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Judicial Remedies in Pattern and Practice Suits under the Fair Housing Act of 1968: United States v. City of Parma

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NOTES

JUDICIAL REMEDIES IN "PATTERN AND PRACTICE" SUITS UNDER THE FAIR HOUSING ACT OF 1968: *UNITED STATES v. CITY OF PARMA*

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I. INTRODUCTION

The elimination of racially segregated housing is a national goal of high priority. This goal is reflected in the pronouncements of law-makers and policy shapers, in decisional law, and in the existence of federal and state legislation designed to eradicate ghettos and replace them with "truly integrated and balanced" communities.¹ Yet segregated housing patterns persist strongly,² often finding their source and legitimization in

¹ 114 CONG. REC. 422 (1968).

² For example, in 1980 72% of the metropolitan population of Cuyahoga County, in which Parma, Ohio is situated, lived in a neighborhood either more than 95% non-white or

the policies and practices of local governments. This Note will examine an Ohio decision, *United States v. City of Parma*,³ and its impact on two issues: the bringing of a "pattern and practice" suit under Title VII of the Civil Rights Act of 1968⁴ against a municipality in an attempt to alleviate racially segregated housing patterns; and the valid scope of the judicially-imposed remedies to be applied upon a finding of municipal liability. In order to reach these issues, the origins, implications and mechanisms of exclusionary land-use control will first be discussed, since the regulation of land use plays a central role in the artificial restriction of access to housing on the basis of race.

II. EXCLUSIONARY LAND USE CONTROLS

A. Zoning and the Police Power

Under the tenth amendment, the states are responsible for legislating the health, safety and welfare of their citizens.⁵ The states, in turn, delegate the power to plan and control the use of land to local jurisdictions.⁶ Historically, the step from health, safety and welfare to land-use control was not always seen as a self-evident one. If it seemed clear that under a grant of power from the state a local government could provide fire protection, regulate traffic and operate medical facilities, it was not so clear, particularly in the early years of the century, that the power (for example) to limit construction within an area to large single-family homes followed *a priori*.

Every first-year law student is familiar with the evolution of property law from a feudal system in which title to all land vested in the crown to the modern system in which the private individual, holding in fee simple, possesses almost all the "sticks" in the metaphorical bundle comprising important property rights. Yet despite the fee-holder's impressive number of sticks, he is subject to important limitations. Historically, the

more than 95% white. Nearly 50% of the population lived in neighborhoods more than 99% non-white or 99% white. The county itself is nearly 25% non-white (unpublished research on file at the Cuyahoga Plan of Ohio, Cleveland, Ohio).

³ 494 F. Supp. 1049 (N.D. Ohio 1980) (liability opinion), 504 F. Supp. 913 (N.D. Ohio 1980) (remedial order), *aff'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1972 (1982).

⁴ 42 U.S.C. §§ 3601-3635 (1968).

⁵ The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

⁶ Among the states, Hawaii constitutes the only comprehensive exception. See HAWAII REV. STAT. § 205-1 (1973). For an examination of state attempts to control various types of land use, see M. DANIELSON, *THE POLITICS OF EXCLUSION* ch. 10 (1976). Among major metropolitan areas, Houston is the only one that still allows private agreement to control land use exclusively. See Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71 (1970).

maxim "*sic utere tuo alienum non laedas*" enjoined the owner of property from using it in ways injurious to that of another.

The common law of nuisance was an outgrowth of this limitation on freedom of use. While at first it merely addressed actual physical invasions of another's land, nuisance law, under the impact of industrialization and urbanization, grew to encompass intangible intrusions such as smoke,⁷ dust,⁸ and odors.⁹ As generally formulated, an owner was not "permitted to make an unreasonable use of his premises to the material annoyance of his neighbor if the latter's enjoyment of life or property [was] materially lessened thereby."¹⁰ The concept of nuisance operated to make the location of the use the controlling factor; some uses, neutral in themselves, became nuisances when placed in certain areas.¹¹ In a famous formulation, "[a] nuisance may be merely a right thing in a wrong place — like a pig in the parlor instead of the barnyard."¹²

The common law of nuisance, however, had several drawbacks when used as a mechanism for limiting the use of private property. Since it is a reactive doctrine, "operat[ing] on the basis of after-the-fact adjudication of injury,"¹³ nuisance law subjected property owners to the uncertainties of litigation. Further, while it offered individuals some protection from adjacent incompatible uses, nuisance theory was too narrow to benefit the community at large. The development of zoning was a response to the limitations of nuisance theory, growing out of the twin movements of industrialization and suburbanization that characterized the early 1900's.

The first comprehensive zoning law was passed in 1916 in New York City. Prompted by the fear that the loft buildings of the garment district would spill over onto the fashionable sections of Fifth Avenue, an ordinance was enacted creating five use districts, and excluding tall, "undesirable" buildings from the exclusive shopping area. Within a year, twenty cities had adopted zoning plans.¹⁴

Zoning as a method of land-use control had clear advantages over private agreement and nuisance law. With zoning, a municipality could employ its police power¹⁵ to regulate entire areas, restricting uses prospec-

⁷ *Northwest Laundry v. City of Des Moines*, 239 U.S. 486 (1916).

⁸ *McCarthy v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907).

⁹ *Reinmann v. City of Little Rock*, 237 U.S. 171 (1915).

¹⁰ *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 39, 258 N.Y.S. 229, 231 (1932).

¹¹ A nuisance per se is an "act occupation or structure which is a nuisance in a given area regardless of its manner of operation; a use of land that cannot be so conducted as to be allowed to exist." Note, *The Effect of Zoning Ordinances on the Law of Nuisance*, 54 MICH. L. REV. 266, 268 (1955).

¹² *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 388 (1926).

¹³ M. MANN, *THE RIGHT TO HOUSING: CONSTITUTIONAL ISSUES AND REMEDIES IN EXCLUSIONARY ZONING* 15 (1976).

¹⁴ S. TOLL, *ZONED AMERICA* 187 (1969). By 1931, more than 1000 cities had comprehensive land-use ordinances.

¹⁵ "Police power" refers to the delegated ability to enforce laws necessary to preserve

tively in accordance with public policy.¹⁶ Through the use of zoning, property values were stabilized and uncertainty removed. However, significant questions were soon raised by owners whose ability to profit from their property was limited by the uses to which it could lawfully be put according to zoning ordinances.

The question of whether the municipal police power over the health and welfare of its citizens encompassed the power to legislate land use reached the Supreme Court in 1926. In *Village of Euclid v. Ambler Realty Co.*,¹⁷ a developer whose suburban acreage was in the path of Cleveland's advancing urban growth desired to reap its full value as industrial property. The developer was prevented from doing so by the village's zoning plan, adopted by ordinance, which limited his parcel to less profitable residential use. The developer asserted that the ordinance deprived him of property without due process and denied him equal protection under the law.¹⁸ The Court held that the municipal police power encompassed the function of land-use control and that subjecting private property to government control by segregating disparate uses was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."¹⁹ Validating land-use control as a proper exercise of the municipal police power signified a departure from nuisance theory. Henceforth, determinations concerning use would be governed not by actual injuries to others but by public policy.²⁰ Today, by establishing zones where certain uses are permitted and certain prohib-

and protect the health and welfare of citizens.

¹⁶ This public policy, from its earliest expressions in New York City's zoning ordinance, made the single-family dwelling the favorite child of the municipal plan. With tenements in mind, early courts endorsed the superiority of the single-family home: "A man who is seeking a permanent home would not deliberately choose to build next to an apartment." *Miller v. Board of Public Works*, 234 P. 381, 387 (Cal. 1925).

The sentiment was forcefully expressed by one of the foremost advocates of land-use reform:

The blighted districts in every municipality furnish depressing evidence of the harmful effect upon both standards of living and housing development of the premature invasion of residential districts by non-residential uses. Promotion of the single-family home, for instance, is deemed good public policy in America. It requires little reasoning to show that this promotion will be aided by regulations which protect and stabilize the single-family home districts.

Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 839-40 (1924). Modern courts reiterate this theme as well. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

For the argument that the values that give the single-family house preference are not entitled to government protection, see Coase, *The Problems of Social Cost*, 3 J. LAW & ECON. 1 (1960).

¹⁷ 272 U.S. 365 (1926).

¹⁸ The fourteenth amendment states, in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁹ 272 U.S. at 395.

²⁰ MANN, *supra* note 13, at 21.

ited, the local jurisdiction adopts a policy declaring the prohibited uses to be nuisances per se. In his opinion for the *Euclid* Court, Justice Sutherland stated:

The coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun . . . and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business . . . depriving children of the privilege of quiet and open places for play . . . until finally the residential character of the neighborhood . . . [is] . . . utterly destroyed. *Under these circumstances, apartment houses which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.*²¹

In *Euclid*, by means of the intermediate concept of nuisance, the step was taken from use of the police power to legislate the public welfare to its valid exercise in legislating land use. The results of this validation were far-reaching.

B. Implications of Land Use Control

The control of land use is political. As a result of the power which is vested in local jurisdictions, relatively small units of government, responsible to and reflective of the values of a relatively small number of people, are able to authoritatively decide land issues of great consequence. The control of land through the political process has a direct impact on the issues of minority housing, housing for the elderly, energy use and conservation, transportation, sewage and water facilities, recreation, and tax

²¹ 272 U.S. at 394 (emphasis in original). As will be developed, zoning in its many shapes has the almost inevitable effect of excluding minorities from the suburbs, as well as the palpable intent to do so. One commentator aptly points out that "once zoning powers became available to local governments, it was probably inevitable that municipalities would use them to advance the full scope of their interests." Nelson, *A Private Property Theory of Zoning*, 11 URB. LAW. 713, 715 (1979). *Euclid* has most certainly been used to validate the attitude of extreme judicial deference adopted towards local zoning ordinances. However, there is clear language within *Euclid* itself that points to the Justices' intent that the municipal police power in this regard not be untrammelled. The premise of *Euclid* was that use control would take place according to a scientifically developed comprehensive plan which would take into account the relationship of a city to a broader zone of interests. Thus the police power itself was subject to larger policy considerations. Justice Sutherland wrote: "[I]t is not meant by this . . . to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way [of a proposed use]." 272 U.S. at 390. This limitation on the police power to control land use, implicit in its very grant, has been generally unheeded, especially by the Burger Court, which continues to apply *Euclid* to support the parochial concerns of exclusionist communities.

rates.²² The control of land use is not inherently evil. It can meet the prospect of any uncontrolled development which would threaten the legitimate needs of residents in a community. However, the "land use hegemony of local communities"²³ can also have exclusionary results, both intended and unintended. Through political decisions reflecting a local jurisdiction's values and wishes, unwanted groups can effectively be barred from residence.²⁴ In a society that claims to embody democratic values, the exclusion of racial minorities, people of low-income, or the developmentally disabled²⁵ from areas where they seek housing represents a glaring contradiction. Yet land-use controls have inevitably been em-

²² Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 *CATH. U.L. REV.* 363, 381-81 (1981).

²³ McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 *U. ILL. L. REV.* 958, 952.

²⁴ That the effect of comprehensive zoning plans could be to stratify populations was recognized by the *Euclid* trial court: "The purpose to be accomplished is really to regulate the mode of persons who may hereafter inhabit [the property]. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or their situation in life." *Euclid v. United States*, 297 F. 307, 316 (N.D. Ohio 1924). The Supreme Court, in reversing the lower court, set aside this issue for future consideration, stating:

[I]t is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate use.

272 U.S. at 397.

However because of its reluctance to intervene in matters of local land-use control, the Court has reviewed a very small number of such cases. Between the 1926 *Euclid* opinion and 1974, there were more than 10,000 land-use cases officially reported in the highest and intermediate state courts. 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* vii (1975). Of this number, the Supreme Court considered two zoning cases, both in 1928: *Nectrow v. City of Cambridge*, 277 U.S. 183 (zoning ordinance unreasonable when applied to particular tract), and *Seattle Title and Trust Co. v. Roberge*, 278 U.S. 116 (consent provision in zoning ordinance which effectively gave citizens veto power over adjacent property uses stricken as invalid). McGee, *supra* note 23, at 987.

Between 1971 and 1976, reflecting the increased volume of exclusionary land-use litigation, the Court had eighteen opportunities to address land-use issues, but denied certiorari to all but five: *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (referendum excluding low-income housing upheld as constitutional); *Hill v. Gautreaux*, 425 U.S. 284 (1976) (interdistrict remedy appropriate to correct city housing authority and federal government agency's segregative housing policy); *Warth v. Seldin*, 422 U.S. 490 (1975) (non-residents barred from challenging the validity of exclusionary zoning ordinances); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (ordinance zoning entire community for single-family homes upheld); *James v. Valtierra*, 402 U.S. 137 (1971) (city ordinance mandating referendum to approve zoning changes held not unconstitutional).

²⁵ For an account of one suburb's recent attempts to grapple with the issue of zoning for group homes for the developmentally disabled, see Sun Press (Shaker Heights, Ohio), Feb. 3, 1983, at 1A, col. 5; *Id.*, Feb. 24, 1983, at 1A, col. 4.

ployed for these purposes.²⁶

Even when unintended, "nearly every land use control entails some exclusion . . . by raising the costs that the market would otherwise charge."²⁷ Further, intentional exclusion can be seen in a great number of suburban zoning ordinances.²⁸ Thus, income is the first barrier in the quest for unrestricted housing opportunity. Although discrimination on the basis of income has been held invalid with regard to voting rights,²⁹ residency requirements as a precondition to receiving welfare benefits,³⁰ and procedural protection in criminal cases,³¹ the complicated interplay of factors in the housing area has discouraged extension of the doctrine of equal protection to cover the case of unequal treatment in access to housing.³² Further, although shelter is a judicially-recognized necessity of life,³³ the right to housing is not considered to be a fundamental one, nor

²⁶ Under some analyses, zoning's original purposes were benign and only later became distorted to serve as an instrument of economic and social exclusion. See M. MANN, *supra* note 13, at 6. Other commentators, however, point out that the earliest examples of racial zoning pre-date the development of comprehensive zoning plans such as New York City's. The earliest example (except for that of the Indian reservations) is the San Francisco ordinance of 1890 which required all Chinese to remove themselves within days to points outside the city or to designated waste areas within the city. In *In re Lee Sing*, 42 F. 359 (N.D. Cal. 1890), the ordinance was held unconstitutional and violative of the American treaty with China.

The history of racial zoning which preceded the enactment of comprehensive zoning plans continued with zoning specifically aimed at restricting the residence of blacks. Nine years before *Euclid*, in *Buchanan v. Warley*, 245 U.S. 60 (1917), the Supreme Court invalidated zoning prohibitions based solely on race. The pattern of municipalities ever since has been one of subterfuge, and the use of exclusionary land control has accomplished indirectly what could not be done directly. *Buchanan* had the immediate effect of encouraging deed restrictions as an alternate method of segregating housing. Such racial covenants were outlawed after a long tenure, in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The classic work on the history of racial segregation is R. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974).

²⁷ D. JUDD, *THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY* 186 (1979). "From its inception to the present, zoning became the legal justification to insure what social and class barriers might not have prevented — the exclusion of the Great Unwashed." *Id.*

²⁸ C. HAAR & D. IATRIDES, *HOUSING THE POOR IN SUBURBIA: PUBLIC POLICY AT THE GRASS ROOTS* 15 (1974).

²⁹ *McDonald v. Bd. of Election Comm'rs.*, 349 U.S. 739 (1969).

³⁰ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

³¹ *Williams v. Illinois*, 399 U.S. 235 (1970); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

³² "Any restrictions which impose higher standards are likely to increase development costs to some extent; yet it is inconceivable that a court would hold invalid any and all attempts to raise the standards of residential development, for legitimate consideration of health and amenity are involved." 2 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* 608-10 (1975). Nevertheless, it is clear that at least two practices are too overt to withstand judicial scrutiny: the requirement of a minimum income within a given residential area, and the requirement of a minimum dwelling cost. *Id.*

³³ *Black v. Hirsh*, 256 U.S. 135, 156 (1921).

does the Constitution guarantee any particular quality of housing.³⁴ Nevertheless, it is clear that excluding individuals from an area of residence on the basis of income is equivalent to doing so on the basis of race, essentially accomplishing an effect that cannot be achieved lawfully by more overt means. This is so because, despite the growth of the black middle class, minorities are radically overrepresented among the poor and, as a group, will be excluded in disproportionate numbers when income forms the basis for access to housing.³⁵

The values which motivate the exclusion of blacks³⁶ from suburbs such as Parma, Ohio are strong and deeply felt. The presence of low-income housing of the type at issue in *Parma* may be equated with the presence of blacks in the community.³⁷ The presence of blacks is representative of all that white suburban dwellers desired to escape or avoid when they chose not to live in the central city. Many residents of relatively new blue-collar suburbs like Parma have moved directly from the city and feel deep hostility at the perceived necessity of moving again. Such a suburb is one "whose very existence is often a reaction to inner-city desegregation."³⁸ In a survey of four Dayton, Ohio suburbs, lower-income households were associated in the minds of the white respondents with "falling property values, neighborhood instability, deteriorating housing conditions, rising property taxes, more crime, unsuitable neighbors, and a loss of social status for existing residents."³⁹ The arrival of subsidized housing is often viewed as the initiation of all the problems of the inner cities.⁴⁰

³⁴ *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

³⁵ In 1980 the federal government set the poverty level for a family of four at \$7,356. The 1980 census found that 10.48% of white families and 42.5% of black families were impoverished. U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING, summary Tape File 3 (1980). Cf. Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1655-57 (1971) (disproportionate poverty of minorities may be responsible for discrimination along class lines).

³⁶ "Minority" and "black" are by no means synonymous terms. Yet, because in metropolitan Cleveland, the locus of the *Parma* decisions, blacks are the predominant minority, and because equal housing opportunity for black Americans is the theme enunciated by the decisions, the convention of equating "minority" and "black" will be adopted here.

³⁷ *United States v. City of Parma*, 494 F. Supp. 1049, 1073 (N.D. Ohio 1980) (liability opinion).

³⁸ McGee, *supra* note 23, at 995.

³⁹ M. DANIELSON, *supra* note 6, at 83, (quoting N. GRUEN & C. GRUEN, *LOW AND MODERATE INCOME HOUSING IN THE SUBURBS: AN ANALYSIS FOR THE DAYTON, OHIO REGION* 64 (1972)). Significantly, Gruen and Gruen found of those surveyed, only 2% were willing to list "race" as a "very important" reason for "considering low/moderate-income households undesirable neighbors." *Id.* Blatantly expressed racial prejudice was perhaps not seen by the respondents as an attitude to be revealed in public, while the desire to "protect property values" was viewed as more socially acceptable.

⁴⁰ During the period of Parma's subsidized housing controversy, Mayor John Petruska was quoted as saying, "Parma people have to take care of themselves, and leave Cleveland's problems for Mayor Ralph Perk." M. DANIELSON, *supra* note 6, at 95 (quoting Cleveland Plain Dealer, June 23, 1971).

The xenophobic character of the suburban reaction is demonstrated by a survey of Westchester County, New York, in which eighty-three percent of the respondents were favorable to subsidized housing if "people now living in this town" got first priority in moving into such housing, while seventy-six percent opposed such development if no priorities were assigned on the basis of where the occupant lived.⁴¹

The hostility of white suburbs to the encroachment of blacks and the accompanying employment of exclusionary land controls arises from a demographic possibility that has its basis in reality. It is the case that the suburbs have "most of the vacant land available for housing development in metropolitan areas."⁴² Further, among suburbs in general, low- and moderate-income suburbs are the most likely to attract subsidized housing since they commonly have requisites which planners consider important when choosing housing sites: industry, access to public transportation, existing sewage facilities and, perhaps most important, comparatively low land prices, which are within reach of the private developer of subsidized housing.⁴³ Also, cases over the last fifteen years have suggested that judicially imposed limits can be on the amount of low-income housing capable of being located in areas already having a concentration of minorities and subsidized housing, i.e. older metropolitan centers.⁴⁴ As a corollary, "[r]acially motivated opposition to subsidized housing is greatest among less affluent suburbanites,"⁴⁵ as they react to the potential disruption of their homogeneous enclaves.⁴⁶ The foregoing suggests that there is strong motivation to erect land-use barriers to suburban racial integration and that in response to pressure from their constituencies, officials who should employ the classical comprehensive zoning plan to produce racial integration instead use it to exclude. Such commu-

⁴¹ M. DANIELSON, *supra* note 6, at 111 (quoting OLIVER QUAYLE & Co., A SURVEY OF ATTITUDES TOWARD GOVERNMENT-ASSISTED MODERATE AND LOW INCOME HOUSING IN WESTCHESTER COUNTY 74, 63 (1972)).

⁴² M. DANIELSON, *supra* note 6, at 81.

⁴³ *Id.* at 91.

⁴⁴ Hill v. Gautreaux, 425 U.S. 284 (1976) (Chicago); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part without opinion*, 473 F.2d 910 (6th Cir. 1973) (Cleveland); Shannon v. United States Dep't. of Housing and Urban Dev., 436 F.2d 809 (1970) (Philadelphia).

⁴⁵ M. DANIELSON, *supra* note 6, at 91 (quoting OLIVER QUAYLE & Co., *supra* note 41, at 73). This part of the study showed that 60% of low- and moderate-income respondents were "against subsidized housing because it forces racial integration on people," while 36% of middle- and upper-income respondents held this attitude.

⁴⁶ In Parma, Ohio, the racism reflected in local newspaper accounts of the subsidized housing controversy, and other literature, has an ironic side: The 1980 census reflects the suburb's strong ethnic character, with 26.7% of respondents indicating Eastern European ancestry. The largest single group indicated Polish ancestry. U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING, Summary Tape File 3 (1980). "[T]he newly-arrived victims of prejudice in one generation have become, a generation or two (or three) later, the old residents objecting to a newer group." N. WILLIAMS, *supra* note 32, at 568.

nity leaders "have been placed at Thermopylae to keep the barbarians out, if only for a time, rather than to direct them where to pitch their tents."⁴⁷

C. Mechanisms of Exclusion

Because of the strong motivation of white suburbs to resist integration and the capability to do so endowed by the grant of police power from the state, numerous mechanisms have developed to protect suburban exclusiveness from racial integration. The "variety of land use policies and devices which are adaptable for the [racially exclusionary] purpose is almost infinite."⁴⁸ However numerous, these practices can be divided roughly into three groups: conventional zoning restrictions, the promotion of citizen control over the disposition of the community's real property, and policy-making with indirect exclusionary effect.

1. Conventional Zoning Strictures

The most overt way to exclude unwanted minorities is to use the comprehensive zoning plan to make housing too expensive for them to afford.⁴⁹ This can be accomplished through zoning code enactments which mandate certain construction methods: large lot sizes,⁵⁰ minimum building sizes,⁵¹ and large floor areas per dwelling.⁵² Building occupancy can also be legislated by zoning ordinance. The historic preference for single-family occupancy, when given expression in zoning plans limiting multi-family housing, has the effect of removing the best hope for improving the housing situation of low- and mid-income people. Multi-family construction is probably the only suburban housing feasible for the poor and mid-income. The attractiveness of this type of construction to developers stems from the economies of scale possible as well as the federal incentives offered to multi-family projects. As a direct result, "zoning for

⁴⁷ D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 7 (1977).

⁴⁸ N. WILLIAMS, *supra* note 32, at 585.

⁴⁹ The relationship between economic status and race has already been noted, *supra* note 35.

⁵⁰ Large-lot zoning has been invalidated on the basis that it is exclusionary. *E.g.*, *Kurzus v. Village of Upper Brookville*, 67 A.D.2d 70, 414 N.Y.S.2d 573 (1979); *S. Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

⁵¹ "The purpose of zoning requirements in minimum-building-size may be stated quite simply: to force up the cost of housing, thus insuring that low- and middle-income buyers turn elsewhere." N. WILLIAMS, *supra* note 32, at 624.

⁵² An "argument is sometimes brought in that such regulations tend to protect the public health A number of scholarly studies have demonstrated that there is some relationship between insufficient space . . . and emotional tensions which in turn may effect public health and family stability and so on." *Id.* at 627. The real nature of such controls is revealed by the fact that they are seldom based on occupancy, so that legislation requiring big houses is blind to whether they are occupied by five people or fifteen. *Id.*

[only] single-family detached houses is now the most important of the exclusionary techniques"⁵³ If not severely limited or banned outright, zoning impediments may be placed in the way of multi-family construction, making it unappealing to developers. In Parma, for example, the zoning code mandated an unusually large number of parking spaces per multi-family dwelling unit, driving the cost of such construction up to unattractive levels. The related tactic of balking at granting variances to the builders of unwanted developments will be considered later.

With the emergence of national concern over ecology, and the growth of the environmental movement in the 1970s, another zoning tactic became available for suburbs that wished to halt population *change*: halting population *growth*. A no-growth zoning plan may contain some or all of the following: bans on specified types of construction, a moratorium on all construction, ceilings on the number of new units constructed per year, limitations on water resource or sewage development, and restraints on utility connections. The power of these measures to exclude is self-evident, and "those seeking to challenge the barriers erected by suburban communities . . . found that their opponents . . . latched onto the environmental cause to defend their zoning, land use, housing and growth policies."⁵⁴ The accomplishment of the goals of the environmental movement — fewer people and more green space, for example — drives up the cost of land acquisition, eliminating sites for the construction of low- and moderate-income housing.

Environmental groups and local officials who employ ecological rationales commonly contend that they are not opposed to subsidized housing in their suburbs per se, but to measures that will consume more land, stimulate growth, and downgrade the local environment . . . which of course means keeping lower-income groups where they are.⁵⁵

In *United States v. City of Parma*,⁵⁶ the defendant city argued that its exclusionary land use ordinances were a response to citizen concern over

⁵³ *Id.* at 666.

⁵⁴ M. BROOKS, HOUSING EQUITY AND ENVIRONMENTAL PROTECTION: THE NEEDLESS CONFLICT 52 (1976) The increasing use of the environmental defense reflects a change in fair housing litigation as it developed after 1968, the watershed year of *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1966 Civil Rights Act bars all racial discrimination in the sale or rental of property), the Fair Housing Act, 42 U.S.C. §§ 3601-3631, and the Housing and Urban Development Act, Pub. L. No. 90-12, 82 Stat. 476 (codified in scattered sections of 5 U.S.C., 12 U.S.C. and 42 U.S.C.). Prior to the 1968, most litigation centered on refusals to rent or sell to minorities. After that year, the focus shifted to the suburban attempt to halt developers who desired to use vacant suburban land for low- and moderate-income housing. *Id.* at 51.

⁵⁵ M. DANIELSON, *supra* note 6, at 87-8.

⁵⁶ 494 F. Supp. 1049 (N.D. Ohio 1980) (liability opinion).

the environment.⁵⁷ The ordinances had been passed in 1971 and had appeared on the ballot by initiative petition. One ordinance limited the height of all future residential construction to thirty-five feet. The other required voter approval for construction of any subsidized housing or any participation in rent supplement programs. The impetus for the enactment of the ordinances was the attempt of a private developer, Forest City Enterprises, Inc. (FCE), to construct a federally subsidized section 236 apartment project,⁵⁸ twenty percent of whose low-income tenants would also be receiving federal rent supplements.⁵⁹ From the inception of the proposal, the development was debated, "often in blatantly racial terms."⁶⁰ The passage of the restrictive ordinances occurred at the climax of the controversy. The day after the election, the city engineer rejected the plans for the subsidized development, killing a project whose death was already a foregone conclusion. At trial, to counter the government's contention that the passage of these ordinances was (among other actions) evidence of a pattern or practice of racial discrimination in violation of the Fair Housing Act of 1968, the city advanced its environmental defense. "Specifically, high-rise buildings were mentioned as being fire hazards . . . creating traffic congestion . . . causing ecological and aesthetic damage . . . and overloading sewage facilities."⁶¹

Although the district court accepted the fact that some Parma residents were sincerely motivated by ecological concerns, the evidence persuaded the court that racial considerations were decisive. First, in his deposition, the city engineer admitted that high-rise construction was not

⁵⁷ *Id.* at 1086-87.

⁵⁸ Under the Housing and Urban Development Act of 1968, two new housing subsidy programs were created: § 235 (12 U.S.C. § 1715z) and § 236 (12 U.S.C. § 175201). The § 236 program offered reduced rents to tenants, made possible by federal subsidization of project mortgages above a certain rate. The programs were very successful in terms of sheer numbers. Between 1969 and 1973 they spurred 540,000 subsidized units, over half the total number of units constructed under all the subsidy programs of the previous 30 years. Sloan, *The Changing Shape of Land use Litigation: Federal Court Challenges to Exclusionary Land Practices*, 51 NOTRE DAME L.J. 48, 53 (1975).

Unlike older subsidy programs, §§ 235 and 236 did not require local government approval per se to locate in the suburbs — that is to say that the significant stumbling block of the formal cooperation agreement was removed, leaving only local zoning ordinances to overcome. However, these ordinances, along with negative public opinion, were equally effective in thwarting subsidized housing. One estimate is that less than one quarter of the record number of subsidized units built in 1971 were sited in the suburbs. A. DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 156 (1973). Also, unfortunately for the cause of subsidized housing in the suburbs, the 235-236 programs were plagued by scandals which received wide publicity in the 1970's. Slipshod construction, graft, and poor maintenance were widely complained of. M. DANIELSON, *supra* note 6, at 86. As of 1980, § 236 was no longer being federally funded. 494 F. Supp. at 1078.

⁵⁹ This was in accordance with the policy of the Department of Housing and Urban Development. 494 F. Supp. at 1078.

⁶⁰ *Id.* at 1087.

⁶¹ *Id.* at 1086.

inherently more unsafe than the low-rise type. Further, Parma at that time had fire equipment capable of handling emergencies in tall buildings. In addition, no anxiety about the hazard of fire was expressed the previous year when FCE built a six-story "luxury" development.⁶² Second, concerning traffic congestion, no evidence was introduced at trial to support the contention that traffic was a concern, nor were any studies done on potential traffic problems before the rejection of the section 236 project.⁶³ Finally, the city engineer was never asked to study the impact of the subsidized development on Parma's sewer system, nor did he do so independently.⁶⁴ The environmental defense, decisively rejected by the *Parma* court, has had a similar lack of success as a litigation technique in other fair housing cases as well.⁶⁵ It can be concluded that the defense will fail when it appears to the court that ecological concern is a mere pretext concealing discriminatory motives or where it seems that there is some genuine environmental concern, but also an admixture of discriminatory intent.

2. Citizen Control

The charters under which municipal corporations operate usually include a reservation of referendum power, granting to the electorate the capacity to approve or reject any legislative act by majority vote.⁶⁶ Following the establishment of the section 235 - 236 housing program in 1968, many suburbs enacted ordinances requiring that such subsidized housing projects be submitted to popular referendum.⁶⁷ Establishing a referendum requirement for public housing places a potent veto power in the hands of the community. Demanding such direct participation in local land-use decisions may reflect a fear that officials might not be able to resist pressure from public housing developers.⁶⁸ The right to resist these pressures by means of the referendum was upheld by the Supreme Court

⁶² *Id.* at 1087.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Other cases in which the environmental defense was not successful are: *S. Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975) (city contended that lot-size ordinance was motivated by ecological concern); *Kennedy Park Homes v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (city rezoned area selected for low-income housing project as park, and cited problematic sewer and flooding situation); *Dailey v. City of Lawton*, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970) (city officials justified denial of zoning change to proposed § 236 project by citing need to use parcel for park, and increased burden on public services). *But see Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

⁶⁶ In Ohio, the power of referendum is reserved to each municipality "on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action." OHIO CONST. art. II, § 1(f).

⁶⁷ M. DANIELSON, *supra* note 6, at 100.

⁶⁸ *Id.*

in 1971. In *James v. Valtierra*,⁶⁹ the Court held that article 34 of the California state constitution, making low-income housing projects contingent on local approval, was not violative of the federal Constitution. Justice Black, writing for a five-member majority, reasoned that the equal protection clause was not offended by the California provision because all low-rent projects were affected, not only those that would be occupied by minorities. "Provisions for referendums demonstrate devotion to democracy, not bias, discrimination, or prejudice,"⁷⁰ Justice Black stated. The fact that the results of referendums always disadvantage the losing side, he asserted does not mean that the losers have been denied equal protection.⁷¹ The constitutionality of the *effects* of the referendum was not reached, the case being decided only on affidavits in support of a motion for summary judgment.

The power of the voter to veto unwanted development was given further support five years later by *City of Eastlake v. Forest City Enterprises, Inc.*⁷² In that case, the city charter of a Cleveland suburb had been amended to require that *any* changes in land use agreed upon by the city council nonetheless be submitted to referendum, with a fifty-five percent majority needed for passage.⁷³ The Ohio Supreme Court held that making zoning changes referable constituted an impermissible delegation of legislative power and subjected the rights of private land-owners to the "caprice" of "thousands of voters with no interest whatever in property."⁷⁴ However, in reversing, the Supreme Court found that the referendum was

⁶⁹ 402 U.S. 137 (1971).

⁷⁰ *Id.* at 141.

⁷¹ *Id.* at 142. The dissenters in *James*, Justices Marshall, Brennan, and Blackmun, (Justice Douglas took no part), identified the constitutional provision as invidious discrimination on the "basis of poverty — a suspect classification which demands exacting judicial scrutiny" under the terms of the fourteenth amendment, just as race does. *Id.* at 145.

How powerful a weapon the referendum is in blocking public housing is indicated by its success in California. Between 1950, the year of the adoption of the referendum provision, and 1970, approximately half of all public/subsidized housing proposals were defeated by local electorates. M. DANIELSON, *supra* note 6, at 100.

⁷² 426 U.S. 668 (1976).

⁷³ The provision also put the costs of the mandatory referral on the applicant for the zoning change.

⁷⁴ 41 Ohio St. 2d 187, 199-200, 324 N.E.2d 740, 748-49 (1975) (J. Stern concurring). Judge Stern went on to write:

There can be little doubt of the true purpose of Eastlake's charter provision — it is to obstruct changes in land use by rendering such change so burdensome as to be prohibitive. The charter provision was apparently adopted specifically, to prevent multi-family housing, and indeed was adopted while Forest City's application for rezoning to permit a multi-family housing project was pending The restrictive purpose of the provisions is crudely apparent on its face There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.

Id. The Stern concurrence was quoted as some length by the dissenters in *Eastlake*, Justices Stevens and Brennan.

not a delegation of power, but a power that, under the Ohio state constitution, had been reserved to the people from the beginning. While Chief Justice Burger, writing for the Court, conceded that the *Euclid* doctrine would support a challenge to a referendum resulting in the enforcement of a zoning restriction that was itself unreasonable or arbitrary, he asserted that no challenge to the actual Eastlake zoning code was before the court.⁷⁵

Seven months after the Supreme Court's decision in *James v. Valtierra*, the city of Parma enacted an ordinance substantially similar to California's article 34. Parma's General Building Regulation 1528 required elector approval of "(1) the development, construction or acquisition in any manner of a subsidized housing project by a public body, or (2) any participation by private individuals or non-public bodies in any program in which the Federal Government pays all or part of the rent of low-income families."⁷⁶ This ordinance was enacted concurrently with the height-regulation ordinance during the controversy surrounding the development of the section 236 project.⁷⁷ In November, 1974, Parma voters enacted another ordinance, Building Code 1229.01, requiring voter approval of any change in existing land uses or land-use ordinances.

In *Parma*, the government assailed the referendum requirements as violating the Fair Housing Act. In striking the ordinances, the *Parma* district court called the effect of the city's referendum requirements "devastating,"⁷⁸ noting that the required referenda operated together to block both developers of subsidized housing who would need zoning changes to effectuate their plans and those who would not. When taken together with the two-and-one-half parking-space-per-dwelling-unit requirement, the court held that "the cumulative effect . . . is to prevent construction of any low-income housing in the City. Developers will not even attempt to bring low-income public housing proposals to the City, where it is clear that at best they will receive no cooperation from Parma officials, and at worst they will encounter deep-rooted resistance."⁷⁹

Despite the earlier holdings of *James* and *Eastlake*, the Parma court achieved a different result by proceeding on statutory, as opposed to con-

⁷⁵ 426 U.S. at 676.

⁷⁶ *United States v. City of Parma*, 494 F. Supp. 1049, 1086 (N.D. Ohio 1980) (liability opinion).

⁷⁷ During the same campaign that resulted in passage of the two ordinances, the mayor and members of his council stood for reelection. One piece of their political advertising read:

SPECIAL MESSAGE: Your entire endorsed democratic slate is pledged to defend the rights of the residents of Parma to establish building standards by referendum ballot and will fight in the federal courts any pressures from outside agencies or organizations

M. DANIELSON, *supra* note 6, at 101.

⁷⁸ 494 F. Supp. at 1089.

⁷⁹ *Id.* at 1090.

stitutional, grounds and by connecting the referenda to racial exclusion.⁸⁰ The district court declared that because the city's actions "were motivated by racial bigotry,"⁸¹ sections 3604(a) and 3617 of the Fair Housing Act had been violated,⁸² and thus, under the Act's section 3615, the referenda were "to that extent . . . invalid."⁸³ The ordinance mandating a referendum on low-income housing projects was found to be discriminatory in both motivation and effect⁸⁴ and was found to serve no legitimate city interest.⁸⁵ Accordingly, it was declared completely invalid. In contrast, the ordinance making all zoning changes referable was not limited to low- and moderate-income housing and was declared invalid only to the extent that its prospective application would be to such development.⁸⁶ The Court of Appeals for the Sixth Circuit upheld the district court's actions regarding Parma's referenda, noting that "[t]hrough invalidation of an ordinance is a strong remedy, it is not beyond the power of a court where necessary to correct a violation."⁸⁷

3. Municipal Policy-Making with Indirect Exclusionary Effects

Exclusionary mechanisms such as restrictive zoning codes and referendum requirements are easily identified exclusionary land-use controls. Other mechanisms act more indirectly yet just as effectively to exclude unwanted groups from the suburbs. City policies which are "seemingly

⁸⁰ In a footnote, the district court distinguished *Parma* from *James* on the basis of the *James* Court's statement that the record there would not support the claim that the seemingly neutral constitutional provision was in fact aimed at a racial minority. 494 F. Supp. at 1099 n.66. However, in *James*, the Supreme Court implicitly based its reasoning on its refusal to inquire into the motivation for a "neutral" policy which had as an effect adverse impact on minorities. If the same Court had subjected the *Parma* referenda to the same analysis, it is arguable that the referenda would have been upheld on constitutional grounds.

⁸¹ 494 F. Supp. at 1099.

⁸² Section 3604(a) states that it shall be unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." Section 3617 states that it shall be unlawful "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. . . ."

⁸³ Chapter 42 U.S.C. § 3615 states:

Nothing in this title . . . shall be construed to invalidate or limit any law of a state or political subdivision of a state . . . but any law of a state, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title . . . shall to that extent be invalid.

Id.

⁸⁴ 504 F. Supp. 913, 919 (N.D. Ohio 1980) (remedial order).

⁸⁵ *Id.* at 920.

⁸⁶ *Id.*

⁸⁷ 661 F.2d 562, 578 (6th Cir. 1981).

neutral on [their] face"⁸⁸ and widely considered to be within the governmental discretion of a municipality also defeat low- and moderate-income housing.

The decision of a city's legislative body to pass or to defeat certain resolutions is within the scope of municipal power. Yet, for example, in Parma the widely publicized defeat of a fair-housing resolution in 1968 was found by the district court to have an exclusionary effect, enhancing the city's reputation as a restricted community hostile to blacks.⁸⁹

Similarly, the decision to adopt a flexible, cooperative attitude in dealing with developers and the zoning problems encountered during construction projects is within the realm of municipal discretion. However, the differential exercise of this type of discretion can act to discourage developers from proceeding with plans for subsidized housing opposed by the community. For instance, in 1971 Parma allowed Forest City Enterprises to sail with ease over several zoning and building code impediments to the construction of its luxury development, Parmatown Towers.⁹⁰ However, the next year, when the subject matter of FCE's discussions with the city of Parma was the section 236 project, Parmatown Woods, the same impediments which were easily surmounted in the case of Parmatown Towers were used by the city as effective blockades.⁹¹

⁸⁸ James v. Valtierra, 402 U.S. 137, 141 (1971).

⁸⁹ In 1968, a fair housing resolution was placed before Parma city council. The resolution could have no legally binding effect. It stated that "all persons of goodwill have been and are welcome in the city of Parma by this Council," and at the same time asserted "this Council defends the individual property owners [sic] right to sell, lease, rent, control or dispose of their private house and their right of association and the private enjoyment and use of their own homes." Despite the lukewarm language of the resolution, it was hotly debated by the council and the community. The sponsor of the resolution, who later admitted he was ashamed of the weak language, received one hundred letters and phone calls opposing the resolution. Community meetings were held concerning the proposal. It was finally defeated by the Parma city council by a vote of 7 to 5. 494 F. Supp. at 1067-69.

⁹⁰ One problem impeding the project was that the street on which Parmatown Towers was to front had not been dedicated to the city prior to the grant of the building permit. Had Parma refused to accept the dedication, the Cleveland Water Department could have declined to review the development plans and to hook up water connections. Further, non-acceptance would have relieved Parma of the obligation to provide garbage pick-up and other services. Parma's actions violated its Planning and Zoning Code § 1101.06; however, this did not prevent construction of Parmatown Towers. Instead the city accepted the dedication of the street for record purposes on the same day that Forest City Enterprises appeared with the tardy dedication request, and the Parmatown Towers project proceeded to completion. 494 F. Supp. at 1075-76. The district court concluded that "the manner in which the Parmatown Towers matter was handled indicated that Parma would bend the rules when it wished to cooperate with a developer of a non-subsidized multi-family housing project." *Id.* at 1077.

⁹¹ The § 236 project, Parmatown Woods, was to be sited on a plot adjacent to Parmatown Towers and involved another undedicated street. Instead of the flexibility that had characterized the city's attitude concerning the luxury apartment project, Parma

Another area of policy making within a city's discretionary realm is that of application for federal funds. For example, under the guidelines of Title I of the Housing and Community Development Act of 1974, known as the Community Development Block Grant Program (CDBG),⁹² no city may be forced to apply for federal funds to implement local housing and community development. However, the failure to apply for such funds, or the failure to adhere to application requirements, can signify opposition to the government's requirement that cities receiving CDBG monies plan for the housing needs of present and expected low-income residents. Parma, for instance, applied for CDBG funds during 1974, the first year of the program. However, by specifying that the city had no plans to assist low-income households that year, and by refusing to revise these plans, the city disqualified itself from receiving federal funds.⁹³ The district court noted that "[t]o maintain the City's all-white character, millions of dollars in federal funds were rejected by the citizens of the community and their elected officials. The effect of this rejection was to further insulate the community against low-income housing and increased opportunities for minority housing."⁹⁴

Similarly, a suburb is free to decide whether to cooperate with local or regional housing authorities in siting subsidized housing within its jurisdiction. In northeast Ohio, the Cuyahoga Metropolitan Housing Authority (CMHA) is empowered to develop public housing in the suburbs; each project is contingent upon entering into a cooperation agreement with the local government.⁹⁵ Failure to enter into such an agreement effectively precludes development of CMHA public housing. Parma, like most other northeast Ohio suburbs, rebuffed CMHA's attempt to conclude a cooperation agreement.⁹⁶ The district court found that racial reasons motivated this refusal and, in its remedial opinion, ordered Parma to either sign an

adopted an unmovable stance regarding the subsidized project. The review of the Parmatown Woods plan stopped immediately upon discovery of the street dedication problem. When revised plans were submitted, parking specification problems were discovered. Acknowledging the city's deep opposition, Forest City ceased submitting revised plans in October, 1971. In November, 1971, the low-income housing referendum ordinance was passed, making the death of Parmatown Woods inevitable. *Id.* at 1078.

⁹² 42 U.S.C. §§ 5301-5317.

⁹³ 494 F. Supp. at 1092. On Parma council member voted against submitting the CDBG application at all, even with the low-income housing assistance goal set at zero, since he felt that in submitting the application Parma would be "getting involved in an area where we are seeking Federal subsidies in low-income housing." *Id.* at 1093.

⁹⁴ *Id.* at 1094.

⁹⁵ Such agreements provide that the Metropolitan Housing Authority will make payments in lieu of taxes, and that in exchange the local government will extend all services offered other residents to housing constructed under the auspices of the CMHA.

⁹⁶ Parma's mayor was quoted as saying: "We don't want anybody over which we have no jurisdiction doing anything in our city." M. DANIELSON, *supra* note 6, at 95 (quoting Cleveland Plain Dealer, June 23, 1973).

agreement with CMHA or develop its own city housing authority.⁹⁷

While "[r]acial motivations . . . are difficult to isolate from other factors which prompt exclusionary policies,"⁹⁸ it is clear that the *effect* of even such indirect policies, as exemplified above, is to exclude minorities by restricting their locational options. In summary, the zoning hegemony of local communities, as granted by the states, works to enact parochial interest through a wide variety of exclusionary land use controls, whose effects combine to promote the racial segregation of American housing.

III. THE FAIR HOUSING ACT OF 1968

Suit against the city of Parma was commenced by the United States Justice Department in 1973 pursuant to Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act.⁹⁹ The government alleged that the city had engaged in a pattern or practice of housing discrimination through activities which made housing unavailable to homeseekers because of their race, thus violating two sections of the Act.¹⁰⁰

The Fair Housing Act is a potential tool in eliminating exclusionary land-use controls legitimized by municipalities which result in the racial segregation of housing. The Act declares a national policy of providing fair housing throughout the nation;¹⁰¹ makes unlawful discrimination in the sale, rental and financing of housing;¹⁰² bans discrimination in the provision of brokerage services;¹⁰³ allows individual parties to file administrative complaints with the Department of Housing and Urban Development¹⁰⁴ and subsequently to act as "private attorney generals" in prosecuting civil damage suits,¹⁰⁵ or to seek enforcement through civil actions without pursuing administrative remedies;¹⁰⁶ empowers the Attorney General to bring civil actions against people or groups reasonably believed to be engaged in a practice or pattern of discrimination, or when any group of persons has been denied rights granted by the Act, where this denial raises an issue of public importance;¹⁰⁷ permits the Attorney General to apply for preventive relief, including injunction, restraining order, or other order as deemed necessary to secure the rights guaranteed under Title VIII;¹⁰⁸ and invalidates any state or local law which permits

⁹⁷ 504 F. Supp. 913, 922 (N.D. Ohio 1980) (remedial order).

⁹⁸ M. DANIELSON, *supra* note 6, at 89.

⁹⁹ 42 U.S.C. §§ 3601-3631 (1968).

¹⁰⁰ See *supra* note 83 for the text of the sections of the Act allegedly violated.

¹⁰¹ 42 U.S.C. § 3601.

¹⁰² *Id.* § 3604-05.

¹⁰³ *Id.* § 3606.

¹⁰⁴ *Id.* § 3610 (a).

¹⁰⁵ *Id.* § 3610 (c).

¹⁰⁶ *Id.* § 3612.

¹⁰⁷ *Id.* § 3613.

¹⁰⁸ *Id.*

discriminatory housing practices.¹⁰⁹

The provisions of the Fair Housing Act are to be given broad judicial interpretation¹¹⁰ in light of the expansive purpose of the legislation which its sponsor in the Senate said is no less than to replace the ghettos with "truly integrated and balanced living patterns."¹¹¹ This breadth of interpretation is applied to a law which, by its own language, sweeps broadly. Section 3604 (a)-(e) has the effect of reaching any discriminatory act, including those relating to negotiations for sales and rentals, as well as sales and rentals themselves;¹¹² terms and conditions of sales or rentals, and provisions of services or facilities;¹¹³ advertisements for sale or rent;¹¹⁴ representations of availability;¹¹⁵ and blockbusting conduct.¹¹⁶ In addition, section 3604 provides for any additional unspecified practice which "otherwise makes unavailable or den[ies]" a dwelling to any person because of race, color, religion, or national origin.¹¹⁷ The language in section 3617, making it unlawful to "interfere with any person in the exercise . . . of . . . any right"¹¹⁸ granted by the Act, is likewise inclusive in nature.

The provisions relating to "pattern or practice" suits are characterized by the same inclusiveness as the foregoing sections of the Act.¹¹⁹ By its terms, section 3613 is activated whenever the Attorney General has reasonable cause to believe that rights granted by the Fair Housing Act are

¹⁰⁹ *Id.* § 3615.

¹¹⁰ *United States v. City of Parma*, 504 F. Supp. 913, 917 (1980) (remedial order) (generous construction concerning appropriate relief); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (generous construction of provisions endowing standing to sue); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 (1979) (generous construction of remedial provisions and of standing to sue).

¹¹¹ 114 CONG. REC. 3,422 (1968).

¹¹² 42 U.S.C. § 3604 (a).

¹¹³ *Id.* § 3604 (b).

¹¹⁴ *Id.* § 3604 (c).

¹¹⁵ *Id.* § 3604 (d).

¹¹⁶ *Id.* § 3604 (e).

¹¹⁷ *Id.* § 3604 (a).

¹¹⁸ *Id.* § 3617.

¹¹⁹ Section 3613 states:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

Id. § 3613.

being trammled. The basis of this reasonable belief is not subject to judicial inquiry or confirmation.¹²⁰ A suit may be launched when the Attorney General reasonably believes that either of two situations exist: 1) that a person or group¹²¹ is engaged in a pattern or practice of resistance to fair housing; or 2) that any group of persons has been denied their rights under the Fair Housing Act, and this denial raises an issue of general public importance. As with "reasonable belief," the Attorney General's determination about the public importance of the defendant's conduct is not judicially reviewable.¹²²

What constitutes a practice or pattern of discrimination under the Fair Housing Act has also been given a non-restrictive judicial interpretation.¹²³ The words "pattern or practice" have their generic meanings,¹²⁴ requiring only that the conduct of the defendant not be an isolated instance of discrimination,¹²⁵ but rather recurrently unlawful.¹²⁶ The defen-

¹²⁰ *United States v. Hunter*, 324 F. Supp. 529 (D. Md. 1971), *aff'd*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

¹²¹ A municipality is included in the term "person or group" as used in § 3613. *United States v. City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981), *cert. denied*, 102 U.S. 1972 (1982); *United States v. City of Black Jack*, 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). See also *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Kennedy Park Homes Ass'n. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

¹²² *United States v. Bob Lawrence Realty*, 474 F.2d 115, 125 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

¹²³ Judicial interpretation of the key phrase "pattern or practice" has been necessary to fill the partial gap left in the legislative history of the Act. The Fair Housing Act of 1968 had its genesis as S. 1358, an amendment to H.R. 2516, a House-passed bill providing statutory protection to civil rights workers. Senators Walter Mondale and Edward Brooke co-sponsored the amendment, introduced February 6, 1968. There seems to have been no specific Senate discussion concerning the practice-and-pattern provision of the bill, which had to overcome conservative efforts to filibuster against it. On March 1, the report of the National Advisory Commission on Civil Disorders, known as the Kerner Commission, was issued, in the midst of attempts by Senate liberals to win a cloture vote on S. 1358. Against the backdrop of the Commission's stark warnings regarding the likely results of a continuation of national racial policies, cloture was invoked, and the bill passed the Senate on March 11. On its arrival at the House, the bill was bottled up in the Rules Committee, where it might have remained. The very expeditious nature of the bill's passage in the House was a direct result of the assassination of Martin Luther King Jr., on April 4. The Fair Housing Act was dislodged from the House Rules Committee the same day. On April 10, the House debated the bill for a single hour, while National Guard Troops were called to quell racial disturbances in the Capitol city. The Fair Housing Act passed the House by a vote of 250-171, and was signed into law on April 11, 1968. For an exhaustive account of the legislative battle for passage in the Senate, see Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969).

¹²⁴ *United States v. Mayton*, 335 F.2d 153, 159 (5th Cir. 1964). *Mayton*, a voting rights case, construed the term "pattern or practice" as used in the Civil Rights Act of 1960, 42 U.S.C. § 1971(e), relying on the legislative history of that Act. In the absence of guidance from the drafters of the 1968 Act, courts have had recourse to construals of the term appearing in the earlier legislation.

¹²⁵ *Mayton*, 335 F.2d at 159 (quoting the testimony of the Deputy Attorney General

dant is charged with responsibility for all actions which are not accidental.¹²⁷ The number of incidents necessary to establish a pattern depends on the nature of the right protected as well as the nature of the violations.¹²⁸ Blockbusting representations made by a real estate company to three landowners has been held to constitute a pattern,¹²⁹ whereas one act by a single person might not.¹³⁰ However, the activities of several separate defendants who happen to direct their sales operations at the same geographic area cannot be cumulated for the purpose of establishing a pattern or practice of discrimination.¹³¹ While some showing of a coordinated effort has been held necessary,¹³² it is not necessary for the Attorney General to prove that a conspiracy to violate the Fair Housing Act existed among a group of defendants. In one formulation, the requirement when the defendant is one entity is that the conduct be one which happens "in the regular procedures followed by" that defendant.¹³³

It is clear that one of the primary features of a section 3613 Attorney General's suit is the relatively large number of actions that fit under the "pattern or practice" rubric as judicially interpreted. Particularly when the defendant is a municipality, the pattern and practice suit seems an appropriately flexible statutory tool able to reach a broad range of conduct by the city. Policies and practices not unlawful in themselves can become *evidence* of a pattern of discrimination carried out in violation of the Fair Housing Act. Thus under the deferential *Euclid* standard, exclusionary zoning ordinances in *Parma* might be viewed as lawful exercises of police power. The city's referendum requirements could pass muster under the Supreme Court's *Valtierra* and *Eastlake* decisions. The municipal acts of defeating a fair housing ordinance and denying building permits to developers of subsidized housing were exclusionary in effect, but were not otherwise unlawful. However, when subjected to the dual analysis of section 3604 (a) and section 3613, these acts were found to violate the Fair Housing Act.¹³⁴ The potential strength of the Act is its ability to reach subtle forms of discrimination and to use exclusionary mechanisms which restrict housing choice as *evidence* of racial discrimination.

Another advantage of the pattern and practice suit is its avoidance of

before the House Judiciary Committee concerning the meaning of "pattern or practice").

¹²⁶ *United States v. Ray Mitchell Realty Co.*, 327 F. Supp. 476 (N.D. Ga. 1971).

¹²⁷ *United States v. Mintzes*, 304 F. Supp. 1305, 1314 (D. Md. 1969).

¹²⁸ *United States v. Hunter*, 324 F. Supp. 529, 525 (D. Md. 1971).

¹²⁹ *United States v. Mintzes*, 304 F. Supp. 1305. *But see* *United States v. Bob Lawrence Realty*, 327 F. Supp. 487 (N.D. Ga. 1971), *aff'd*, 474 F.2d 115 (5th Cir.) *cert. denied*, 414 U.S. 826 (1973), (three blockbusting representations made in one afternoon by two agents employed by a single company, did not constitute a pattern or practice of discrimination).

¹³⁰ *United States v. Bob Lawrence Realty*, 327 F. Supp. 487, 493 (N.D. Ga. 1971).

¹³¹ *Id.* at 491.

¹³² *Id.* at 493.

¹³³ *United States v. Hunter*, 324 F. Supp. at 535.

¹³⁴ *United States v. City of Parma*, 494 F. Supp. at 1099.

"one of the most muddled areas of our constitutional jurisprudence"¹³⁵ — the question of whether the discriminatory actions of the municipality offend the equal protection clause of the fourteenth amendment. In housing discrimination cases based on constitutional theories, municipal actions that have a disproportionate impact on a racial minority may not be sufficient to impose liability on the defendant city. Plaintiffs may be required to prove purposeful design, as where city policies are intentionally administered so as to discriminate impermissibly.¹³⁶ In contrast, because the statutory language of section 3604 (a) of the Fair Housing Act, prohibiting housing discrimination on the basis of race, does not require proof of intent, a pattern-and-practice attack on municipal exclusionary land use practices may use a test based solely on the *effect* of the allegedly discriminatory conduct — a test obviously easier for plaintiffs to employ with success. Thus, in *United States v. City of Black Jack*,¹³⁷ Court of Appeals for the Eighth Circuit declared:

To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivation¹³⁸

Metropolitan Housing Development Corp. v. Arlington Heights (Arlington Heights II),¹³⁹ on remand for consideration of the plaintiff's cause of

¹³⁵ McGee, *supra* note 23, at 970.

¹³⁶ The leading case is *Washington v. Davis*, 426 U.S. 229 (1976). The Supreme Court reversed a court of appeals' invalidation of a qualifying test for Washington, D.C. police officers. The lower court invalidated the test on equal protection grounds, deciding that the test had the effect of excluding blacks on a basis unrelated to job performance. In reversing, the Supreme Court held that proof of racially disproportionate impact alone was not sufficient; purposeful design or administration of the test with intent to discriminate was also necessary to the plaintiff's case. In the housing area, the Court held in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," *id.* at 265, although it would be sufficient if race were but one of several motivating factors. The plaintiff in *Arlington Heights*, a non-profit development corporation attempting to build low- and moderate-income housing, failed to carry this burden of proof. (The Court remanded the case for consideration of the plaintiff's statutory claims under the Fair Housing Act, which had not been considered by the Court of Appeals.) The difficulty for the plaintiff in meeting the motive test and prevailing under an equal protection theory has led one commentator to conclude that "the Constitution may not by itself prove to be a significant instrument of metropolitan desegregation." McGee, *supra* note 23, at 995.

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

¹³⁸ *Id.* at 1184-85 (footnotes omitted).

¹³⁹ 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

action under the Fair Housing Act, also held that a prima facie case under the Act could be established on the basis of discriminatory effect alone. The court bluntly stated that "[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. . . . We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because these municipalities act discreetly."¹⁴⁰

Some courts, however, have employed motivation tests, or at least such language, in assessing pattern and practice suits brought under section 3613 of the Fair Housing Act. The effort to use a motivation test in considering liability under the Act has been accompanied by a Procrustean-bed expansion of the judicial definition of "motive." In some cases, the effort results in a circular argument that solely and effectively uses the discriminatory effect of defendant's conduct to prove discriminatory motivation. In *Kennedy Park Homes Association v. City of Lackawanna*,¹⁴¹ the federal district court inferred a racially discriminatory motivation on the part of the defendant city by examining the ultimately discriminatory effect of Lackawanna's denial of building permits to a section 235 housing development.¹⁴² In a recent pattern and practice case, *United States v. City of Birmingham*,¹⁴³ the government argued prior to trial that the suburb's liability for violation of sections 3604 (a) and 3617 of the Fair Housing Act could be predicated solely on the effects of interference with a non-profit group's attempt to construct subsidized housing in the "virtually all-white city."¹⁴⁴ However, at trial the government abandoned this effort and instead sought to establish "that defendant actually intended to discriminate on a proscribed basis."¹⁴⁵ In stretching the concept of motive, the court found that the discriminatory intent did not have to be the city's own. It was sufficient that the plaintiff prove that the city responded to the wishes of citizens opposed to the housing project, and that the city knew that these opponents were at least partially motivated by racial concerns.¹⁴⁶ Further, the city commission's desire to placate its con-

¹⁴⁰ *Id.* at 1290.

¹⁴¹ 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). The United States was granted plaintiff-intervenor status under § 3613 of the Fair Housing Act.

¹⁴² In affirming, the court of appeals agreed with this finding of motivation, but hinted that discriminatory effect would have been sufficient to impose liability on the city. 436 F.2d 108, 114 (2d Cir. 1970).

¹⁴³ 538 F. Supp. 819 (E.D. Mich. 1982).

¹⁴⁴ *Id.* at 827 n.9.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 828. The citizen opposition to the subsidized housing project was fierce, with 75-100 people commonly attending city Commission meetings to express their concern about "those people" coming to Birmingham. The court found that the phrase "those people" referred to blacks. *Id.* at 824.

stituency did not need to be the sole motivating factor for its conduct. The court held that "the discriminatory purpose need only be a motivating factor."¹⁴⁷ In addition, the city's knowledge that some of its actions regarding the subsidized housing project would have a foreseeably discriminatory effect was held to constitute evidence of impermissible motive.¹⁴⁸ Last, the court found that although there exists no constitutional or statutory requirement for a municipality to provide housing for its low-income citizens, the circumstances under which plans to construct such housing are abandoned are relevant in the assessment of racially discriminatory motivation.¹⁴⁹

The *Parma* district court liability opinion clearly delineated the two theories and stated that violations of the Fair Housing Act can be established under either the motive or effect theory.¹⁵⁰ However, in the same manner as courts in *Kennedy Park Homes* and *Birmingham* have found discriminatory motive based on discriminatory effect, *Parma* allows a finding of discriminatory effect to rest, at least in part, on a foundation of discriminatory motive. In discussing the proof required to establish a violation under the effects theory, the court cited four crucial factors: "1) the strength of the showing of discriminatory effect; 2) evidence of discriminatory intent; 3) the defendant's interest in taking the action complained of; and 4) the nature of the remedy sought."¹⁵¹

In *Parma* the government asserted that under both the motive test and the effects test the city had violated the Fair Housing Act. In affirming the district court's finding of liability in part, the appeals court expressly approved the lower court's assessments concerning the discriminatory intent or effect of each instance of conduct alleged by the government to have violated the Act.¹⁵²

Under the effect standard, once a prima facie showing of racially discriminatory effect has been made, the burden shifts to the municipal defendant, which must demonstrate that its conduct is justified by a compelling government interest.¹⁵³ In some formulations, the defendant also shoulders the burden of showing that no other conduct could serve the desired interest with a less segregative impact.¹⁵⁴

It appears then that broadness of purpose, language, and interpretation can benefit plaintiffs attacking municipal patterns and practices of racial discrimination under the Fair Housing Act. In addition, the ability to

¹⁴⁷ *Id.* at 827.

¹⁴⁸ *Id.* at 828.

¹⁴⁹ *Id.* at 829.

¹⁵⁰ 494 F. Supp. at 1053.

¹⁵¹ *Id.* at 1055 (citations omitted)(emphasis added).

¹⁵² 661 F.2d at 574-76.

¹⁵³ *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974).

¹⁵⁴ 494 F. Supp. at 1055 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978)).

prevail under the effect or the motive theory distinguishes the pattern and practice suit from constitutionally based claims for relief, which require the more difficult-to-prove element of intent to discriminate. However, the ultimate success of a pattern and practice suit is does not lie in finding the defendant liable, but rather in bringing about a change in racially segregated housing patterns. It is the function of the judicial remedy formed pursuant to a finding of municipal liability under the Act to ensure that new housing opportunities actually become available to minorities and are not instead simply talked about.

IV. THE SCOPE OF JUDICIAL REMEDIES IN PATTERN AND PRACTICE SUITS

A. Remedial Reluctance

"Litigation is the most common recourse for those who are unable to persuade suburban governments to change their land-use and housing policies."¹⁵⁵ The perception that courts are removed from the sphere of narrow community values and have historically "advanced the interest and rights of individuals and groups which lack political support, unpopular causes, or challenge accepted practices,"¹⁵⁶ makes them, in the eyes of fair housing advocates, a natural locus of activity in seeking a remedy for exclusionary municipal practices.¹⁵⁷ However, the courts, including the Supreme Court, have not embraced with enthusiasm the role desired for them. They instead have been reluctant to deal with questions concerning local land use. Judicial deference to local values has sometimes been expressed as the refusal of a court to sit as a super zoning board.¹⁵⁸ In other formulations, courts have voiced their reluctance to meddle in local matters which they viewed as legislative.¹⁵⁹ The Supreme Court has held that where zoning policy is set by local procedures the lines drawn are presumptively valid and that "this exercise of discretion . . . is a legislative, not a judicial function."¹⁶⁰ However, there is a strong argument in favor of the proposition that defeating exclusionary land-use practices is a proper judicial function and that the question properly posed by the courts is not "Should a remedy be fashioned?," but rather, "How should

¹⁵⁵ M. DANIELSON, *supra* note 6, at 159.

¹⁵⁶ *Id.* at 160.

¹⁵⁷ For a contrary argument that courts merely respond to the strongest interest group in deciding land use cases, see R. LINOWES & D. ALLENSWORTH, *THE POLITICS OF LAND-USE LAW* ch. 2 (1976).

¹⁵⁸ *Bow and Arrow Manor, Inc. v. Town of West Orange*, 63 N.J. 335, 307 A.2d 563 (1973); *C.O.M.E. v. Chancy*, 289 Ala. 555, 269 So.2d 88 (1972).

¹⁵⁹ "It is not our function to approve the ordinances before us, as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts." *Brae Burn, Inc., v. City of Bloomfield Hills*, 350 Mich. 425, 431, 86 N.W.2d 166, 169 (1957).

¹⁶⁰ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 23 (1974).

this remedial process be carried out?" In addition, it seems that state and local legislatures are "paralyzed" with respect to fair housing issues¹⁶¹ and that, realistically, the courts are the *only* likely sources of remedy; thus, the courts have a large share of the responsibility in carrying out the national policy of fair housing. This responsibility should not be shirked but rather accepted, even at the expense of stretching the traditional remedy-shaping powers of the courts.

Moreover, in the absence of legislative action, the alternative to comprehensive judicial intervention in exclusionary municipal conduct is an unsatisfactory and piecemeal approach to the problem. The traditional case-by-case approach of common law courts does not yield results in the land-use control area. If "[e]ach variation on the exclusionary theme"¹⁶² is treated individually, a multiplicity of suits centering around the conduct of a single municipality could result, perhaps without ever dismantling of the exclusionary infra-structure. In *Parma*, for example, a judicially-shaped remedy focused solely on the height restrictions and parking-space specifications¹⁶³ would have yielded little in terms of progress toward racial integration in the suburb.¹⁶⁴ Only a comprehensive judicially-shaped remedy can hold out that promise.¹⁶⁵

¹⁶¹ 3 N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER*, AMERICAN LAND PLANNING LAW 111 (1975). This legislative paralysis, according to Williams, simply stems from the domination of state legislatures by suburban representatives whose interests are served by the current system of land-use controls. The local tax structure, which encourages a community to seek "good ratables," functions to discourage subsidized housing. *Id.* at 112. A related reason that state legislatures have not taken the lead in promoting fair housing is that the legislative remedies seem radical, requiring as they would a renunciation of local self-determination in favor of a regionalized assessment of moderate- and low-cost housing needs. See Feiler, *Metropolitanization and Land-Use Parochialism — Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971). (For one example of a state-wide legislative attack on exclusionary zoning, however, see 1980 CAL. STAT. 477, amending CAL. GOV'T CODE § 65008) (local governments barred from using zoning or planning powers to discriminate against developers of low-income housing). Further, even if some regionally-oriented fair housing reform schemes are adopted, the attendant problems and "questions will simply be presented to [courts] in another form." Feiler, *supra* at 662. For the contrary view that the legislative forum is the only appropriate one for the solution of the fair housing problem, see Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976), and Notre, *Toward Improved Housing Opportunities: A New Direction for Zoning Law*, 121 U. PA. L. REV. 330 (1972).

¹⁶² Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1, 19 (1975).

¹⁶³ See *supra* text accompanying notes 50-59.

¹⁶⁴ Two additional arguments that support the necessity of a comprehensive judicial approach to exclusionary land controls are 1) that "the possibilities for delay are greater where courts are content to gradually chip away at exclusionary policies, . . . until the developer gives up and goes elsewhere." Mytelka & Mytelka, *supra* note 163, at 24; and 2) "the piecemeal approach leaves room for substantial maneuvering. Imaginative draftsmen can usually create fresh [exclusionary] devices, untrammelled by precedent." *Id.* at 19.

¹⁶⁵ The promise of racial integration seems finally, at this writing, about to bear fruit in *Parma*. The mechanics of the remedial order of the district court, as affirmed in part by the

B. *The Basis for Judicial Remediation*

There is ample precedent for increasing the scope of judicial remedy-tailoring in fair housing litigation.

[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts are loathe to review the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.¹⁶⁶

Instead of adopting a deferential attitude, a court faced with a statutory fair housing violation may, in Justice Cardozo's famous formulation, mold "[t]he plastic remedies of the chancery . . . to the needs of justice."¹⁶⁷ Conversely, the court, whether confronting a defense based on separation of powers¹⁶⁸ or merely an intransigent local legislative body,¹⁶⁹ has no "equitable authority to exercise equitable powers so as to *permit* violations of statutes to continue."¹⁷⁰ Rather, courts have held, the proper judicial role is to evaluate which land uses are so vital to the public welfare that their exclusion will be contrary to public policy and to shape remedies that will eliminate improper exclusion.¹⁷¹ Further, where the interests of many are involved, courts of equity might go farther in giving and withholding relief than where only the private interests of a few are at stake.

The fact that a suit is prosecuted under a statute has a dual effect on the remedial powers of the court. Where statutes expressly change the traditional equity practices, courts must accordingly adjust their remedies. In addition, where statutes enunciate public policy clearly¹⁷² they

Sixth Circuit, are in place. See *Cleveland Plain Dealer*, Nov. 23, 1982 at 1A, col. 2; *Id.*, Feb. 8, 1983, at 6A, col. 1; Feb. 23, at 1A, col. 5. In the final analysis, "housing for low- and moderate-income families must be built, not just talked about." Mytelka & Mytelka, *supra* note 163, at 18.

¹⁶⁶ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (Arlington Hts. I).

¹⁶⁷ *Foreman v. Foreman*, 251 N.Y. 237, 238, 167 N.E. 428, 429 (1929).

¹⁶⁸ *City of Richmond v. Randall*, 215 Va. 506, 510, 211 S.E.2d 56, 61 (1975) (city's ability to zone not protected by the separation of powers doctrine where it acted unreasonably).

¹⁶⁹ *Girsh Appeal*, 437 Pa. 237, 236 A.2d 395 (1970) (when court invalidated local ordinance excluding apartment construction, city responded by rezoning *quarry* for apartment use).

¹⁷⁰ Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 527 (1982) (emphasis added).

¹⁷¹ *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 223, 220 A.2d 97, 103 (1966) (Hall, J., concurring) (ordinance prohibiting schools in residential district).

¹⁷² For example, the invalidation of impermissibly exclusionary zoning ordinances as an equitable remedy may be based on § 3615 of the Fair Housing Act, which specifies that

comprise an addendum to the roster of equitable remedies, "leaving all options open for the court's exercise of discretion."¹⁷³ In *United States v. West Peachtree 10th Corp.*,¹⁷⁴ the defendant argued that under section 3613 of the Fair Housing Act, the court's remedial options were limited to issuing an injunction. The Court of Appeals for the Fifth Circuit found this argument to be without merit, noting that past decisions construing the identical phrase, "preventive relief including . . . a permanent or temporary injunction, restraining order, or other order" as it occurred in the Civil Rights Act of 1960,¹⁷⁵ had held that the provision permitted the grant of affirmative relief.¹⁷⁶

C. The "Pattern and Practice" Remedy

A pattern and practice suit brought against a city has as its aim the dismantling of an entire municipal system of racially exclusionary practices and policies. Part of the system may consist, as it did in Parma, of exclusionary zoning ordinances. But, as discussed above, the effectiveness of the pattern and practice suit is in its ability to address exclusionary controls which are not ordinance-based. The judicial remedy in pattern and practice suits must affirmatively address these other aspects of municipal behavior found violative of the Fair Housing Act. Thus, pattern and practice suits and the remedies called for upon a finding of liability can be distinguished from litigation which is addressed solely to exclusionary ordinances. It is still instructive, however, to examine remedies fashioned in the context of such litigation, since exclusionary ordinances so commonly appear as components of pattern and practice suits under the Fair Housing Act.

1. Ordinances: Declaration of Invalidity

Where a particular zoning ordinance has been found impermissibly exclusionary, the "traditional equitable remedy is a declaration that the offending ordinance is invalid and is usually coupled with an injunction against its enforcement."¹⁷⁷ For example, in *Herzog v. City of Pocatello*,¹⁷⁸ the Idaho Supreme Court affirmed the lower court's finding that the city's refusal to grant plaintiff a variance was discriminatory, but re-

"any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter . . . shall to that extent be invalid." 42 U.S.C. § 3615.

¹⁷³ Mytelka & Mytelka, *supra* note 163, at 25.

¹⁷⁴ 437 F.2d 221 (5th Cir. 1971).

¹⁷⁵ 42 U.S.C. § 1971(c).

¹⁷⁶ 437 F.2d at 228, (citing *Alabama v. United States*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962)).

¹⁷⁷ Mytelka & Mytelka, *supra* note 163, at 25.

¹⁷⁸ 83 Idaho 365, 363 P.2d 188 (1961).

versed the lower court's action in ordering the city to grant plaintiff the variance sought. Instead, the appellate court limited its relief to invalidation of the city's ordinance with respect to plaintiff's property. The court stated that "[s]ince our system has not conferred upon the courts power to exercise administrative functions in zoning matters, the court may not order the enactment of zoning regulations such as is directed by the judgment appealed from."¹⁷⁹

A similarly simple declaration of invalidity can be directed against an ordinance as it applied to an entire community,¹⁸⁰ or even an entire section of a county,¹⁸¹ rather than to a single tract. However, merely declaring an ordinance invalid on an area-wide basis leaves a city "free to adopt a scheme as unsatisfactory as that which was struck down."¹⁸²

2. Affirmative Relief Involving Ordinances

A more judicially activist approach is to afford the defendant affirmative relief through rezoning the property in question, where a single plaintiff is seeking to construct subsidized housing. One commentator has stated; "[o]bviously, if judicial review of local zoning actions is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief."¹⁸³

Even when deciding to grant some form of affirmative relief, courts have preferred to allow local authorities some latitude in decision-making, reasoning that even if mandated by the court, a solution emanating at least partially from the community itself will more effectively remedy exclusionary practices.¹⁸⁴ However, this judicial restraint may be rewarded by municipal obstructionism of a type dubbed by one commentator "the zoning amendment shuffle."¹⁸⁵ By rezoning during the course of litigation, municipal defendants can extend the suit through the need for reconsideration. Other delay or obstructing tactics are also possible.

In *Pascak Association v. Township of Washington*,¹⁸⁶ the plaintiffs primarily sought relief from the suburb's refusal to grant a variance for the

¹⁷⁹ *Id.* at 373-74, 368 P.2d at 193.

¹⁸⁰ *National Land & Investment Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965) (minimum acreage requirement invalid).

¹⁸¹ *Board of County Supervisors v. Carper*, 200 Va. 653, 655, 107 S.E.2d 390, 391-92 (1959) (zoning code amendment which placed entire western two-thirds of the county under large-lot limitation void).

¹⁸² Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 767 (1976).

¹⁸³ Kransnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1082 (1972).

¹⁸⁴ See *United States v. City of Parma*, 661 F.2d 562, 578 (6th Cir. 1981) (imposition of special master was error by district court because antithetical to philosophy of allowing local jurisdiction to attempt to frame own solution).

¹⁸⁵ Mytelka & Mytelka, *supra* note 163, at 29.

¹⁸⁶ 131 N.J. Super. 195, 329 A.2d 89 (1 Law Div. 1974).

construction of a multi-family project; however, they also challenged the township's entire zoning code as exclusionary. The initial action of the appeals court was to sustain the challenge to the exclusionary ordinance, but to give the township responsibility for rezoning. However, as a result of this rezoning, the classification of the plaintiff developer's property did not change. Accordingly, the court, probably suspecting bad faith on the part of the township, called on experts who detailed the need for multi-family housing in the area, and made specific recommendations which the court adopted and imposed on the township, over its objections that the courts lacked the power to rezone property.¹⁸⁷ The court justified its intrusion on the theory that "the judiciary has historically and necessarily exercised its power to compel coordinate branches of government to fulfill their obligations as defined by the courts."¹⁸⁸ *Pascak* illustrates the initial and traditional reluctance of courts to intervene in zoning issues and the realization that effecting change may require them to do so.

3. *United States v. City of Parma*: The Ordinance Remedy

The government in *Parma* alleged that four of the city's land-use ordinances violated the Fair Housing Act. First, a height-limitation ordinance¹⁸⁹ placed a ceiling of thirty-five feet on all future residential construction. The district court noted that the height limitation made construction of subsidized housing economically unfeasible¹⁹⁰ and that since the passage of the ordinance no variances to construct taller buildings had been granted.¹⁹¹ The second ordinance subjected all subsidized housing development in the city to voter approval by referendum.¹⁹² Calling the language of the ordinance "all-inclusive,"¹⁹³ the district court noted that it even seemed to prevent private individuals from participating in any federal program that partially paid rents, and cited the ordinance as an "unmistakable signal to developers of a climate of prejudice against any government-subsidized housing."¹⁹⁴ Both of the above ordinances appeared on the ballot at the November, 1971 general election by initiative petition. The election coincided with the public furor over the proposed construction of Parmatown Woods, the federally subsidized section 236 project.¹⁹⁵ With this background in mind, the district court found that the adoption of both ordinances was racially motivated, and

¹⁸⁷ 131 N.J. Super. at 203, 329 A.2d at 94.

¹⁸⁸ *Id.*

¹⁸⁹ PARMA GENERAL BUILDING REGULATIONS § 1529.37.

¹⁹⁰ *United States v. City of Parma*, 494 F. Supp. 1049, 1088 (N.D. Ohio 1980) (liability opinion).

¹⁹¹ *Id.* at 1089.

¹⁹² PARMA BUILDING CODE § 1528.

¹⁹³ 494 F. Supp. at 1023.

¹⁹⁴ *Id.* at 1089.

¹⁹⁵ See *supra* notes 58-66 and accompanying text.

had an impermissibly discriminatory effect. However, reasoning that only the subsidized housing referendum was solely aimed at low-income housing, the court totally invalidated only that ordinance.¹⁹⁶ Although the height ordinance was equally impermissible under both the motivation test and the effects test, the district court, under the flexible provisions of section 3615 of the Fair Housing Act,¹⁹⁷ invalidated the ordinance only as it applied to future subsidized housing construction.¹⁹⁸ The third ordinance cited by the government in its complaint was one requiring two-and-one-half parking spaces per dwelling unit for apartments.¹⁹⁹ The requirement was shown in testimony to be sharply higher than prevailing parking requirements for similar land usage in surrounding communities.²⁰⁰ Under the same reasoning employed in its consideration of the height limitation ordinance, the district court struck down the parking requirement solely as it applied to construction of low- and moderate-income housing,²⁰¹ noting that there was no evidence of discriminatory intent, but only of exclusionary effect.²⁰² The last ordinance assailed by the government was enacted in 1974 and required voter approval of any change in existing land uses or land-use ordinances.²⁰³ The court noted that the zoning change ordinance had a chilling effect on applications for all residential construction, and labelled as "Herculean" the task faced by potential developers of subsidized housing in any attempt to build in Parma.²⁰⁴ Because the zoning change ordinance, like the height limitation and parking regulations, did not operate only against low- and moderate-income housing, the district court rendered it invalid only as it applied to such housing.²⁰⁵

With respect to Parma's exclusionary ordinances, the simple declaration of invalidity was invoked against the ordinance most obviously addressed to subsidized housing. The remedial power of the court concerning the other three ordinances, was guided by section 3615 of the Fair Housing Act. Rather than acting as a blunt instrument, section 3615 gave the district court the option of suspending the ordinances only to the extent that they would permit instances of discrimination as defined by the Act. Section 3615 preserves the electorate's power to self-legislate, but acts to ensure that legislation is in accordance with the law.²⁰⁶

¹⁹⁶ *United States v. City of Parma*, 504 F. Supp. 913, 920 (N.D. Ohio 1980) (remedial order).

¹⁹⁷ See *supra* note 173.

¹⁹⁸ 504 F. Supp. at 920.

¹⁹⁹ PARMA PLANNING AND ZONING CODE § 1197.03.

²⁰⁰ 494 F. Supp. at 1089.

²⁰¹ 504 F. Supp. at 920.

²⁰² 494 F. Supp. at 1090.

²⁰³ PARMA BUILDING CODE § 1229.01.

²⁰⁴ 494 F. Supp. at 1090.

²⁰⁵ 504 F. Supp. at 920.

²⁰⁶ "The sovereignty of the people is itself subject to those constitutional limitations

4. Other Correctives To Municipal Conduct Found Discriminatory

In addition to partially or totally invalidating exclusionary ordinances, courts may mandate a variety of other equitable remedies. At the district court level in the *Parma* suit, the main elements of the remedial order were: a) an injunction; b) an order mandating participation in housing subsidy programs, with a numerical goal for new housing units fixed by the court; and c) an order establishing a special master.

a) Injunction, once regarded as an extraordinary equitable measure, has lost that character and become "a common, widely used judicial remedy precisely because of its ability to fine tune the regulation of private conduct in a complex, modern society."²⁰⁷ In a pattern and practice suit, injunction may be used in a broad manner to halt any type of further discriminatory action on the part of the defendant city, giving courts which retain jurisdiction authority to intervene again should the defendant backslide. The *Parma* remedial order, for example, enjoined the city from "[t]aking any action which in any way" would further violate the Fair Housing Act.²⁰⁸ Injunctions may also be focused on a specific municipal action or ordinance.²⁰⁹

b) Another equitable remedy available to the courts is that ordering the city to develop or participate in programs resulting in the construction of subsidized housing. The city of Parma was instructed by the district court to sign a cooperation agreement with the regional public housing authority or, alternatively, to establish its own housing authority in order to implement the location of federal section 8 housing in the suburb.²¹⁰ Further, Parma was ordered to submit an acceptable CDBG application to the Department of Housing and Urban Development, to correct its past unwillingness to avail itself of federal funds for the construction of low- and moderate-income housing.²¹¹ Where pattern and practice suits have centered on municipal actions in preventing a particular developer from constructing low-cost housing, the remedy has been expressed in terms placing an affirmative duty on the city to take whatever steps are neces-

which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

²⁰⁷ Plater, *supra* note 171, at 545.

²⁰⁸ 504 F. Supp. at 918. See also *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982) (city enjoined from further interference with non-profit corporation's efforts to construct subsidized housing).

²⁰⁹ *E.g.*, *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (city enjoined from enforcing ordinance prohibiting multi-family construction); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (city enjoined from condemning site targeted for subsidized housing or acquiring for use as park).

²¹⁰ 504 F. Supp. at 922.

²¹¹ *Id.* at 923. See *supra* text accompanying notes 93-5.

sary to expedite the construction.²¹² The Eighth Circuit has held that even where the original project which was the subject of fair housing litigation had become unfeasible because of cost increases, the city was still subject to a continuing duty to promote reasonably priced integrated housing equivalent to the project which would have been constructed had the alleged racially discriminatory zoning not been enacted.²¹³ However, in *Parma*, the Sixth Circuit was not prepared to go so far. The district court's attempt to establish an annual numerical goal for new low-income units was reversed by the appellate court.²¹⁴ Calling the requirement that 133 low- and moderate-income units be provided per year "premature,"²¹⁵ the court of appeals noted that the actual mechanics of construction were dependent on the "housing development community"²¹⁶ rather than on the city itself. Hence, in this attempt by a district court to quantify a municipal defendant's fair housing obligation, the appellate court expressed its unwillingness to radically extend the reach of equity. The philosophy underlying this reluctance is substantially the same as that which the court of appeals applied to the problem of appointing a special master, discussed below.

c) Although the appointment of a special master to oversee court-ordered remedies is not unknown in school desegregation,²¹⁷ voting rights,²¹⁸ and prisoners' rights²¹⁹ cases, the imposition of such an overseer is unprecedented in litigation under the Fair Housing Act of 1968.²²⁰ The *Parma* district court ordered the appointment of a special master to supervise the implementation of its remedial order. The role of the master as proposed by the district court was to prepare recommendations for the court, conduct hearings and investigations and evaluate the performance of the city under the remedial order. The master was to have unrestricted access to city records and city staff, as well as all public or private city meetings. The master was to be compensated by the city of Parma at a rate set by the district court.²²¹ The district court acknowledged the unprecedented nature of the appointment of a special master in a fair housing case, but justified the remedy under the court's broad equity powers.

²¹² *E.g.*, *United States v. City of Birmingham*, 538 F. Supp. 819, (E.D. Mich. 1982); *Kendy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y. 1970).

²¹³ *Parkview Hts. Corp. v. City of Black Jack*, 605 F. 2d 1033, 1038-40.

²¹⁴ *United States v. City of Parma*, 661 F.2d 562, 577-78 (6th Cir. 1981).

²¹⁵ *Id.*

²¹⁶ *Id.* at 578.

²¹⁷ *Brown v. Board of Educ. II*, 349 U.S. 294 (1955).

²¹⁸ *Baker v. Carr*, 369 U.S. 186 (1962).

²¹⁹ *Pugh v. Locke* 406 F. Supp. 318 (M.D. Ala. 1976).

²²⁰ For a discussion of the use of special masters, see Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neo-Receiverhips to Implement Large-Scale Institutional Change*, 1976 Wisc. L. Rev. 1161.

²²¹ *United States v. City of Parma*, 504 F. Supp. 913, 924-26 (N.D. Ohio 1980) (remedial order).

It further cited the extensive scope of the suburb's unlawful conduct and the complex nature of the remedy, declaring that "[t]he magnitude of the wrong has dictated the magnitude of the remedy. . . ." ²²² On appeal, the Sixth Circuit struck the special master provision. Several factors figured in the reversal of this portion of the district court's remedy. First, the appeals court found appointment of a special master to be "an extra-ordinary remedy," ²²³ and could not resolve its doubts concerning the lack of precedent for such a move. Second, the district court had acted on its own motion; no witness for the government had suggested a need for an overseer. In its lengthy liability and remedial opinions, the district court had strongly supported its findings with testimony from the trial. A contrasting lack of external support for the appointment of a master was noteworthy to the court of appeals. ²²⁴ Most important, the appeals court cited the special master provisions as a departure from the principle that judicial intervention in municipal affairs should be as unintrusive as possible, even where the court was mandating the performance of extensive remedial actions by the suburb. The court expressed its approval of a policy of precisely circumscribed remedial measures: "[C]ourts must carefully tailor the remedy in cases of statutory violations, limiting it to relief necessary to correct the violations." ²²⁵ Primary value was placed by the court of appeals on drawing the Parma community into plans determinative of its future. Steps toward this end had been taken by the district court in ordering that a fair housing committee comprised of Parma residents be appointed to aid in implementing housing integration. ²²⁶ The court of appeals found that the appointment of a special master would be antithetical to this spirit, and to the principle of "giving maximum freedom to the local jurisdiction to develop its own solution." ²²⁷ This same policy was the foundation for the rejection of the district court's requirement for 133 units of low-income housing per year. The quantification of Parma's fair housing duty would have been much more intrusive than the form in which the remedy was framed by the court of appeals.

These aspects of the Sixth Circuit's decision indicate that courts are not generally prepared to impose the most intrusive forms of remedy on municipalities which have violated the Fair Housing Act, although the judiciary will insist on statutory compliance, and to that extent abandon its historic deference towards local jurisdictions in the area of land use control.

²²² 504 F. Supp. at 924.

²²³ 661 F.2d at 579.

²²⁴ *Id.*

²²⁵ *Id.* at 576.

²²⁶ 504 F. Supp. at 921.

²²⁷ 661 F.2d at 578.

V. CONCLUSION

The constitutional grant of police power gives municipalities the ability to exclude unwanted groups from residence by employing exclusionary land use controls. The Fair Housing Act of 1968, however, not only enunciates a national policy in conflict with the land-use hegemony of suburban communities, but also is a tool for reaching subtle forms of racial housing discrimination which are not based on land-use controls. The *Parma* appellate court decision indicates that even though courts are prepared to demand compliance with the letter of the Fair Housing Act, they are not ready to enforce its spirit to the point of installing court-appointed overseers or mandating other intrusive measures. There is justifiable concern that for courts to encroach too far on a community's legislative prerogatives is equivalent to destroying self-government and replacing it by judicial fiat. However, to the extent that a community employs the power to control land use to ends not in accordance with the national policy of ending segregated housing, it acts illegitimately. The police power is *granted* to cities. When a court finds that this power has been abused, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."²²⁸ In this respect, it is arguable that the *Parma* appeals court was not bold enough. It is possible that the court's strategy was to preserve as much of Parma's municipal autonomy as possible in the hopes that this "carrot" would ensure that the suburb would reform its discriminatory practices. However, it is doubtful whether a city with such a deeply entrenched system of exclusion as Parma is sufficiently motivated by the "carrot" approach. The "stick" — continuing the jurisdiction of the district court over the city's future efforts to comply with the remedial order — would seem to be the factor most responsible for any future subsidized housing which comes to Parma.

The courts will probably continue to avoid the potential confrontation between their duty to enforce the Fair Housing Act and the separation of powers doctrine by refusing to impose extremely intrusive remedies on cities found violating the Act. However, when Congress refrained from limiting the judicial remedies available under the Act, it implicitly authorized even the most stern measures in furtherance of the national goal of ending housing discrimination. This goal must be met. The cost of imposing explicit judicial guidance on a community whose exclusionary land use controls function to strictly segregate its housing is not too great to pay.

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²²⁸ *Louisiana v. United States*, 380 U.S. 145, 154 (1965).