

URBAN NEIGHBORHOOD REGENERATION AND THE PHASES OF COMMUNITY EVOLUTION AFTER WORLD WAR II IN THE UNITED STATES

JAMES A. KUSHNER*

ABSTRACT

This Article describes four distinct phases that urban neighborhoods have passed through in the last sixty years. The first phase, from World War II until 1968, followed a pattern of decentralization, investment in suburban infrastructure, and strict segregation. The second phase, 1968 to 1975 was marked by hyper-sprawl, the loss of the central city economic base and population, and hyper-segregation. The third phase, 1975 to 1990, was characterized by class segregation, increased cost to access the suburbs, and increased class and racial separation. The fourth phase, 1990 to 2008, witnessed hyper-segregation; voluntary class, racial, and ethnic separation; and persistent racial discrimination. The Article suggests that the United States may be entering a fifth post-war phase of Smart Growth, public transport, infill strategies, and New Urbanist and suburbanist designs producing greater diversity.

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INTRODUCTION

America's urban centers have evolved through four distinct phases in the last fifty years. The first phase, from World War II until 1968, followed a pattern of decentralization and was marked by extraordinary investment in suburban infrastructure including federally subsidized highways, utility extension, and rapid suburbanization. During this period, development was strictly segregated

* Professor of Law, Southwestern Law School. This Article was written for the Symposium at Indiana University School of Law—Indianapolis sponsored by the *Indiana Law Review*, "The Fair Housing Act After Forty Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation," April 3-4, 2008. The Author appreciates the constructive comments of Michael Dorff and Florence Roisman on an earlier draft, but takes full responsibility for the ideas and research contained herein.

on the basis of race. The principal regulatory model was zoning, particularly suburban exclusionary zoning requiring detached, single-family homes on relatively large lots. This phase concluded with passage of the Federal Fair Housing Act known as Title VIII.¹

The second phase, 1968 to 1975, was marked by hyper-sprawl. During this period, cities lost jobs as manufacturing shifted to the sun belt, the suburban belt, or went offshore. The city became more unattractive and lost its tax base because retail and businesses moved to the suburbs. Public services in the city declined as suburban services improved with the support of an enhanced tax base. As public schools were faced with broad desegregation remedies, whites left the city causing the further decline of the structure and tax base of the city. Finally, subdivision regulation resulted in expensive suburbs based upon a model of attractive, single-family, automobile-based lifestyles.

The third phase, 1975 to 1990, was characterized by class segregation. As suburbs increased access costs through regulation, inflated demand-push land prices, exclusionary zoning and growth management, the suburbs and city became distinguished from one another by class. The poor were concentrated in the city and the affluent in the suburbs.

The fourth phase, 1990 to 2008, can be described as hyper-segregation. This period was marked by an increase in voluntary class, racial, and ethnic separation as more ethnic and racially concentrated neighborhoods grew or were established. Although residential segregation in the United States is largely the result of both government and private discrimination, voluntary segregation by whites marked the geography between 1945 and 1975, and since that time, voluntary separation has been a phenomenon of both whites and non-whites with a relatively small number of non-whites choosing assimilation and residential integration for which there exists limited opportunities. Even where integration occurs according to census data, however, minorities frequently concentrate in small suburban or urban enclaves masking the extent of separation and the lack of social cohesion. Neighborhoods were increasingly regenerated through gentrification and the investment of public and private funds. The divide between many minority communities (now in the city and the older suburbs) and the more affluent, predominantly white and newer suburbs became more pronounced.

The United States may be entering a fifth post-World War II phase. This phase would be one of actual Smart Growth. Truly Smart Growth involves migrating away from automobile-based transport to a greater use of public transport and developing transit-served urban and suburban communities that incorporate infill strategies, are denser, and utilize New Urbanist designs. The results will be the creation of pedestrian-friendly models of the European compact city and a recreation of pre-war, small, industrial towns and streetcar neighborhoods and suburbs. The increase in density, accessibility, and choice between homes of different sizes and costs may stimulate greater racial and ethnic diversity and assimilation. The four post-World War II phases of urban

1. 42 U.S.C. §§ 3601-3619, 3631 (2000).

evolution:

PHASES	Social Equity	Subsidy	Regulation
1945-1968 Decentralization	Apartheid	Infrastructure	Zoning
1968-1975 Hyper-Sprawl	White Flight Concentrated Poverty	Taxation	Subdivision
1975-1990 Class Segregation	Assimilation	Revitalization	Affirmative Action
1990-2008 Hyper-Segregation	Voluntary Separation	Gentrification and Regeneration	Smart Growth

I. PHASE ONE—DECENTRALIZATION: 1945-1968

Phase	Social Equity	Subsidy	Regulation
1945-1968 Decentralization	Apartheid	Infrastructure	Zoning

At the end of World War II, pent-up housing demand and returning soldiers sent the public looking for new housing in the newly developing suburbs. The period between 1945 and 1968 was marked by extraordinary national investment in suburban infrastructure including federally subsidized highways,² utility extension,³ and rapid suburbanization.⁴ Suburbanization resulted from demand

2. See generally 23 U.S.C. §§ 101-189 (2000); JAMES A. KUSHNER, *APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES* 21-24 (1980) [hereinafter KUSHNER, *APARTHEID IN AMERICA*] (originally published as James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 568-71 (1979)); JAMES A. KUSHNER, *THE POST-AUTOMOBILE CITY: LEGAL MECHANISMS TO ESTABLISH THE PEDESTRIAN-FRIENDLY CITY* 11-14 (2004) [hereinafter KUSHNER, *THE POST-AUTOMOBILE CITY*]; James A. Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161 (1981) [hereinafter Kushner, *Urban Transportation Planning*]; Gary T. Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406 (1976).

3. KUSHNER, *APARTHEID IN AMERICA*, *supra* note 2, at 20-30.

4. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 231-45 (1985).

fueled by the availability of low-interest loans for the purchase of modestly priced houses in new suburban subdivisions. Loans were insured by the Federal Housing Administration⁵ and often made through the Veterans Administration.⁶ During this period, development was strictly segregated on the basis of race as mandated by federal government loan requirements, i.e., the federal government conditioned the availability of mortgage insurance to entire housing developments on the adoption of racial covenants or equitable servitudes⁷—covenants inserted into subdivision deeds or in the subdivision plat filed with the deed and binding future lot purchasers as compared to covenants entered into between neighbors or those attached to deeds—and often local zoning,⁸ private covenants,⁹ or simply violence by local police or white supremacists.¹⁰ The basis of the requirement was the belief that a one-race community would stabilize housing values and assure marketability by adhering to the American custom of racial segregation.¹¹ The principal regulatory mechanism used was zoning,¹² particularly suburban exclusionary zoning

5. National Housing Act, 12 U.S.C. §§ 1701-1750 (2000); KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30.

6. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 12 & 38 U.S.C.); KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30.

7. See FHA UNDERWRITING MANUAL ¶ 935 (1938) (containing model mandatory racial restrictive covenant); JACKSON, *supra* note 4, at 203-18; KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30; JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 129-30 (2005); John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 LAW & SOC. INQUIRY 399, 411 (2007) (describing proactive FHA segregationist policy).

8. See *City of Richmond v. Deans*, 281 U.S. 704, 713 (1930); *Harmon v. Tyler*, 273 U.S. 668, 668 (1927) (permitting Negro residence only upon consent of majority of neighborhood); *Buchanan v. Warley*, 245 U.S. 60, 80-92 (1917) (invalidating the practice as interfering with the white seller's freedom of contract); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 276-79 (1959); KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 15-16.

9. Compare *Corrigan v. Buckley*, 271 U.S. 323, 331-32 (1926) (sustaining racial covenants as part of freedom of contract and disposal of property), with *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948) (invalidating judicial enforcement of private racial covenants as illegal state action). See generally KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 16-20.

10. See LOEWEN, *supra* note 7, at 227-79.

11. See KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30; see also IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA 115-41 (2005); Kimble, *supra* note 7, at 20-30 (describing proactive FHA segregationist policy); Rajeev D. Majumdar, Comment, *Racially Restrictive Covenants in the State of Washington: A Primer for Practitioners*, 30 SEATTLE U. L. REV. 1095, 1102 (2007).

12. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 379-80 (1926); see also Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955); Joel S. Hirschhorn, *Zoning Should Promote Public Health*, 18 AM. J. HEALTH PROMOTION 258,

requiring detached, single-family homes on relatively large lots.¹³ Communities often required in excess of an acre per home¹⁴ with broad street setbacks for lawns.¹⁵ Virtually no lots were zoned for mobile homes¹⁶ or apartments.¹⁷ Where apartments were provided, sites were often unattractive, and bedrooms were limited to exclude families and attract senior citizens and single adults.¹⁸ The period ended with the dawn of the War on Poverty,¹⁹ the Great Society,²⁰ and passage of the Federal Fair Housing Act, known as Title VIII,²¹ which reflected the policies of President Lyndon Johnson.

258-59 (2004).

13. See *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 600 (Pa. 1965). For discussion of "Not in my Backyard" ("NIMBY"), see Vicki Been, *Comment on Professor Jerry Frug's the Geography of Community*, 48 STAN. L. REV. 1109, 1110-1134 (1996). See generally AM. BAR ASS'N, NIMBY: A PRIMER FOR LAWYERS AND ADVOCATES (1999); FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES (Edwin S. Mills & Wallace E. Oates eds., 1975) [hereinafter FISCAL ZONING]; JANE ANNE MORRIS, NOT IN MY BACK YARD: THE HANDBOOK (1994); Andrew Auchincloss Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 BUFF. ENVTL. L.J. 101, 137-42 (2004) (arguing conversion of local zoning to regional planning).

14. See *Nat'l Land & Inv. Co.*, 215 A.2d at 600.

15. See *Gorieb v. Fox*, 274 U.S. 603, 604-05 (1927) (sustained over taking claim); V. Woerner, Annotation, *Validity of Front Setback Provisions in Zoning Ordinance or Regulation*, 93 A.L.R. 2d 1223 (1964).

16. Compare *Vickers v. Twp. Cmty.*, 181 A.2d 129, 138 (N.J. 1962) (sustaining exclusion), *overruled by S. Burlington County NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983), with *English v. Augusta Twp.*, 514 N.W.2d 172, 173 (Mich. Ct. App. 1994) (illegal exclusion) and *S. Burlington County NAACP*, 456 A.2d at 450-51 (obligation to include unless alternative means to house a fair share of regional affordable housing need).

17. *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 107 (Pa. 1977). See generally CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); Bruce L. Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L. F. 1, 1; Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 790-94 (1969).

18. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 44-52.

19. See generally BILIANA C.S. AMBRECHT, POLITICIZING THE POOR: THE LEGACY OF THE WAR ON POVERTY IN A MEXICAN-AMERICAN COMMUNITY (1976); HUBERT H. HUMPHREY, WAR ON POVERTY (1964); MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); EDWARD ZIGLER & JEANETTE VALENTINE, PROJECT HEAD START: A LEGACY OF THE WAR ON POVERTY (1979).

20. See generally JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY (1998); NANCY A. COLBERT, GREAT SOCIETY: THE STORY OF LYNDON BAINES JOHNSON (2002); WILLIAM LOREN KATZ, A HISTORY OF MULTICULTURAL AMERICA: THE GREAT SOCIETY TO THE REAGAN ERA, 1964-1990 (1993); IRWIN UNGER, THE BEST OF INTENTIONS: THE TRIUMPHS AND FAILURES OF THE GREAT SOCIETY UNDER KENNEDY, JOHNSON, AND NIXON (1996).

21. 42 U.S.C. §§ 3601-3619, 3631 (2000).

II. PHASE TWO—HYPER-SPRAWL: 1968-1975

Phase	Social Equity	Subsidy	Regulation
1968-1975 Hyper-Sprawl	White Flight Concentrated Poverty	Taxation	Subdivision

During the period from 1968 to 1975, urban and regional development was defined by hyper-sprawl.²² Urban centers were developing circumferential highways²³ that circled the city on the edge of older suburbs generating an enormous supply of accessible land to build new housing subdivisions.²⁴ Along with interstate and state highways, the local highway systems provided the access for a stampede toward suburban development.²⁵ Also attracted were the big-box retailers,²⁶ the mega-malls,²⁷ and the new industrial and office centers that made

22. Edward H. Zigler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL'Y & L. 26, 28-33 (2003). See generally ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING AND ENVIRONMENTAL SYSTEMS (1999); WILLIAM FULTON ET AL., BROOKINGS INST., WHO SPRAWLS MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S. 2-3 (2001), available at <http://www.brookings.edu/es/urban/publications/fulton.pdf>; Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 183-86 (1997); Michael Lewyn, *The Law of Sprawl: A Road Map*, 25 QUINNIPIAC L. REV. 147, 164 (2006); Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies Are Losing*, 34 CONN. L. REV. 539, 553-54 (2002).

23. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 21-24; Kushner, *Urban Transportation Planning*, *supra* note 2, at 173; Gilbert Paul Verbit, *The Urban Transportation Problem*, 124 U. PA. L. REV. 368 (1975).

24. JACKSON, *supra* note 4, at 233; KUSHNER, THE POST-AUTOMOBILE CITY, *supra* note 2, at 11-14; Robert Fishman, *The American Metropolis at Century's End: Past and Future Influences*, 11 HOUSING POL'Y DEBATE 199, 200 (2000); James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 215 (1982); Kushner, *Urban Transportation Planning*, *supra* note 2, at 173; Zigler, *supra* note 22, at 35-36.

25. JACKSON, *supra* note 4, at 3-5; see also OLIVER GILLHAM: THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE 15-16, 32-38, 42-45, 134-36 (2002); Michael Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 MARQ. L. REV. 301, 304-35 (2000) [hereinafter Lewyn, *Suburban Sprawl*].

26. Richard Vedder, *Wal-Mart, Individuals and the State*, 39 CONN. L. REV. 1725, 1726, 1734 (2007) (noting that the average household in the United States spends \$2000 annually at Wal-Mart and that big-box retailers have increased the GDP by 5%).

27. Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533 (2004) (citing International Council of Shopping Centers, *Did You Know?*, <http://www.icsc.org/srch/about/DidYouKnow.pdf>

up the “edge cities”—some as far as twenty to fifty miles from the old city centers.²⁸ Farmland disappeared²⁹ as fast as sales of automobiles increased.³⁰ During this period, when cities lost jobs³¹ because manufacturing shifted to the

(last visited Apr. 15, 2008) (45,721 shopping centers in the United States account for over half of all retail sales)).

28. See generally JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991); ROBERT E. LANG & JENNIFER B. LEFURGY, *BOOMBURBS: THE RISE OF AMERICA'S ACCIDENTAL CITIES* 85-89 (2007).

29. U.S. DEP'T AGRIC., NATURAL RES. CONSERVATION SERV., *FARM AND RANCH LANDS PROTECTION PROGRAM FINAL ENVIRONMENTAL ASSESSMENT 1* (2003) (approximately four million acres of prime farmland will be lost to nonagricultural uses between 2002 and 2007, amounting to approximately 667,000 acres per year); Michael R. Eitel, *The Farm and Ranch Lands Protection Program: An Analysis of the Federal Policy on United States Farmland Loss*, 8 DRAKE J. AGRIC. L. 591, 593 (2003); Lawrence W. Libby & Michael R. Dicks, *Rural-Urban Interface Issues*, in *THE 2002 FARM BILL: POLICY OPTIONS AND CONSEQUENCES* (Joe L. Outlaw & Edward G. Smith eds., 2001), available at http://www.farmfoundation.org/news/articlefiles/35-2002_farm_bill_policy.pdf (approximately 645,000 acres of the nation's most productive farmland will be converted to urban uses each year); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 113 (1998) (loss of 1.5 million acres of farmland per year in the United States) (citing AM. FARMLAND TRUST, MEMBERSHIP PAMPHLET, *SAVING THE LAND THAT FEEDS AMERICA* (1995)); Am. Farmland Trust, *Issues & Programs*, <http://www.farmland.org/programs/default.asp> (last visited Apr. 25, 2008) (each year nearly 1.2 million acres of American farmland will be lost to sprawling development).

30. JAMES J. MACKENZIE, *THE KEYS TO THE CAR: ELECTRIC AND HYDROGEN VEHICLES FOR THE 21ST CENTURY 5* (1994) (between 1970 and 1990, U.S. automobile population grew almost three times faster than the human population); Hank Dittmar, *Sprawl: The Automobile and Affording the American Dream*, in *SUSTAINABLE PLANET: SOLUTIONS FOR THE TWENTY-FIRST CENTURY* 109, 109 (Juliet B. Schor & Betsy Taylor eds., 2002) (184,980,187 licensed drivers and 207,048,193 licensed motor vehicles in 1998); John Seabrook, *The Slow Lane: Can Anyone Solve the Problem of Traffic?*, *NEW YORKER*, Sept. 2, 2002 (since 1970, population of the United States has grown by 40%, while the number of motor vehicles has increased by 100% and road capacity has increased by 6%).

31. Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL'Y 513, 513-15 (1996) (citing *THE WORLD ALMANAC AND BOOK OF FACTS 1996*, at 381, 390, 425 (Robert Famighetti ed., 1995) [hereinafter 1996 ALMANAC] and *THE WORLD ALMANAC AND BOOK OF FACTS FOR 1954*, at 292, 294 (Harry Hansen ed., 1954) [hereinafter 1954 ALMANAC]) (between the 1950s and 1980s, eighteen of the nation's twenty-five largest cities suffered a population loss, and by contrast, during the same years, the population of the nation's independent suburbs gained more than sixty million persons, and in recent years businesses have also followed their employees to the suburbs causing cities to lose jobs as well as people). The following figures indicate the eighteen largest cities in America which suffered population losses between 1950 and 1990 (ranked from highest to lowest according to 1950 figures):

New York (from 7,891,957 in 1950 to 7,322,564 in 1990), Chicago (from 3,550,404 in 1950 to 2,783,726 in 1990), Philadelphia (from 2,071,605 in 1950 to 1,585,577 in 1990), Detroit (from 1,849,568 in 1950 to 1,027,974 in 1990), Baltimore (from 949,708

sun belt, the suburban belt, or went offshore, the city became more unattractive and lost its tax base³² as retail and businesses moved to the suburbs.³³ Public services declined in the city as the enhanced suburban tax base generated improved suburban services.³⁴ As public schools were faced with broad

in 1950 to 736,014 in 1990), Cleveland (from 914,808 in 1950 to 565,616 in 1990), St. Louis (from 856,796 in 1950 to 396,685 in 1990), Washington, D.C. (from 802,178 in 1950 to 606,900 in 1990), Boston (from 801,444 in 1950 to 574,283 in 1990), San Francisco (from 775,357 in 1950 to 723,959 in 1990), Pittsburgh (from 676,806 in 1950 to 369,879 in 1990), Milwaukee (from 637,392 in 1950 to 628,088 in 1990), Buffalo (from 580,132 in 1950 to 328,175 in 1990), New Orleans (from 570,445 in 1950 to 496,938 in 1990), Minneapolis (from 521,718 in 1950 to 368,383 in 1990), Cincinnati (from 503,998 in 1950 to 364,114 in 1990), Kansas City (from 456,622 in 1950 to 434,829 in 1990) and Newark (from 438,776 in 1950 to 275,221 in 1990).

Id. (citing 1996 ALMANAC). Of the cities which ranked among the twenty-five largest in 1950, only seven (Los Angeles, Houston, Seattle, Dallas, Denver, Indianapolis, and San Antonio) had a larger population in 1990 than in 1950. *Id.* For example, St. Louis's population nose-dived from 856,796 in 1950 to 396,685 in 1990, while during the same period suburban St. Louis County's population soared from 406,349 to 993,508. *Id.* (citing 1996 ALMANAC). Similarly, Washington, D.C.'s population declined from 802,178 in 1950 to 606,900 in 1990, while the population of suburban Montgomery County, Maryland increased from 164,401 to 757,027 during that period. *Id.* (citing 1996 ALMANAC and 1954 ALMANAC); see JACKSON, *supra* note 4, at 283; Clarence Lusane, *Persisting Disparities: Globalization and the Economic Status of African Americans*, 42 HOW. L.J. 431, 443 (1999) (observing "Chicago lost 79,744 manufacturing jobs during the 1980s directly due to plant closings and relocations and an additional 106,200 jobs in the city and surrounding areas as reverberations from those initial job losses. In the rest of the state, another 68,000 jobs were eliminated as firms relocated jobs to Mexico's Maquiladora industries which operate along the Mexican-Texas border." (citing DAVID C. RANNEY & WILLIAM CECIL, CTR. FOR URBAN & ECON. DEV., TRANSNATIONAL INVESTMENT AND JOB LOSS IN CHICAGO: IMPACTS ON WOMEN, AFRICAN AMERICANS, AND LATINOS 2 (1993))).

32. William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 69-70 (1999); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 9-10 (2006); see also Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1723-24 (1979). See generally DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993).

33. F. KAID BENFIELD ET. AL., NATURAL RES. DEF. COUNCIL, *ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY AND SOCIAL FABRIC* 14 (1999) (stating "around 95 percent of the 15 million new office jobs created in the 1980s were in low-density suburbs," and suburbs "captured 120 percent of net job growth in manufacturing"); Freilich & Peshoff, *supra* note 22, at 190-92; Lewyn, *Suburban Sprawl*, *supra* note 25, at 302 (stating that jobs as well as people have fled to suburbia); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 349 (1999); Anne Gearan, *Clinton to Help Needy Own Car*, ATLANTA J. CONST., Feb. 24, 2000, at C1 (stating two-thirds of all new jobs are created in suburbs).

34. KUSHNER, *APARTHEID IN AMERICA*, *supra* note 2, at 56-63; Emel Gökyigit Wadhvani,

desegregation remedies, whites left the city causing the further decline of the structure and tax base of the city as well as limiting diversity.³⁵ Since property taxes were the predominant funding mechanism for schools, declining city values translated into a reduction of school funding.³⁶ Reduced funding, the problems of multiple languages, a student body containing too many unmotivated learners, and a marked decline in school quality and average test scores rendered the city schools and neighborhoods unattractive.³⁷ White flight included transfers to religious and private schools which further threatened the public schools.³⁸ It was also during this period that African Americans began a migration to the suburbs, albeit on a somewhat separate basis and not without white resistance.³⁹ Zoning⁴⁰ and subdivision⁴¹ regulation were the dominant regulatory mechanisms,

Achieving Greater Inter-Local Equity in Financing Municipal Services: What We Can Learn from School Finance Litigation, 7 TEX. F. ON C.L. & C.R. 91, 94 (2002).

35. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 74-84; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 642-43 (1983); Alfred A. Lindseth, *A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 886 (1993); Wadhvani, *supra* note 34, at 95; Joanna R. Zahler, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1028-30 (1999).

36. James K. Gooch, *Fenced In: Why Sheff v. O'Neill Can't Save Connecticut's Inner City Students*, 22 QUINNIPAC L. REV. 395, 397 (2004); Mildred Wigfall Robinson, *Fulfilling Brown's Legacy: Bearing the Costs of Realizing Equality*, 44 WASHBURN L.J. 1, 11-12 (2004); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 259-60 (1999) (discussing ineffective financial reforms); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2051 (2002). *Cf.* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006) (arguing that the citizenship clause of the Fourteenth Amendment requires equality in educational resources between states which is a greater problem than disparity of resources between districts within states and arguing for an affirmative obligation of Congress to fund a minimum floor). *Compare* *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (describing extraordinarily poor-performing Cleveland schools) and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-20 (1973) (sustaining property-tax financed school system resulting in significantly higher per pupil expenditures in suburbs as compared to cities), *with* *Sheff v. O'Neill*, 678 A.2d 1267, 1280 (Conn. 1996) (recognizing affirmative obligation to equalize educational opportunities between city and suburb).

37. Susan L. DeJarnatt, *The Myths of School Choice: Reflections on the Two-Income Trap*, 4 RUTGERS J.L. & PUB. POL'Y 94, 108-17 (2006); Susan L. DeJarnatt, *The Philadelphia Story: The Rhetoric of School Reform*, 72 UMKC L. REV. 949, 952 (2004); Thomas J. Kane et al., *School Quality, Neighborhoods, and Housing Prices*, 8 AM. L. & ECON. REV. 183, 183-85 (2006).

38. Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 770-71 (1993).

39. ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY* 209-54 (2004).

40. Been, *supra* note 13, at 1110-14; Annette B. Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981); Sager, *supra* note 17, at 767. *See generally* AM. BAR ASS'N, *supra* note 13, at 33-47; FISCAL ZONING, *supra* note 13, at 33-47; MORRIS, *supra* note 13, at 104-07; *see also* Lundgren,

resulting in the suburbs becoming expensive and following a strict model of attractive, single-family, automobile-based lifestyles. Avoidance of service-demanding, lower-income residents and use of expensive parking conditions and low density zoning discouraged or outlawed the development of suburban apartments. More expensive homes required infrastructure and amenities, and higher quality homebuilders dramatically increased the cost of a home.⁴²

III. PHASE THREE—CLASS SEGREGATION: 1975-1990

Phase	Social Equity	Subsidy	Regulation
1975-1990 Class Segregation	Assimilation	Revitalization	Affirmative Action

As the suburbs expanded in size and prestige, housing costs increased. Cost-generating regulation,⁴³ such as exclusionary zoning⁴⁴ and growth management,⁴⁵ and a steady demand that inflated land and home prices led to dramatic economic class segregation between city and suburb.⁴⁶ The poor became concentrated in

supra note 13, at 104-07 (arguing conversion of local zoning to regional planning).

41. 1 JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 4:05 (2d ed. 2001 and Supp. 2007) [hereinafter KUSHNER, *SUBDIVISION LAW*] (discussing housing price inflation). *See generally* Michael M. Shultz & Jeffrey B. Groy, *The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action*, 1988 UTAH L. REV. 569; Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525 (1990).

42. NAT'L COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 213-15 (1969); LYNNE B. SAGALYN & GEORGE STERNLIEB, CTR. FOR URBAN POLICY, *ZONING AND HOUSING COSTS: THE IMPACT OF LAND-USE CONTROLS ON HOUSING PRICE* 20-24 (1972).

43. *See generally* Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Harvard Inst. of Econ. Research, Working Paper No. 1948, 2002), available at <http://www.economics.harvard.edu/pub/hier/2002/HIER1948.pdf>.

44. Been, *supra* note 13, at 1110-14; Sager, *supra* note 17, at 767; *see also* Lundgren, *supra* note 13, at 101-03 (arguing conversion of local zoning to regional planning). *See generally* AM. BAR ASS'N, *supra* note 13, at 33-47; FISCAL ZONING, *supra* note 13, at 31-100; MORRIS, *supra* note 13, at 236-38.

45. KUSHNER, *SUBDIVISION LAW*, *supra* note 41, § 4:05 (discussing housing price inflation); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); *see generally* Lawrence Katz & Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Control on Housing Prices*, 30 J.L. & ECON. 149 (1987).

46. Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001) [hereinafter Cashin, *Middle-Class Black Suburbs*]; Paul A. Jargowsky, *Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas*, 61 AM. SOC. REV. 984, 990-91 (1996) (showing increase

the city and the affluent in the suburbs. Although minority racial and ethnic groups entered the suburban housing market as part of assimilation, class separation increased.⁴⁷ Neighborhoods became characterized by the average resident income. The most affluent resided in neighborhoods with the best amenities and facilities, such as clean air, access to recreation, and green spaces, or in urban neighborhoods such as the old city center or around university campuses and trendy communities where investment and gentrification displaced the poor. Most of the wealthy, however, settled in the affluent suburbs.⁴⁸ The poor and lower income workers largely resided in poor census tracts in the center city and depressed suburban communities.⁴⁹ During this period, broad efforts to

in economic segregation); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 111, 115 (2003) [hereinafter Reynolds, *Intergovernmental Cooperation*]; George Gasper, Note, *The Economics of Flight: Why the Decentralization of Corporate America from Central Cities is Inevitable and What It Means to Older, Central Cities*, 10 GEO. J. ON POVERTY L. & POL'Y 247, 261 (2003).

47. BUZZ BISSINGER, A PRAYER FOR THE CITY 372 (1997) (showing that from 1992 to 1994, Philadelphia residents who moved to the suburbs earned almost two and one half times as much as the suburban residents who moved into the city); DAVID RUSK, INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 60 (1999) [hereinafter RUSK, INSIDE GAME/OUTSIDE GAME] (stating that as of 1990, Baltimore accounted for 28% of the region's population but only 15% of the gross assessed valuation of property; Detroit fell from 24% of the region's population to 22% and from 7% of the gross assessed valuation of property to 6%); TODD SWANSTROM, THE CRISIS OF GROWTH POLITICS: CLEVELAND, KUCINICH, AND THE CHALLENGE OF URBAN POPULISM 68-70, 136-53 (1985) (Suburban homeowners were able to monopolize the positive externalities of the housing market so that suburban home values soared while inner city home values stagnated. In 1969, the average selling price of a single-family home in Cleveland "was only 53% of the average sales price in the suburbs." In 1979, "the average sales price of all one- to four-family properties in the city . . . was only 44 percent of the average sales price in the suburbs."); WIESE, *supra* note 39, at 955-92 (discussing "The Next Great Migration"); Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 734-41; Jargowsky, *supra* note 46, at 990-91 (showing increase in economic segregation); Reynolds, *Intergovernmental Cooperation*, *supra* note 46, at 111, 115; Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157, 162-63 (2005); Gasper, *supra* note 46, at 261.

48. MYRON ORFIELD, CHICAGO METROPOLITICS: A REGIONAL AGENDA FOR MEMBERS OF THE U.S. CONGRESS 30, 31 (1998), available at http://www.brookings.edu/~media/Files/rc/reports/1998/05metropolitanpolicy_Orfield/congrep6.pdf; MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 15-16, 30 (1997); MYRON ORFIELD, SEATTLE METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY IN THE PUGET SOUND REGION 19 (1999); WILLIAM D. VALENTE, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 16-17 (2d ed. 1980); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2011-13, 2020-21 (2000).

49. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 1-4; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a 'Race-Making*

revitalize attractive city neighborhoods and declining older suburbs also existed.⁵⁰ Although separated by strict class identity, neighborhoods in the city and older suburbs—and to a lesser extent the newer edge suburbs—reflected an increasingly racial and ethnic diversity and assimilation.⁵¹ Such revitalization typically generated gentrification whereby the wealthier new residents and shops displaced lower-income residents⁵² and locally supporting commercial facilities,⁵³ thereby reducing the supply of affordable housing.⁵⁴ The national strategy to achieve residential equal opportunity through affirmative action and civil rights laws ultimately proved Pyrrhic.⁵⁵ Minority group members did benefit from employment discrimination laws; more jobs in nontraditional work⁵⁶ and the

Situation, 35 U. MICH. J.L. REFORM 749, 928-30 (2002).

50. See generally James J. Kelly, Jr., “We Shall Not be Moved”: *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN’S L. REV. 923, 928-30 (2006); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 1-2 (2003); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 691-93 (1994).

51. Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 736-37, 740.

52. John J. Betancur, *Can Gentrification Save Detroit? Definition and Experiences from Chicago*, 4 J.L. SOC’Y 1 (2002); Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS’N 39, 39 (2004); Diane K. Levy et al., *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238, 238 (2007); Henry W. McGee, Jr., *Seattle’s Central District, 1990-2006: Integration or Displacement?*, 39 URB. LAW. 167, 169 (2007) [hereinafter McGee, *Seattle’s Central District*] (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

53. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, AND TOKYO* 251 (1991); SHARON ZUKIN, *THE CULTURES OF CITIES* 211 (1995); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 824-25 (1993); David J. Maurrasse & Jaclyn B. Bliss, *Comprehensive Approaches to Urban Development: Gentrification, Community, and Business in Harlem, New York*, 1 NW. J.L. & SOC. POL’Y 127, 137-38 (2006); Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2296-97 (1994).

54. Aoki, *supra* note 53, at 711; J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405-06 (2003); Deliah D. Lawrence, *Can Communities Effectively Fight Displacement Caused by Gentrification?*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 357, 360 (2002); Levy et al., *supra* note 52, at 238; Isis Fernandez, Note, *Let’s Stop Cheering, and Let’s Get Practical: Reaching a Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL’Y 409, 409-10, 417 (2005).

55. JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* §§ 8.1, 8.6 (2006) [hereinafter KUSHNER, *GOVERNMENT DISCRIMINATION*], available at WL Gov. Discrim. § 8:1, § 8:6; James A. Kushner, *New Urbanism: Urban Development and Ethnic Integration in Europe and the United States*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 27, 36-38 (2005) [hereinafter Kushner, *New Urbanism*].

56. Jonathan S. Leonard, *Antidiscrimination or Reverse Discrimination: The Impact of*

professions⁵⁷ were opened, and a burgeoning middle class was created.⁵⁸ However, housing discrimination laws failed to be administered or utilized to advance racial integration.⁵⁹ Voting rights laws, although effective in extending the vote to minority group members,⁶⁰ may have had the effect of discouraging assimilation as political power required compact minority communities.⁶¹ Affirmative action was ineffective as it engendered majority public hostility and was limited by conservative courts ruling that racial considerations were largely prohibited in voting district drawing,⁶² limited to a class of victims and group members of proven discrimination in employment and public contracting, limited to the extent of the proven bias,⁶³ and simply invalidated in the case of housing discrimination.⁶⁴ In the housing discrimination arena, most cases were brought

Changing Demographics, Title VII, and Affirmative Action on Productivity, 19 J. HUMAN RES. 145, 145 (1984) (arguing that Title VII has played a significant role in increasing black employment).

57. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 947-49 (1982).

58. BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987); Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 732; Barbara Jordan, *Making It—Losing It*, 5 TEX. J. WOMEN & L. 217, 217 (1996); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 940 (1997).

59. See James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050-52 (1989) [hereinafter Kushner, *The Fair Housing Amendments*]; James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUSING POL'Y DEBATE 537, 547 (1992) [hereinafter Kushner, *Federal Enforcement*].

60. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1082-84 (1991); Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. PA. J. CONST. L. 665, 687 (2003).

61. See Joan F. Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial 'Intent' and the Legislative 'Results' Standards*, 50 GEO. WASH. L. REV. 689, 721 n.207 (1982); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1903-05 (1994).

62. See, e.g., *Bush v. Vera*, 517 U.S. 952, 957 (1996) (rejecting bizarrely shaped Texas congressional districts); *Shaw v. Hunt*, 517 U.S. 899, 902-03 (1996) (rejecting bizarrely shaped majority-black North Carolina congressional district); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (obtaining Justice Department preclearance not a compelling interest to justify affirmative action in designing Georgia congressional district). *But see Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (finding political considerations rather than race the overriding motive in establishing a safe North Carolina democratic district ostensibly allowing race to be a factor and a permissible means to serve a non-racial end).

63. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (invalidating affirmative action public works program absent study disclosing current discrimination); *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); KUSHNER, *GOVERNMENT DISCRIMINATION*, *supra* note 55, § 8:15.

64. See *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (1988). *But cf. Raso v.*

by individuals. Even where the Justice Department brought litigation, affirmative action remedial obligations were rarely sought.⁶⁵ Affirmative action in primary, secondary,⁶⁶ and higher education⁶⁷ were largely limited and symbolic. Efforts to mandate suburban development of affordable or racially-integrated housing were limited to a few jurisdictions and rarely implemented in

Lago, 135 F.3d 11, 17 (1st Cir. 1998) (sustaining affirmative action marketing plan that denied promised preferences to former urban renewal residents who were white and would have denied diversity); S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 871 (7th Cir. 1991) (sustaining affirmative marketing race-conscious referrals, outreach, and solicitation); Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1401, 1445-50 (arguing that affirmative marketing and other proactive strategies short of the use of racial preferences are legal). See generally KUSHNER, GOVERNMENT DISCRIMINATION, *supra* note 55, § 8:16; Kushner, *The Fair Housing Amendments*, *supra* note 59; Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 339 (2007) (arguing HUD has failed to administer Title VIII affirmatively to undo housing segregation); Adam Weiss, Note, Grutter, *Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Suits*, 107 COLUM. L. REV. 1195, 1195 (2007) (arguing that *Grutter v. Bollinger*, 539 U.S. 306 (2003), supports affirmative action remedies in housing segregation litigation).

65. Kushner, *The Fair Housing Amendments*, *supra* note 59, at 1070, 1113-19; Kushner, *Federal Enforcement*, *supra* note 59, at 582.

66. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007) (The Supreme Court rejected school actions in Seattle, Washington and Jefferson County, Kentucky, that voluntarily adopted student assignment plans relying on race to assign which school children would attend for the purpose of advancing racial integration. Justice Kennedy, however, along with the dissent constitute the majority in identifying diversity as a compelling educational goal. Moreover, the majority recognizes a compelling interest in avoiding racial isolation; race, according to Justice Kennedy and the majority, can be a factor in pursuing diversity in a multi-racial and ethnic society; school districts need not ignore the problem of *de facto* resegregation in schooling. School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.); KUSHNER, GOVERNMENT DISCRIMINATION, *supra* note 55, § 8:15; Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 640-55 (2007) (arguing for desegregation jurisprudence rather than affirmative action jurisprudence in reviewing voluntary desegregation policies in elementary grades and applying less than strict scrutiny).

67. See *Grutter*, 539 U.S. at 334-41 (sustaining law school admission policy that considers race and ethnicity among a number of unique characteristics in pursuit of a compelling interest in attaining a diverse student body); *Gratz v. Bollinger*, 539 U.S. 244, 271-76 (2003) (rejecting automatic advantage and preference to racial minority applicants to undergraduate college); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (invalidating setting aside of a number of seats for qualified minorities in medical school admission process).

a meaningful manner.⁶⁸

IV. PHASE FOUR—HYPER-SEGREGATION: 1990-2008

Phase	Social Equity	Subsidy	Regulation
1990-2008 Hyper-Segregation	Voluntary Separation	Gentrification and Regeneration	Smart Growth

The fourth phase, from 1990 to 2008, is hyper-segregation⁶⁹ and was marked by voluntary class, racial, and ethnic separation as more ethnic and racially concentrated neighborhoods grew or were established.⁷⁰ This is not to say that discrimination has significantly abated but that the dominant force yielding separation is voluntary decisions of members of all races and ethnic groups. One of the most dramatic changes in cities in the 1990s was that most city centers became majority “minority” for the first time in American history.⁷¹

68. See *S. Burlington County NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (unique ruling requiring each community to provide its fair share of affordable housing); see also Sheryll D. Cashin, *Building Community in the Twenty-First Century: A Post-Integrationist Vision of the American Metropolis*, 98 MICH. L. REV. 1704, 1719 n.34 (2000) (noting that the racial integration experience of affordable housing in the developing suburbs is disappointing with more than eighty percent of New Jersey’s suburban affordable housing units occupied by whites) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)); Josh Getlin, *Home is Where the Hurt Was: After a Bruising Legal Fight, an Affluent New Jersey Town has Housing for the Poor. But It’s Still a Struggle to Keep Doors of Acceptance Open*, L.A. TIMES, Nov. 5, 2004, at A1 (describing how Mount Laurel finally developed an affordable housing project, but one that is a virtual all-minority “project” segregated from the now exclusive highly affluent suburban community).

69. MASSEY & DENTON, *supra* note 49, at 129; Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 798-99 (1996); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 65 (2002); Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century*, 41 DEMOGRAPHY 23, 29 (2004) (listing twenty-nine metropolitan areas with black-white hypersegregation in 2000 and observing that most of the metropolitan areas that were hypersegregated in 2000 were also hypersegregated in 1990).

70. See NANCY MCARDLE & GUY STUART, *THE CIVIL RIGHTS PROJECT, RACE, PLACE & SEGREGATION: REDRAWING THE COLOR LINE IN OUR NATION’S METROS* (2002); Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 24 (2001).

71. Alan Berube, *Racial and Ethnic Change in the Nation’s Largest Cities*, in 1 REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 137, 139-41 (Bruce Katz & Robert E. Lang eds., 2003) [hereinafter 1 REDEFINING URBAN & SUBURBAN AMERICA]; Bruce Katz & Robert E. Lang, *Introduction* to 1 REDEFINING URBAN & SUBURBAN AMERICA, *supra*, at 1, 1.

Neighborhoods increasingly were regenerated through gentrification and the investment of public and private funds.⁷² “Between 1960 and 2000, the number of African Americans living in suburbs grew by approximately 9 million, representing a migration as large as the exodus of African Americans from the rural South in the mid-twentieth century. More than one-third of African Americans—almost 12 million people—lived in suburbs.”⁷³ The divide between many minority communities, which were now in the city and the older suburbs, and the more affluent communities, predominantly in white newer suburbs, became more pronounced⁷⁴ despite back-to-the-city moves,⁷⁵ investment, the gentrification of attractive neighborhoods,⁷⁶ and despite the fact that segregation between blacks and non-blacks is at its lowest level since 1920.⁷⁷ Although minorities increased their presence in the suburbs⁷⁸ and the affluent were

72. See Aoki, *supra* note 53, at 791-820; James Geoffrey Durham & Dean E. Sheldon III, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1, 10-17 (1986); Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 508 (1991); Richard T. LeGates & Chester Hartman, *Gentrification-Caused Displacement*, 14 URB. LAW. 31, 31 (1982); Levy et al., *supra* note 52, at 238-40; Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931, 931-33 (1985); Maurrasse & Bliss, *supra* note 53; Harold A. McDougall, *Gentrification: The Class Conflict Over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177, 177-79 (1982); Henry W. McGee, Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25, 25-26 (1991); McGee, *Seattle's Central District*, *supra* note 52, at 167-73 (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

73. WIESE, *supra* note 39, at 1.

74. Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 737-41.

75. See MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INST., DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES (2001), available at <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf>; Michael H. Lang, *Gentrification*, in HOUSING: SYMBOL, STRUCTURE, SITE 158 (Lisa Taylor ed., 1990); Fernandez, *supra* note 54, at 411-13; Teri Karush Rogers, *Goodbye, Suburbs*, N.Y. TIMES, Jan. 8, 2006, available at www.nytimes.com/2006/01/08/realestate/08cov.html.

76. See Betancur, *supra* note 52, at 1-8; Freeman & Braconi, *supra* note 52, at 39; Levy et al., *supra* note 52, at 238-40; McGee, *Seattle's Central District*, *supra* note 52, at 169-73, 208-22 (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

77. Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation: Promising News*, in 1 REDEFINING URBAN & SUBURBAN AMERICA, *supra* note 71, at 211, 216.

78. See Malamud, *supra* note 58, at 969-70, 978-79 (middle-class blacks segregated in older enclave neighborhoods adjacent to central cities); see also Elizabeth D. Huttman & Terry Jones, *American Suburbs: Desegregation and Resegregation*, in URBAN HOUSING SEGREGATION OF MINORITIES IN WESTERN EUROPE AND THE UNITED STATES 335, 335-37 (Elizabeth D. Huttman et al. eds., 1991); Douglas S. Massey & Nancy A. Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 AM. J. SOC. 592, 613 (1988) (noting that blacks are less suburbanized than

returning to certain neighborhoods in the city,⁷⁹ the divide between neighborhoods during this period was still characterized by hyper-segregation.⁸⁰ Thus, while black-white segregation in metropolitan areas has declined in the past two decades and diversity has increased, the nation must nevertheless be characterized as having a high degree of racial separation.⁸¹ Majority-black suburban neighborhoods generally provide fewer economic opportunities in terms of rising home values and access to good schools and jobs, making it harder for blacks to catch up and keep up financially with whites.⁸² In 2005, “the average white person in the United States live[d] in a neighborhood that [was] more than 80 percent white, while the average black person live[d] in one that [was] mostly black.”⁸³ African Americans are the most residentially segregated group in the United States.⁸⁴ Black suburbanization did little to desegregate metropolitan areas, for while the movement of blacks to the suburbs signaled the lifting of the suburban-urban barrier, any optimism about greater residential integration between whites and blacks was short-lived.⁸⁵ The suburbs engaged

Hispanics or Asians).

79. See Betancur, *supra* note 52, at 1-8; Freeman & Braconi, *supra* note 52, at 39; McGee, *supra* note 52, at 167-73, 208-22 (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

80. MASSEY & DENTON, *supra* note 49, at 129.

81. John R. Logan, *Ethnic Diversity Grows, Neighborhood Integration Lags*, in 1 REDEFINING URBAN & SUBURBAN AMERICA, *supra* note 71, at 235, 238.

82. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 130-31 (2004) (noting that lower quality schools encountered when moderately affluent non-whites voluntarily choose minority enclaves); Robert D. Bullard, *Introduction: The Significance of Race and Place*, in THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE 1, 3 (Robert D. Bullard ed., 2007) [hereinafter THE BLACK METROPOLIS]; Sheryll Cashin, *Dilemma of Place and Suburbanization of the Black Middle Class*, in THE BLACK METROPOLIS, *supra*, at 87, 88-96 (describing how poor blacks follow the middle class blacks to suburban communities).

83. MICHAEL T. MALY, BEYOND SEGREGATION: MULTIRACIAL AND MULTIETHNIC NEIGHBORHOODS IN THE UNITED STATES 1 (2005); see also KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005) (defending white enclaves).

84. JOHN ICELAND ET AL., U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000, at 15 (2002).

85. MALY, *supra* note 83, at 12. See generally DESEGREGATING THE CITY: GHETTOS, ENCLAVES, & INEQUALITY (David P. Varady ed. 2005) [hereinafter DESEGREGATING THE CITY].

in Smart Growth regulatory policies to slow development⁸⁶ and reduce sprawl,⁸⁷ using approaches such as urban growth boundaries;⁸⁸ conservation easement purchases;⁸⁹ and, in Maryland's urban service districts where public subsidies are targeted to designated growth areas and corridors,⁹⁰ incentives for infill development,⁹¹ home purchases,⁹² and the transfer of infrastructure costs to new

86. See *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 908-09 (9th Cir. 1975) (sustaining annual permit cap); *Golden v. Planning Bd.*, 285 N.E.2d 291, 301-05 (N.Y. 1972) (sustaining timed sequential zoning providing for development conditioned on the concurrent extension of infrastructure). *But see* *Bldg. Indus. Ass'n v. City of Oceanside*, 33 Cal. Rptr. 2d 137, 154-55 (Ct. App. 1994) (invalidating annual building cap); *Toll Bros., Inc. v. W. Windsor Twp.*, 712 A.2d 266, 269-72 (N.J. Super. Ct. App. Div. 1998) (invalidating timed growth control ordinance).

87. See FREILICH, *supra* note 22, at 15-29, 167-202 (noting the need for Smart Growth policies because of the costs associated with sprawl and describing Smart Growth in counties in Utah, Florida, Colorado, and California); George Galster et al., *Wrestling Sprawl to the Ground: Defining and Measuring an Elusive Concept*, 12 HOUSING POL'Y DEBATE 681, 687-98 (2001) (offering alternative definitions based on low value density, continuity, concentration, clustering, centrality, nuclearity, mixed uses, or proximity).

88. See Michael Lewyn, *Sprawl, Growth Boundaries and the Rehnquist Court*, 2002 UTAH L. REV. 1, 4-8 [hereinafter Lewyn, *Sprawl*] (describing Oregon's urban growth boundary program); Robert Stacey, *Urban Growth Boundaries: Saying "Yes" to Strengthening Communities*, 34 CONN. L. REV. 597, 597-609 (2002) (examining the urban growth boundary program in Portland, Oregon).

89. James Boyd et al., *The Land and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 215 (2000); J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States*, 39 URB. LAW. 19, 20, 72-74 (2007); Connie Kertz, *Conservation Easements at the Crossroads*, 34 REAL ESTATE L.J. 139, 139-46 (2005); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 554-55, 559-83 (2006) (applying behavioral psychology to encourage the acceptance of conservation easements by individual landowners); Gwenann Seznec, Note, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 VA. ENVTL. L.J. 479, 480-82, 516-25 (2005). *But see* Valerie Cotsalas, *Preserving Land, but Not for Farmers*, N.Y. TIMES, Aug. 5, 2007 (describing how land prices have inflated on Long Island so that developers are purchasing land subject to conservation easements and using it as lawns for adjacent luxury homes and witnessing the end of farming).

90. See PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 64-65 (2001); John W. Frece, *Smart Growth: Prioritizing State Investments*, 15 NAT. RESOURCES & ENV'T 236, 236-38, 273 (2000); John W. Frece & Andrea Leahy-Fuckeck, *Smart Growth and Neighborhood Conservation*, 13 NAT. RESOURCES & ENV'T 319, 319-20 (1998); J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 J. LAND USE & ENVTL. L. 377, 408-18 (2004).

91. Thomas A. Gihring, *Incentive Property Taxation: A Potential Tool for Urban Growth Management*, 65 J. AM. PLAN. ASS'N 62, 76 (1999) (recommending heavier taxes on sprawl development).

92. Smart Growth Online, *Revival of Maryland's Live Near Your Work Program Draws Criticism From Smart Growth Advocates*, <http://www.smartgrowth.org/news/article.asp?art=5660&>

residents.⁹³ The result of all of these influences was typically higher cost housing⁹⁴ and even greater sprawl as developers often leap-frog jumped over regulating communities to develop even farther out.⁹⁵ This period was the time of excessive traffic congestion,⁹⁶ air pollution,⁹⁷ obesity,⁹⁸ diabetes,⁹⁹ and

State=21 (last visited Apr. 16, 2008).

93. *Dolan v. City of Tigard*, 512 U.S. 374, 378 (1994) (invalidating dedication of land for floodplain and pedestrian/bicycle pathway as no individualized evidence that exaction roughly proportional to impact of proposed development); *J.W. Jones Cos. v. City of San Diego*, 203 Cal. Rptr. 580, 582 (Ct. App. 1984) (sustaining facilities benefit assessment districts where impact fees can be paid for each home at time of building permit application); *N. Ill. Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384, 397 (Ill. 1995) (sustaining transportation impact fee); KUSHNER, *SUBDIVISION LAW*, *supra* note 41, §§ 6.01-.08; Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMUL. REV. 177, 182 (2006).

94. NAT'L COMM'N ON URBAN PROBLEMS, *supra* note 42, at 213-15; James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45 (2002) [hereinafter Kushner, *Smart Growth*].

95. James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 72-73 (1994) [hereinafter Kushner, *Growth Management*]; Stephanie Yu, Note, *The Smart Growth Revolution: Loudoun County, Virginia and Lessons to Learn*, 7 ENVTL. LAW. 379 (2001).

96. MICHAEL BERNICK & ROBERT CERVERO, *TRANSIT VILLAGES IN THE 21ST CENTURY* 43-44 (1997) (stating traffic congestion costs \$73 billion annually in the United States with each commuter paying \$375 in extra fuel and maintenance); ROBERT CERVERO, *THE TRANSIT METROPOLIS: A GLOBAL INQUIRY* 40 (1998) (stating social costs of traffic congestion in most industrialized countries between two and three percent of GDP); ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 8 (1994); KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 46-48; Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 466 (2003); Morris Newman, *The Driving Factor: Commute Time is Becoming Increasingly Important in Home-Buying Decisions*, L.A. TIMES, Oct. 5, 2003, at K1 (noting that Los Angeles drivers with a thirty-minute commute spend 108 hours annually stopped in traffic as of 2001).

97. PETER FREUND & GEORGE MARTIN, *THE ECOLOGY OF THE AUTOMOBILE* 27-33 (1993) (noting that 120,000 annual U.S. deaths are from air pollution, generating \$4.3 billion in health costs); JAMES A. KUSHNER, *HEALTHY CITIES: THE INTERSECTION OF URBAN PLANNING, LAW AND HEALTH* 97-99 (2007) [hereinafter KUSHNER, *HEALTHY CITIES*]; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 37-41; Marla Cone, *State's Air is Among Nation's Most Toxic: Only New York Has a Higher Risk of Cancer Caused by Airborne Chemicals, the EPA Says*, L.A. TIMES, Mar. 22, 2006, at A1; *Researchers Link Childhood Asthma to Exposure to Traffic-Related Pollution*, SCIENCE DAILY, Sept. 21, 2005, <http://www.sciencedaily.com/releases/2005/09/050921082651.htm> (stating that "[f]or every 1.2 kilometers . . . the student lives closer to the freeway, asthma risk increased 89 percent" according to University of Southern California study).

98. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 141-53; NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., *HEALTH, UNITED STATES, 2002—WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS* 213-15 tbls. 70 & 71 (2003), available at <http://www.cdc.gov/nchs/data/hs/hs02.pdf> (reporting a 300% increase in overweight children

prohibitively costly health care which was made worse by motor vehicle crashes,¹⁰⁰ the largest cost of care.¹⁰¹ Smart Growth fell short of its goal; sprawl

over the last three decades and 64.5% of Americans over age twenty were overweight and 30.5% were obese in 1999-2000, up 8% from 1988-1994, while 15% of children aged six to nineteen years of age overweight, a 4% increase); NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 1999-2000, *available at* <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm> (reporting that nearly two-thirds of United States adults aged twenty to seventy-four are overweight, and 31% are obese); OFFICE OF THE SURGEON GEN., U.S. DEP'T HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at 2 (2001), *available at* <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> (reporting that at least 60% of adult Americans fail to meet the Surgeon General's minimum targets for physical activity, defined as thirty minutes of moderate-to-vigorous activity most days of the week).

99. KUSHNER, HEALTHY CITIES, *supra* note 97, at 145-53 (stating that obese people are as much as forty times more likely to develop diabetes); *see also* Anne Fagot-Campagna et al., *Type 2 Diabetes Among North American Children and Adolescents: An Epidemiologic Review and a Public Health Perspective*, 136 J. PEDIATRICS 664, 669-70 (2000); Frank B. Hu et al., *Diet, Lifestyle, and the Risk of Type 2 Diabetes Mellitus in Women*, 345 N. ENG. J. MED. 790, 793-96 (2001); Ali H. Mokdad et al., *Prevalence of Obesity, Diabetes, and Obesity-Related Health Risk Factors, 2001*, 289 JAMA 76, 77 (2003) (obesity and overweight has increased by 74% since 1991 and diabetes by 61% since 1990; in 2001, 7.9% of all adults in the United States reported having the disease); Ali H. Mokdad et al., *The Continuing Epidemics of Obesity and Diabetes in the United States*, 286 JAMA 1195, 1196-97 (2001) (reporting obesity increase of 61% since 1991, diabetes 49% since 1991); K.M. Venkat Narayan et al., *Lifetime Risk for Diabetes Mellitus in the United States*, 290 JAMA 1884, 1889 (2003) (study of women indicating that those who develop diabetes before age forty will lose an average of fourteen years of life but twenty-two years if quality of life is considered); CDC's Diabetes Program—Data & Trends, <http://www.cdc.gov/diabetes/statistics/prev/national/figpersons.htm> (last visited Apr. 16, 2008) (diabetes has doubled in prevalence since 1980).

100. KEVIN KINSELLA & VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, AN AGING WORLD: 2001, at 10, 126-27 (2001), *available at* <http://www.census.gov/prod/2001pubs/p95-01-1.pdf> (reporting America's population of those older than age sixty-five will double by the year 2030 from 2006); KUSHNER, HEALTHY CITIES, *supra* note 97, at 141-51 (noting challenge reflected by rapidly escalating health care costs shows no sign of abating since numerous pressures such as emerging diseases, threats of bioterrorism, new technology and discoveries, shortages of caregivers, increasing life expectancy, immigration, adverse environmental health consequences, and others, all significantly impact the demand for services); NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2003—WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS 306 tbl. 112 (2003), *available at* <http://www.cdc.gov/nchs/data/hus/hus03.pdf> (reporting taxpayer cost of this rapidly inflating system in 2001 was \$1.4 trillion annually); Gerald F. Anderson et al., *Health Spending and Outcomes: Trends in OECD Countries, 1960-1998*, 19 HEALTH AFF. 149, 150-51 (2000) (noting health care system accounted for 5.2% of the gross domestic product in 1960); Gerald F. Anderson et al., *Health Spending in the United States and the Rest of the Industrialized World; Examining the Impact of Waiting Lists and*

expanded.¹⁰² “Rather than disappearing, residential segregation is extending beyond the city limits and adding new colors, and it promises to persist as an American dilemma well into the twenty-first century.”¹⁰³

This Article was prepared for a symposium and conference celebrating the fortieth anniversary of the enactment of Title VIII. This Author was honored to participate in the celebrations of the twentieth¹⁰⁴ and thirtieth¹⁰⁵ anniversaries of

Litigation Reveals No Significant Effects on the U.S. Health Spending Differential, 24 HEALTH AFF. 903, 905 (2005) (14.6% as of 2002); Gerald F. Anderson et al., *It's the Prices Stupid: Why the United States is So Different from Other Countries: Higher Health Spending but Lower Use of Health Services Adds Up to Much Higher Prices in the United States Than in Any Other OECD Country*, 22 HEALTH AFF. 89, 91 (2003) (reporting health costs at 13% of GDP in 2000); Ricardo Alonso-Zaldivar, *Health Costs Take Big Bite From Economy: Report Finds Spending Eats Up 24% of Recent Growth, Far Outpacing Defense and Education*, L.A. TIMES, Feb. 9, 2005, at A14, available at <http://news.orb.com/stories/latimes/2005/0209/healthcarecoststakebigbitefromeconomy.php> (reporting forty-five million Americans lack any health insurance despite rapidly rising government and private spending); Julie Appleby, *Health Spending Rises at Blistering Pace: 20% of GDP Could Go Towards Care by 2015*, USA TODAY, Feb. 22, 2006, at B1 (reporting \$4 trillion or \$12,320 per capita projected by 2015; health care costs are currently 16.2% of GDP and are projected to reach 20% of the national economy by 2015); Debora Vrana, *Rising Premiums Threaten Job-Based Health Coverage*, L.A. TIMES, Sept. 15, 2005, at A1 (noting annual cost of health insurance for a family of four exceeds annual income of a minimum wage worker); Boston University School of Public Health—Health Reform Program, <http://www.healthreformprogram.org> (last visited Mar. 13, 2006) (reporting U.S. healthcare federal spending at \$1.9 trillion in 2005 up from \$621 billion in 2000).

101. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 85-91; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 41-44; Ctr. for Disease Control, U.S. Dep't Health & Human Servs., *Motor-Vehicle Safety: A 20th Century Public Health Achievement*, 48 MORBIDITY AND MORTALITY WKLY. REP. 369, 372 (1999) (noting crashes cost the United States \$200 billion annually); *Costs of Treating Trauma Disorders Now Comparable to Medical Expenditures for Heart Disease*, AHRQ NEWS & NUMBERS, Jan. 25, 2006, <http://www.ahrq.gov/news/nn/nn012506.htm> (reporting agency for Healthcare Research and Quality reports spending for trauma from automobile crashes and violence nearly doubled from 1996 to 2003 to \$71.6 billion, the largest component of medical cost involving forty million trauma victims annually as compared to \$67.8 billion for heart disease and \$48.4 billion for cancer).

102. Thomas Benton Bare III, *Recharacterizing the Debate: A Critique of Environmental Democracy and an Alternative Approach to the Urban Sprawl Dilemma*, 21 VA. ENVTL. L.J. 455, 464 (2003) (continuing subsidies for sprawl); Gerrit-Jan Knaap & John W. Frece, *Smart Growth in Maryland: Looking Forward and Looking Back*, 43 IDAHO L. REV. 445, 453 (2007) (waning political support in Maryland); Timothy B. Wheeler, *Searching for Signs of Intelligent Growth*, HARTFORD COURANT, Sept. 2, 2007 (finding little benefit of Smart Growth in Maryland after ten years; while 75% of homes built within growth areas, 75% of land on which homes built outside of designated growth areas).

103. Logan, *supra* note 81, at 235, 255.

104. *The Fair Housing Act After Twenty Years*, Conference at Yale Law School, New Haven, Mar. 25-26, 1988. See James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing*

that enactment. Having advocated the use of Title VIII to achieve the dream of an integrated and colorblind society,¹⁰⁶ including more than twenty years maintaining a treatise on fair housing¹⁰⁷ and volunteering as an activist in the fair housing movement,¹⁰⁸ the Author of this Article is unfortunately ready to declare that the effort was ineffective. It appears that housing discrimination and racial segregation are continuing and largely unabating.¹⁰⁹ Despite statistical reductions in separation between whites and certain non-white groups, economic, racial, ethnic, and social segregation is still the pervasive geographical pattern, often masked by vague definitions of race such as characterizing ethnic minorities as white for census purposes. In addition to discrimination in sales and rentals, African Americans are denied mortgages and home improvement loans at twice the rate of whites.¹¹⁰ After forty years Title VIII, although a useful tool for the occasional victim or agency willing to battle the isolated housing provider, never

Enforcement Effort, 6 YALE L. & POL'Y REV. 348 (1988), reprinted in THE FAIR HOUSING ACT AFTER TWENTY YEARS 48 (Robert G. Schwemm ed., 1989) [hereinafter Kushner, *An Unfinished Agenda*].

105. Fair Housing 1968-1998: Promises Kept, Promises Broken, Conference at University of Miami School of Law, February 6-7, 1998 (celebrating the thirtieth anniversary of the Fair Housing Act and the tenth anniversary of the Fair Housing Amendments Act). See James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931, 931 (1998) [hereinafter Kushner, *A Comparative Vision*].

106. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 37-44; Kushner, *The Fair Housing Amendments*, *supra* note 59, at 1062; Kushner, *Federal Enforcement*, *supra* note 59, at 537.

107. JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (2d ed. 1995 & Supp. 2000) [hereinafter KUSHNER, FAIR HOUSING: DISCRIMINATION].

108. Fair Housing Congress of Southern California (Chairman of the Board of Directors 1985-86, President 1984-1985, member of Board 1983-1986).

109. Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456-57 n.6 (2007) (Whites were favored over blacks 21.6% of the time and over Hispanics 25.7% of the time. The rate of rental discrimination against Hispanics was actually higher than had been shown in a similar study in 1989, and the 2000 figure for blacks was down only a few percentage points compared to its 1989 counterpart. Additional phases of this study found similar rates of rental discrimination against other ethnic minorities (citing MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000, at i-iv (2002))). See MARGERY AUSTIN TURNER & STEPHEN L. ROSS, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 2-ASIANS AND PACIFIC ISLANDERS iv (2003) (reporting that Asians and Pacific Islanders experienced adverse treatment compared to whites in 21.5% of rental tests); MARGERY AUSTIN TURNER & STEPHEN L. ROSS, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 3-NATIVE AMERICANS iii (2003) (reporting that Native Americans experienced consistently unfavorable treatment compared to whites in 28.5% of rental tests).

110. Robert D. Bullard, *Introduction: The Significance of Race and Place*, in THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE 1, 6 (Robert D. Bullard ed., 2007).

received administrative and enforcement leadership or adequate funding and is unfortunately a relic of Phase II community development in the United States.

V. TOWARD PHASE FIVE—SMART GROWTH

Phase	Social Equity	Subsidy	Regulation
2008-2020 Smart Growth	New Urbanism New Suburbanism	Public Transport Tax Sharing	Densification and Inclusion

The future will be about sustainability, health, and fairness. Smart Growth is growth that supports environmental,¹¹¹ economic,¹¹² and social sustainability.¹¹³ Sustainability refers to policies that allow future generations to enjoy the resources and quality of life of today.¹¹⁴ Really Smart Growth, as compared to the vague notion of improved urban design that has been advanced and implemented through variations of traditional development patterns, is growth based on urban design for the pedestrian rather than for the automobile.¹¹⁵ Connectivity through public transport is a critical component. Government priorities must shift to improved public transport,¹¹⁶ alternative energy sources,¹¹⁷

111. Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 297-99 (2000).

112. See generally Emery N. Castle et al., *The Economics of Sustainability*, 36 NAT. RESOURCES J. 475 (1996); Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 63-70 (2001); Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, 277 (1995).

113. See generally James A. Kushner, *Social Sustainability: Planning for Growth in Distressed Places—The German Experience in Berlin, Wittenberg, and the Ruhr*, 3 WASH. U. J.L. & POL'Y 849 (2000), published in *EVOLVING VOICES IN LAND USE LAW* Ch. 13 (2000) [hereinafter Kushner, *Social Sustainability*].

114. See generally John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 3 (1998); see also Beatley & Collins, *supra* note 111, at 297-99.

115. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 61-66; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 63-65, 71-75; Kushner, *Smart Growth*, *supra* note 94, at 45.

116. VUKAN R. VUCHIC, *TRANSPORTATION FOR LIVEABLE CITIES* 248-58 (1999); Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357, 373 (2000); Hannibal B. Johnson, *Making the Case for Transit: Emphasizing the "Public" in Public Transportation*, 27 URB. LAW. 1009, 1010 (1995); Patrick Moulding, Note, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 GEO. J. ON POVERTY L. & POL'Y 155, 169-76 (2005).

117. AL GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* 166-72 (2006). See generally *RENEWABLE ENERGY: POWER FOR*

efficient building technology,¹¹⁸ sustainable infrastructure,¹¹⁹ and agricultural policies.¹²⁰ Truly Smart Growth emphasizes public transport, with transit-served urban and suburban communities developing in a model of heightened densification, infill, and access.¹²¹ Urban growth boundaries¹²² would be established, and development would focus on infill, brownfields,¹²³ and areas of the city that are lying fallow such as rail yards, former industrial sites, and

A SUSTAINABLE FUTURE (Godfrey Boyle ed., 2d ed. 2004); RENEWABLE RESOURCES AND RENEWABLE ENERGY: A GLOBAL CHALLENGE (Mauro Graziani & Paolo Fornasiero eds., 2007).

118. See generally PETER BUCHANAN, TEN SHADES OF GREEN: ARCHITECTURE AND THE NATURAL World (2005); BUILDING WITHOUT BORDERS: SUSTAINABLE CONSTRUCTION FOR THE GLOBAL VILLAGE (Joseph F. Kennedy ed., 2004) (emphasis on straw); DEAN HAWKES & WAYNE FORSTER, ENERGY EFFICIENT BUILDINGS: ARCHITECTURE, ENGINEERING, AND ENVIRONMENT (2002); PETER F. SMITH, ARCHITECTURE IN A CLIMATE OF CHANGE: A GUIDE TO SUSTAINABLE DESIGN (2d ed. 2005); JAMES STEELE, ECOLOGICAL ARCHITECTURE: A CRITICAL HISTORY (2005); Stephen T. Del Percio, *The Skyscraper, Green Design & the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?*, 28 ENVIRONS ENVTL. L. & POL'Y 117 (2004); Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397 (2005).

119. FRITJOF CAPRA, THE HIDDEN CONNECTIONS: A SCIENCE FOR SUSTAINABLE LIVING 265-68 (2002); CAROL INSKIPP, REDUCING AND RECYCLING WASTE (2005); Timothy Beatley & Richard Collins, *Americanizing Sustainability: Place-Based Approaches to the Global Challenge*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 193, 196-205 (2002).

120. See generally GLOBAL DEVELOPMENT OF ORGANIC AGRICULTURE: CHALLENGES AND PROSPECTS (Niels Halberg et al. eds., 2006); Lisa Chamberlain, *Skyfarming*, N.Y. MAG., Apr. 2, 2007, available at <http://www.nymag.com/news/features/30020> (discussing the research of Dickson Despommier of Columbia University suggesting that the future of agriculture may call for urban high-rise farms that involve green architecture).

121. See KUSHNER, HEALTHY CITIES, *supra* note 97, at 61-66; KUSHNER, THE POST-AUTOMOBILE CITY, *supra* note 2, at 63-65, 71-75; Kushner, *Smart Growth*, *supra* note 94, at 48-61.

122. See generally Lewyn, *Sprawl*, *supra* note 88; Stacey, *supra* note 88.

123. See generally James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857 (2006). See also CHARLES BARTSCH & ELIZABETH COLLATON, BROWNFIELDS: CLEANING AND REUSING CONTAMINATED PROPERTIES 2-3 (1997); Joel B. Eisen, "Brownfields of Dreams"?: *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 890-91; Denise Ferkich Hoffman & Barbara Coler, *Brownfields and the California Department of Toxic Substances Control: Key Programs and Challenges*, 31 GOLDEN GATE U. L. REV. 433, 449-63 (2001); Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Development*, 34 B.C. ENVTL. AFF. L. REV. 479, 480 (2007); Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 120 (2000); Richard G. Opper, *The Brownfield Manifesto*, 37 URB. LAW. 163, 178-80 (2005); Nancy Perkins, *A Tale of Two Brownfield Sites: Making the Best of Times from the Worst of Times in Western Pennsylvania's Steel Valley*, 34 B.C. ENVTL. AFF. L. REV. 503, 528-32 (2007) (critique of two projects, financing, and impacts); Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOLOGY L.Q. 59, 64-67 (2003).

parking lots.

New Urbanism, largely led by developers, may influence and shape this phase.¹²⁴ New Urbanism calls for higher density, walkable communities developed at human scale to accommodate and enhance the experience of pedestrians.¹²⁵ Mixed-use higher density community design is an imperative of escalating population, fuel and commuting costs, and the rising cost of utilities that are making the single-family detached home—the icon of the twentieth century—the horse and buggy of the twenty-first century. Smart Growth would utilize New Urbanist designs to create pedestrian-friendly models of the European compact city, street car neighborhoods and suburbs, and the small industrial and mill towns that thrived prior to World War II. Linking destinations through public transit, increasing density, improving accessibility, and choices in the size and cost of homes would stimulate racial and ethnic diversity.¹²⁶ The Portland experience indicates that greater integration occurs if apartments are dispersed and available along convenient transit lines.¹²⁷

Although the Author remains an unadulterated integrationist, there is reason to question the value of integration and diversity in contemporary American culture. The questions of racial and ethnic cohesion, integration, and assimilation require a very different analysis from the simplistic segregation-integration dichotomy of the twentieth century. Robert Putnam, the author of the best selling book *Bowling Alone*,¹²⁸ an inquiry into the reasons for the withdrawal of Americans from community activities and civic participation, has recently published a massive study on the effects of community diversity. His study, which he was reluctant to release given testing results he was unhappy to find, concluded that the greater the diversity in a community, the fewer people vote,

124. Kushner, *New Urbanism*, *supra* note 55, at 39-40; Kushner, *Smart Growth*, *supra* note 94, at 61-72.

125. See PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* (1993); ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 101-03 (2000); JILL GRANT, *PLANNING THE GOOD COMMUNITY: NEW URBANISM IN THEORY AND PRACTICE* (2006); PETER KATZ, *THE NEW URBANISM: TOWARDS AN ARCHITECTURE OF COMMUNITY* (1994); KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 61-66; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 65-69, 85; EMILY TALEN, *NEW URBANISM & AMERICAN PLANNING: THE CONFLICT OF CULTURES* (2005).

126. Kushner, *New Urbanism*, *supra* note 55, at 39-40; Kushner, *Smart Growth*, *supra* note 94, at 61-72 (noting Portland has emphasized light rail, trams, and public transport, generating transit villages and an abundance of attractive multi-family living opportunities in urban and suburban walkable neighborhoods with most new development within a block of a transit stop and leads the nation in its increasing rate of racial residential integration).

127. ARTHUR C. NELSON ET AL., BROOKINGS INST., *THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE* (2002), <http://www.brookings.edu/es/urban/publications/growthmang.pdf> (reporting on Portland studies); Kushner, *Smart Growth*, *supra* note 94, at 53-57.

128. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

the less they volunteer, the less they give to charity, and the less they work on community projects.¹²⁹ Additional findings were that ethnically and racially diverse neighborhoods lower social capital, generate distrust among neighbors, and increase television viewing.¹³⁰ Like myself, Putnam hopes and anticipates that this unsatisfactory phenomenon is transitory on the way to assimilation. Scott Page, a University of Michigan political scientist and author of the book *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*,¹³¹ does not question the Putnam findings but suggests that, despite civic withdrawal, diversity has a positive impact on productivity and innovation because a greater likelihood of solving problems exists when utilizing different ways of thinking among people from different cultures.¹³² Another study by economist Edward Glaeser of Harvard suggests that greater ethnic diversity in the United States is the reason for significantly lower social welfare spending in America as compared to Europe.¹³³ This “diversity paradox,” or simply continued racial hostility, suggests that the politically correct rhetoric that we celebrate diversity fails to reflect the Nation’s beliefs and a serious review of integration and immigration policies should be undertaken rather than avoided. A study by Patrick Bayer, Fernando Ferreira, and Robert McMillan, while finding that the college-educated are willing to pay \$58 more per month to live in a neighborhood that has 10% more college-educated households, observed that blacks are willing to pay \$98 more per month to live in a neighborhood that has 10% more black households.¹³⁴ Thus, African Americans are no more enthralled with integration than whites appear to be.¹³⁵

The failure of civil rights strategies to generate class and racial integration argues for higher density, mixed tenure of home occupancy, and income as the more attractive strategy to generate increased class and ethnic integration.¹³⁶

129. See Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds that Diversity Hurts Civic Life. What Happens When a Liberal Scholar Unearths an Inconvenient Truth?*, BOSTON GLOBE, Aug. 5, 2007, at D1.

130. *Id.*

131. SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

132. See Jonas, *supra* note 129.

133. *Id.*; see Alberto Alesina et al., *Why Doesn't the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY (2001), available at http://www.wcfia.harvard.edu/sites/default/files/423__0332-Alesina11/pdf.

134. Patrick Bayer et al., *Tiebout, Social Multipliers, and the Demand for School Quality 20-25* (Nat'l Bureau of Econ. Research, Working Paper No. 10871, 2004), available at <http://www.nbr.org/papers/W10871.pdf>.

135. See *How Much Will You Pay to Live Near People Like You*, TERRADAILY, Sept. 5, 2007, available at http://www.terraily.com/reports/How_Much_Will_You_Pay_to_Live_Near_People_Like_You_999.html

136. ARTHUR C. NELSON ET AL., *THE SOCIAL IMPACTS OF URBAN CONTAINMENT* 148 (2007); Kushner, *New Urbanism*, *supra* note 55, at 39-40. But see Tridib Banerjee & Niraj Verma, *Sprawl and Segregation: Another Side of the Los Angeles Debate*, in *DESEGREGATING THE CITY*, *supra*

Despite the ostensible lack of enthusiasm for diversity, I believe it is essential to overcome fear, distrust, and the walled metropolis as an essential component of community. Walkable and diverse urban neighborhoods are popular with a wide array of income, age, and ethnic groups suggesting that New Urbanism as a choice for community design will be popular. However, the New Urbanism in this new phase might differ from prior urban design improvement strategies in that it may be market-driven and promoted by developers. Presently, the spread of New Urbanist, walkable communities is constrained by unsound policies that discourage adequately funded public transit and by zoning codes written after World War II that have long ceased to serve health, welfare, or safety.¹³⁷ Yet, Putnam's work would suggest that a dispersed population does not necessarily generate an assimilated, socially cohesive society.

Current tax policies generate quality infrastructure for affluent communities, but inadequate services for those neighborhoods that are not wealthy. Communities segregated by income result in unsustainable and unstable districts housing the poor and prevent stability, economic growth, and regeneration. The antidote may be mixed-income neighborhoods. A regional tax base could further aid in equalizing infrastructure and reducing other barriers to an enhanced quality of life. If accomplished, suburbs would no longer need to compete with one another for retail centers nor exclude apartments. A shared tax base could encourage communities to aggressively pursue Smart Growth, transit-oriented development, and housing densification with sufficient tax proceeds to fund adequate infrastructure.¹³⁸ Cities that have lost their tax base could be regenerated in part by conversion to a regional shared tax base. This Article suggests that the United States may be entering a fifth post-World War II phase of community evolution—one of true Smart Growth.

note 85, at 200, 200-12 (finding less diversity with functional specialization although the research is inadequate and the relationship unclear); Rolf Pendall, *Does Density Exacerbate Income Segregation? Evidence from U.S. Metropolitan Areas, 1980-1990*, in *DESEGREGATING THE CITY*, *supra* note 85, at 175, 175-99 (acknowledging that density is less important than other factors and arguing that higher density can generate greater class and ethnic segregation as the community becomes more desirable absent additional policies including inclusionary zoning).

137. See e.g., Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 637 (2006) (using current zoning schemes across America it would be illegal to build classic communities such as Charleston, Savannah, Key West, or Alexandria as well as traditional neighborhoods); Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 WASH. U. J. URB. & CONTEMP. L. 5 (1986).

138. MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 105-108 (2002); RUSK, *INSIDE GAME/OUTSIDE GAME*, *supra* note 47, at 222-48; see Note, *Making Mixed-Income Communities Possible: Tax Base Sharing and Class Desegregation*, 114 HARV. L. REV. 1575 (2001).

CONCLUSION

PHASES	Social Equity	Subsidy	Regulation
1945-1968 Decentralization	Apartheid	Infrastructure	Zoning
1968-1975 Hyper-Sprawl	White Flight Concentrated Poverty	Taxation	Subdivision
1975-1990 Class Segregation	Assimilation	Revitalization	Affirmative Action
1990-2008 Hyper-Segregation	Voluntary Separation	Gentrification and Regeneration	Smart Growth
2008-2020 Smart Growth	New Urbanism New Suburbanism	Public Transport Tax Sharing	Densification and Inclusion

We have seen phases of urban evolution over the past fifty years: The first phase, from World War II until 1968, followed a pattern of decentralization marked by extraordinary investment in suburban infrastructure and strictly segregated, rapid suburbanization. The second phase, 1968 to 1975, was marked by hyper-sprawl as jobs shifted to the suburbs, and the cities lost their population and tax base. The third phase, 1975 to 1990, was characterized by class segregation; the poor were concentrated in the city and the affluent in the suburbs. The fourth phase, 1990 to 2008, can be described as hyper-segregation; voluntary class, racial, and ethnic segregation generated more ethnic and racially concentrated neighborhoods. The observations and lessons learned from reviewing these phases of urban evolution have been that traditional urban infrastructure and land regulation have failed to generate neighborhood class, racial, or ethnic diversity; traditional urban planning and land regulation have rendered the nation more segregated by race, ethnicity, and class; and that civil rights initiatives as well as Smart Growth reforms have failed to generate improved living conditions through urban evolution. Today we are living with the challenges of decentralization, hyper-sprawl, class segregation, and hyper-segregation, and we must address the negative consequences of strategies undertaken and strategies not undertaken during that time. The models of Smart Growth and New Urbanism; policies supporting expanded public transport, health, affordable housing, and walkable, safe, accessible communities; and leadership knowledgeable in these areas could lead to communities that are healthful, satisfying, and more diverse. Smart Growth is growth that supports environmental, economic, and social sustainability. It is growth based on urban design for the pedestrian rather than the automobile. Global warming, climate

change,¹³⁹ and the arrival of peak oil,¹⁴⁰ at a time when the world's fossil fuel demand is reaching unsatisfiable levels,¹⁴¹ coupled with the increasingly recognized failure of the twentieth century American urban model,¹⁴² require a new, more sustainable regeneration of neighborhoods and urban community design—one that generates improved access, opportunity, and quality of life.

139. GORE, *supra* note 117; *see generally* CLIMATE CHANGE POLICY: A SURVEY (Stephen H. Schneider et al. eds., 2002); CLIMATE CHANGE: SCIENCE, STRATEGIES, & SOLUTIONS (Eileen Claussen et al. eds., 2001); COMM. ON SURFACE TEMPERATURE RECONSTRUCTIONS FOR THE LAST 2,000 YEARS, NAT'L ACADEMIES, SURFACE TEMPERATURE RECONSTRUCTIONS FOR THE LAST 2,000 YEARS (2006); 1 BRUCE E. JOHANSEN, GLOBAL WARMING IN THE 21ST CENTURY: OUR EVOLVING CLIMATE CRISIS (2006); JOHN HOUGHTON, GLOBAL WARMING: THE COMPLETE BRIEFING (2d ed. 1997); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICY MAKERS (2007), *available at* http://www.aaas.org/news/press_room/climate_change/media/4th_spm2feb07.pdf; A. BARRIE PITTOCK, CLIMATE CHANGE: TURNING UP THE HEAT (2005); J.F. RISCHARD, HIGH NOON: TWENTY GLOBAL PROBLEMS, TWENTY YEARS TO SOLVE THEM 70-75 (2002); SPENCER R. WEART, THE DISCOVERY OF GLOBAL WARMING 160-92 (2003).

140. LESTER R. BROWN, PLAN B 2.0: RESCUING A PLANET UNDER STRESS AND A CIVILIZATION IN TROUBLE 39 (2006).

141. *See id.* at x, 21-40 (projecting that China will require ninety-nine million barrels of oil daily by 2031, compared to the current world production of eight-four million barrels); DAVID GOODSTEIN, OUT OF GAS: THE END OF THE AGE OF OIL 15-19 (2004); RICHARD HEINBERG, POWER DOWN: OPTIONS AND ACTIONS FOR A POST-CARBON WORLD 17-54 (2004).

142. KUSHNER, HEALTHY CITIES, *supra* note 97.

