

RACIAL SEGREGATION AND ENVIRONMENTAL INJUSTICE

by Shannon Roesler

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SUMMARY

One legacy of the environmental justice movement is documenting the unequal distribution of environmental harms and benefits throughout American society. These inequalities are inscribed in our urban physical spaces by laws and policies designed to exclude African Americans and other minority groups from lands and spaces constructed and preserved for whites only. This Article traces this history, identifying ways in which laws designed to address racial discrimination fail to provide remedies for structural inequalities; and suggests that Justice Anthony Kennedy’s “equal dignity” approach in *Obergefell v. Hodges* has the potential to be a necessary first step toward redress. The Article is excerpted from the book *Environmental Law, Disrupted*, to be published by ELI Press later this year.

One of the legacies of the environmental justice movement is the documentation of the unequal distribution of environmental harms and benefits throughout American society. By drawing attention to the spaces where people “live, work, and play,” the movement exposed how environmental laws and policies fail to protect low-income, minority, and tribal communities from the health effects of air pollution and land contamination, just as they fail to provide basic public goods such as clean drinking water, green space, and safe housing. Although the Donald Trump Administration actively sought to undermine progress in addressing environmental injustices, it could not erase the lived experiences of individuals in communities such as Flint, Michigan, where drinking water still contains dangerous levels of lead; and Richmond, California, where people suffer disproportionately high rates of cancer, asthma, and heart disease. Both are majority-minority communities, where many live in poverty.

The reality that health and well-being correlate strongly with zip code sparked a debate about causation in the legal scholarship several years ago.¹ The question was of the chicken-and-egg variety: Did living in a low-income, minority community make it more likely that a heavily polluting industrial plant (like the Chevron refinery that

polluted the air in Richmond) would locate near these communities, or did the presence of intensive land uses depress property values and transform a previously middle-class neighborhood into a less desirable one? Unfortunately, this debate missed the bigger picture because it failed to look at all the variables in their historical context over time. The siting of an undesirable land use is part of a much longer story of de jure segregation and racial discrimination that unfolded throughout the 20th century.

Today, these inequalities are embedded in the American landscape. They are inscribed in the physical spaces of our urban environments by laws and policies designed to exclude and divest African Americans and other minority groups from lands and spaces constructed and preserved for whites only. Although some urban spaces were beginning to integrate in the late 19th century, laws at all levels of government in the early 20th century sought to undo progress toward integration and normalize residential segregation throughout urban environments. Private covenants, racially discriminatory zoning, and federal mortgage and development policies determined where African Americans could live and ensured that home ownership was unavailable to them. Intentional laws and policies created widespread residential segregation by forcing African Americans to live in designated spaces with little opportunity for educational or financial mobility and no means of exit. These spaces are often euphemistically referred to as the “inner city,” though they clearly fit the definition of a ghetto.²

1. Compare Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994) (suggesting that people may move to neighborhoods with undesirable land uses because housing is cheaper there), with Robert D. Bullard, *Neighborhoods Zoned for Garbage*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* (Robert D. Bullard ed., 2005) (arguing that the city of Houston intentionally sited waste disposal sites in African-American communities).

2. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* xvi (2017) (arguing that ghetto is the appropriate word when “government has not only concen-

The history of how law shapes the landscape of our cities is a history of how law “legitimizes spatiality.”³ Not surprisingly, scholars in the field of law and geography have used the “map as a metaphor for the ways in which law interprets, describes, and explains its subject matter.”⁴ But zoning maps of our urban environments are more than metaphors; they are evidence of how law has interpreted social norms of discrimination. When federal law blocks access to mortgages in racially integrated communities and endorses the use of racially restrictive covenants to preserve “stability,” the law legitimizes notions of white superiority by producing a racialized geography that makes racial segregation appear natural.⁵

We therefore need to “take[] account of the spatiality of law” to dismantle its normativity.⁶ That is, we need to dig deeper when considering why a zip code correlates with increased health and environmental risks and take account of the role of law in creating the geographies that shape lived experiences. This Article makes a modest contribution toward that goal. It begins with an overview of the history of the legal discrimination that has shaped urban landscapes and created the residential segregation that exists today. It then turns to a discussion of how this racialized geography results in environmental injustices in the form of increased health costs and lost opportunities for minority communities.

The second half of the Article begins by identifying the ways in which laws designed to address racial discrimination—such as the Equal Protection Clause and the Fair Housing Act—fail to provide remedies for the structural inequalities produced by decades of intentional discrimination in housing law and policy. The U.S. Supreme Court’s approach to antidiscrimination laws validates facially neutral laws with discriminatory effects and precludes race-conscious laws and policies that seek to remedy structural inequalities. Meaningful pathways for reform require a disruption in the Court’s equality jurisprudence. The final section suggests that Justice Anthony Kennedy’s “equal dignity” approach in *Obergefell v. Hodges* has the potential to unsettle certain tenets of the Court’s due process and equal protection doctrines—a necessary first step toward the disruption necessary to redress structural inequalities.

I. Line-Drawing: How Law and Policy Inscribe Inequality Into Physical Space

The Chevron refinery in Richmond, California, has dominated the landscape in a majority African-American community for more than 100 years. In recent years, the large refinery has processed 240,000 barrels of crude oil per day.⁷ Emissions from the refinery and other nearby industrial activities have long exposed residents to carcinogens such as benzene that are linked to negative respiratory and neurological effects. People of color—who often live in Richmond’s fence-line communities closest to industrial uses—do not live as long as their white neighbors on average and have elevated risks of heart and lung disease. School children in Richmond have historically participated not only in earthquake-response drills, but also in chemical-explosion drills. Tragically, explosions do happen. In 2012, a toxic plume from an explosion caused about 15,000 people to seek medical attention for respiratory ailments.⁸

The demographics of Richmond are not the result of chance or choice; they are the result of a history of law and policy designed to exclude African Americans from middle-class residential housing. The federal government made race an explicit criterion in evaluating property values and assessing the risk of a home mortgage.⁹ Local governments passed zoning ordinances prohibiting non-whites from living in majority white neighborhoods and made use of city plans and school siting decisions to isolate African Americans in less ideal, often industrial areas.¹⁰ State courts often upheld these land use decisions, even after the Supreme Court declared them unconstitutional.¹¹ In addition, although in 1948 the Supreme Court in *Shelley v. Kraemer*¹² held that state enforcement of racially restrictive covenants was unconstitutional, government at all levels did little to discourage these covenants in real estate transactions. In fact, federal lending policy encouraged such covenants right up until the U.S. Congress passed the Fair Housing Act in 1968.¹³

Residential segregation is undoubtedly the result of intentional discrimination in law and policy over many decades, and the racialized geography of every American city tells this story. Richmond is just one example, but it is a particularly useful case study because its history has been well documented and the economic and environmental disparities have been the focus of contemporary scrutiny and grassroots activism. Telling Richmond’s story illuminates how discriminatory laws and policies created the racialized geography of a particular place over time. This

trated a minority but established barriers to its exit” and noting that we routinely characterize the spaces where Jews in eastern Europe were forced to live as “ghettos,” whereas we tend to describe African-American neighborhoods as “inner cities” to avoid a history that makes us uncomfortable).

3. Jane Holder & Carolyn Harrison, *Connecting Law and Geography*, in *LAW AND GEOGRAPHY* 3, 5 (Jane Holder & Carolyn Harrison eds., 2003).

4. *Id.* at 15.

5. See James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality*, in *SEGREGATION: THE RISING COSTS FOR AMERICA* 1, 8-9 (James H. Carr & Nandinee K. Kutty eds., 2008). For many years, scholars have called attention to the ways in which laws and policies have “racialized space” and constructed racial identities. See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008); see also Martha Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995) (arguing that residential segregation is a “product of notions of black inferiority and white superiority, manifested geographically through the exclusion of blacks into subordinated neighborhoods stigmatized by both race and poverty”).

6. Holder & Harrison, *supra* note 3, at 3.

7. Jane Kay & Cheryl Katz, *Pollution, Poverty, and People of Color: Living With Industry*, *SCI. AM.*, June 4, 2012, <https://www.scientificamerican.com/article/pollution-poverty-people-color-living-industry/>. The explosion was caused by a corroded pipe.

8. Susie Cagle, *A Year After a Refinery Explosion, Richmond, Calif., Is Fighting Back*, *GRIST* (Aug. 6, 2013), <https://grist.org/climate-energy/a-year-after-a-refinery-explosion-richmond-calif-is-fighting-back/>.

9. See ROTHSTEIN, *supra* note 2, at 64-67.

10. See *id.* at 46-50, 132.

11. See *id.* at 46-47.

12. 334 U.S. 1 (1948).

13. See ROTHSTEIN, *supra* note 2, at 90.

is perhaps why Richard Rothstein begins with Richmond in his book *The Color of Law*. He explains that he chose to begin with Richmond because the “San Francisco Bay Area has a reputation as one of the nation’s more liberal and inclusive regions.”¹⁴ In his view, if government at all levels intentionally sought to segregate Richmond, it surely pursued these same policies in cities in less liberal, inclusive regions across the nation.¹⁵

Richmond more than quadrupled its population between 1940 and 1945, growing from 24,000 to more than 100,000 as people migrated to the area for jobs in shipyards and other war industries.¹⁶ Unlike other northern cities, such as Chicago or Detroit, Richmond’s African-American population was small (only 270 people) before World War II.¹⁷ As people migrated to Richmond to meet the wartime labor demand, the city’s African-American population grew to about 14,000.¹⁸

Prior to this population surge, no pattern of residential segregation existed. But federal and local policies quickly changed this. In response to a serious housing shortage, the federal government stepped in to provide public housing explicitly segregated by race. While white laborers were provided housing near residential areas inland, African Americans were provided only temporary housing near the shipyards and railroad tracks.¹⁹ As more permanent public housing projects were built, they remained segregated and fewer units were available to African Americans.²⁰ By 1947, one-half of Richmond’s African-American population (now 26,000 people) still resided in temporary housing.²¹ As the government underwrote mortgages to enable white workers to move to the suburbs, African Americans moved into the public housing units that white families had left behind or to makeshift housing in unincorporated North Richmond.²²

When the Ford Motor Company relocated in 1953 from Richmond to a larger facility 50 miles south in Milpitas, union leaders secured a contract transferring all the Richmond plant workers, including roughly 250 African-American workers, to the new facility.²³ In an effort to exclude African-American workers, Milpitas residents passed a zoning ordinance allowing residential development only in the form of single-family homes.²⁴ Developers then sought approval of their plans from the Federal Housing Administration (FHA) so that they could obtain low-interest loans for their projects and federally guaranteed mortgages for working-class buyers.²⁵ Without this federal insurance, homeownership would have been unavailable to working

families.²⁶ In fact, because federal insurance was conditioned on an explicit prohibition on sales to African Americans, it remained unavailable to Ford’s African-American workers—some of whom continued to live in Richmond, commuting more than an hour each way to work daily.²⁷

In the case of Richmond, federal housing policy largely created the racialized geography that persists today, but residential segregation was well established decades earlier in cities that adopted racial zoning ordinances. After Reconstruction ended, a campaign of violence and legal subjugation began against formerly enslaved people in the South.²⁸ Legal discrimination took the form of state Jim Crow laws that disenfranchised African Americans and mandated segregation in transportation, education, and accommodation. Ideas of white superiority and black inferiority spread from the South to northern cities, where African Americans in previously integrated communities were eventually segregated.²⁹

Racial zoning ordinances prohibited African Americans from purchasing homes on majority white blocks and prohibited whites from purchasing homes on majority non-white blocks.³⁰ Although the Supreme Court invalidated a racial zoning ordinance in 1917,³¹ cities continued to enact and implement them into the 1960s.³²

Communities that chose to follow Supreme Court precedent on racial zoning found other ways to perpetuate residential segregation. Many turned to economic zoning, such as the single-family zoning law passed by Milpitas.³³ Though facially neutral, the purpose behind these laws was unmistakable. Indeed, members of Secretary of Commerce Herbert Hoover’s advisory committee on zoning openly endorsed economic zoning as a means of racial segregation.³⁴ One member, the famous landscape architect Frederick Law Olmsted Jr., publicly declared that “in any housing developments which are to succeed, . . . racial divisions have to be taken into account.”³⁵ Another public law expert noted that “the coming of colored people into a district” was the most compelling reason for zoning, but that in light of Supreme Court precedent, economic zoning could be used to achieve the same end.³⁶

Other land use decisions ensured not only residential segregation, but also unequal living conditions. Local councils used zoning designations to create slums.³⁷ Ordinances sited multi-family development in commercial or industrial areas and “spot”-zoned industrial and toxic

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 5.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 6.

21. *Id.* at 6-7.

22. *Id.* at 9.

23. *Id.*

24. *Id.*

25. *Id.* at 9-10.

26. *Id.* at 10.

27. *Id.*

28. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 590-95 (2014).

29. ROTHSTEIN, *supra* note 2, at 41.

30. *Id.* at 44.

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

32. ROTHSTEIN, *supra* note 2, at 47-48.

33. *Id.* at 48.

34. *Id.* at 51.

35. *Id.* (internal quotations omitted).

36. *Id.* at 52 (quoting Columbia Law School Prof. Ernst Freund) (internal quotations omitted).

37. *Id.* at 54.

uses near existing African-American neighborhoods.³⁸ Before the Supreme Court struck down school segregation in *Brown v. Board of Education*,³⁹ cities located African-American schools in less desirable, industrial areas so that African Americans with school-age children would have no choice but to move to these areas.⁴⁰

Of course, economic zoning could not accomplish the exclusion of middle-class African Americans from single-family homes in the suburbs. This exclusion was a result of federal housing policy and, in particular, the federal practice of redlining. The practice dates back to a Depression-era federal agency that purchased mortgages from homeowners facing foreclosure and issued new amortized mortgages with better terms.⁴¹ To assess borrowers' risk of default, the agency generated maps that coded neighborhoods by color—the safest were shaded green and the riskiest were shaded red. A neighborhood received a red designation if any African Americans lived there regardless of any other factor.⁴²

This practice continued when the FHA began insuring middle-class mortgages in 1934. An FHA appraisal of a property in a racially integrated (or potentially integrated) neighborhood would find the property too risky for mortgage insurance.⁴³ The FHA underwriting manual adopted an explicit policy of racial exclusion: “If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and reduction in values.”⁴⁴ The manual further directed appraisers to look for “protection against . . . adverse influences,” including the “infiltration of inharmonious racial or nationality groups.”⁴⁵ These policies of racial exclusion persisted long after the explicit language was removed from the manual.

Without access to conventional mortgages, African Americans paid more for single-family homes.⁴⁶ Too often, the only way to purchase a home was to enter into an installment contract, under which the buyer acquired no equity

in the home and faced eviction for one missed payment.⁴⁷ The monthly payments were often inflated, leaving little to no financial resources for the maintenance of a home and forcing many to take on tenants to avoid losing their homes.⁴⁸ The alternative was to live in the federal public housing built solely for African Americans or made available as a result of the federal policies that enabled white families to move to the suburbs.⁴⁹ Like the siting of industrial uses near African-American neighborhoods, federal housing policy contributed to overcrowded and deteriorating conditions in African-American neighborhoods.

II. The Landscape of Inequality: Environmental Injustice as a Consequence of De Jure Discrimination

The large Chevron refinery that caught fire and prompted 15,000 people to seek medical attention has a long history in Richmond, California. Founded in 1902, the refinery is older than the city.⁵⁰ But asking whether the siting of the facility was a result of intentional racial discrimination obscures the larger picture of structural inequality. Discriminatory laws and policies undoubtedly shaped the racial geography of Richmond and surrounding areas.

Federal, state, and local policies helped white families leave and ensured that African Americans stayed. They were soon joined by other minority groups, many of them immigrants from Laos, Latin America, and the Pacific Islands.⁵¹ Today, minority groups comprise 97% of the population of North Richmond.⁵² They live within “a ring of five major oil refineries, three chemical companies, eight Superfund sites, dozens of other toxic waste sites, highways, two rail yards, ports and marine terminals where tankers dock.”⁵³ In North Richmond, the median income in 2010 was \$36,875, less than Richmond’s \$54,012 and much less than the surrounding county’s \$78,385.⁵⁴ In order to find affordable housing, individuals often have no choice but to live next to an environmental hazard and risk suffering significant health impacts.⁵⁵

Although Richmond has a greater number of air quality violations than its neighbors in the Bay Area, the cumulative effects of multiple exposures have not been adequately studied.⁵⁶ The data that are available indicate that non-white residents in fence-line communities live 10 years less on average than white residents in other parts of the coun-

38. *Id.* at 54-55.

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

40. ROTHSTEIN, *supra* note 2, at 122.

41. *Id.* at 64.

42. *Id.*

43. *Id.* at 64-65.

44. *Id.* at 65.

45. *Id.*

46. Because African Americans had fewer housing options than white Americans, they were often willing to pay above-market prices to escape substandard conditions. *Id.* at 94. This would result in increased property values contrary to the predictions of FHA underwriting policies. Unfortunately, nonwhite individuals often purchased homes in white neighborhoods as a result of “blockbusting.” Rothstein describes the widespread practice:

[B]lockbusting was a scheme in which speculators bought properties in borderline black-white areas; rented or sold them to African American families at above-market prices; persuaded white families residing in these areas that their neighborhoods were turning into African American slums and that values would soon fall precipitously; and then purchased the panicked whites' homes for less than their worth.

Id. at 95. These “speculators” would then continue the cycle by selling these homes to African Americans at inflated prices. As white families left, housing demand could not be met by African Americans alone. This inevitably caused property values to fall and led to deteriorating conditions.

47. *Id.* at 97.

48. *Id.*

49. *Id.* at 27.

50. Susie Cagle, *A Year After a Refinery Explosion, Richmond, Calif., Is Fighting Back*, GRIST (Aug. 6, 2013), <https://grist.org/climate-energy/a-year-after-a-refinery-explosion-richmond-calif-is-fighting-back/>. The refinery “is one of the most productive refineries in the country, processing more than 250,000 barrels of crude each day.” *Id.*

51. Kay & Katz, *supra* note 7.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

ty.⁵⁷ African Americans in Richmond are 1.5 times more likely to die of heart disease than the county average and resort to emergency care for asthma four times more often than other racial groups in the county.⁵⁸

These inequalities exist in urban spaces throughout the country. In fact, a recently released study by the U.S. Environmental Protection Agency's (EPA's) National Center for Environmental Assessment concludes that minority groups are more likely to reside near sources of pollution and breathe dangerous air pollutants such as particulate matter (PM), a pollutant linked to asthma, heart attacks, high blood pressure, and cancer.⁵⁹ According to the study, African Americans are exposed to PM at a rate 1.5 times that of white individuals.⁶⁰ This disparity is larger than the disparity the study attributes to income; the exposure of someone living in poverty is 1.3 times that of someone not living in poverty.⁶¹ The study also finds that this disproportionate exposure is a result not only of the unequal siting of industrial polluters, but also of the disproportionately high emissions from individual sources in minority neighborhoods.⁶² These findings suggest that racial inequality is a factor separate from and in addition to poverty in predicting increased exposure.

These newer studies confirm what academic studies have been documenting for some time. The seminal study, conducted in 1983 by what is now the U.S. Government Accountability Office, was a response to nonviolent protests over the siting of a polychlorinated biphenyl (PCB) landfill in Warren County, North Carolina—a county with a large African-American population.⁶³ That study concluded that three of the four major offsite hazardous waste facilities in the South were located in majority African-American neighborhoods, a significant disparity because only one-fifth of the region's population is African American.⁶⁴ Other studies followed, confirming a strong correlation between race and the location of hazardous waste facilities.⁶⁵

Health disparities result from other environmental hazards as well—not just the siting of hazardous waste facilities. African-American children are more likely to have elevated blood lead levels than white children. In many (if not most) of these cases, lead exposure is tied to where the children live.⁶⁶ The children of Flint, Michigan (a major-

ity-minority city), were exposed to lead in their drinking water, while the white children in the suburbs were not.⁶⁷ Children exposed to lead in paint chips and dust in New York City public housing are disproportionately African American as a result of laws and policies that made under-subsidized public housing the only housing option for many families.⁶⁸

III. Law's Challenge Today: The Problem of Structural Racism

The unequal landscape of our cities and the injustices that flow from it undoubtedly result from intentional discrimination in the form of laws and policies designed to create white suburbia and black ghettos. The question for environmental justice advocates today is whether law can be a useful tool to address these injustices. This section briefly outlines conventional legal theories rooted in the Equal Protection Clause, the Fair Housing Act, and Title VI, and highlights the ways they fail to address structural racism. Although countless individual acts of intentional discrimination created the racialized geography of our urban environments, laws designed to remedy intentional discrimination have not addressed these inequalities.

Our equality jurisprudence is ineffective in part because it often requires evidence that inequalities are caused by specific acts of intentional discrimination and because it adopts ideas of colorblindness and neutrality that limit the remedies political and judicial actors can offer. A housing subsidy, for example, must be available on a race-neutral basis, even if the government's intent is to mitigate racial segregation in housing. In other words, antidiscrimination laws cannot adequately connect the harm to its cause and cannot consider the actual harm (racial inequality) in constructing a remedy. The inequalities now inscribed in our urban spaces are intractable and persistent. Solutions therefore require considerable political and economic commitment at all scales of government.

A. Equal Protection

The story of Flint, Michigan, mirrors that of Richmond and other metropolitan areas. Housing policies gave white families the opportunity to relocate to surrounding suburbs and left minorities behind without the resources to maintain residential neighborhoods and city services. Flint was once a thriving city because of the financial success of General Motors, which was founded in Flint in 1908.⁶⁹ But in the late 20th century, most of the GM plants in Flint closed, resulting in substantial job losses.⁷⁰ As other

57. *Id.*

58. *Id.*

59. See Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, THE ATLANTIC, Feb. 28, 2018.

60. *See id.*

61. *See id.*

62. *See id.*

63. U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 83-168 (1983).

64. *Id.*

65. See, e.g., ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS & ENVIRONMENTAL QUALITY (3d ed. 2000); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

66. See CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 46 (2d ed. 2009) (citing a study that found that

"African American children are three to thirteen times more likely . . . to have elevated levels").

67. See discussion in Section III.A *infra*.

68. See discussion in Section III.B *infra*.

69. See Anna Clark, "Nothing to Worry About. The Water Is Fine": How Flint Poisoned Its People, GUARDIAN, July 3, 2018, <https://www.theguardian.com/news/2018/jul/03/nothing-to-worry-about-the-water-is-fine-how-flint-michigan-poisoned-its-people>.

70. *See id.*

businesses suffered or closed, most of Flint’s white population abandoned the area, leaving behind vacant homes, empty schools, and a water infrastructure designed to serve double the current population.⁷¹ The remaining residents, the majority of whom were people of color, and at least 40% of whom lived below the federal poverty level, saw their water bills increase as the city tried to spread the costs among a smaller citizenry.⁷² Eventually, the state appointed an emergency manager to govern the city. The emergency manager’s main job was to cut costs, a move that led to the drinking water crisis.

To see the consequences of this history—the segregated geography of the area—one need only compare Flint to neighboring communities. For example, Flint’s neighbor to the east, the city of Burton, is “86 percent white, the median household income is nearly \$44,000 per year, and the median home is worth almost \$75,000.”⁷³ In contrast, Flint is a majority-minority city: “64 percent of the residents are people of color, the median income is just under \$25,000 per year, and the median home is worth about \$42,000.”⁷⁴ Several years ago, many municipalities had to cut back on spending in response to the recession. But cutbacks looked very different in these two cities: “In Flint, spending declined by \$225 per resident—in Burton, spending actually increased by \$1 per capita.”⁷⁵ Flint residents also had to pay more for their services; at the time of the drinking water crisis, their water bills were among the highest in the area: “In 2014, the average water bill in Flint was \$140, compared with only \$58 in Burton.”⁷⁶

The inequalities could not be starker. Not surprisingly, when Flint residents sued various local and state officials in federal court, they claimed that state actors had violated their right to equal protection under the law.⁷⁷ Majority white communities in Genesee County,⁷⁸ where Flint is located, were not exposed to unsafe drinking water. The state did not usurp the authority of democratically elected local officials in these communities by imposing a state-appointed emergency manager to cut costs at the expense of residents’ health and safety. White populations in other cities would never face such a reality *because* federal, state, and local laws subsidized the housing developments that supported stable schools and services and allowed families to accumulate equity and personal wealth.

Although the minority population of Flint, Michigan, was indeed denied the equal protection of local and federal housing laws, they will have a difficult time proving a violation of the Equal Protection Clause in court. This is so for two reasons. First, our judicial system is not

well-equipped to address structural inequalities such as residential segregation even when they are the products of intentional state action. To enforce a remedy, a court must find a set of actors liable for the harm. Because residential segregation is a consequence of many historical acts of discrimination, a court would have to hold present-day actors responsible for past harms. Then, the court would have to mandate that state actors take affirmative steps to undo the institutionalized racism in place today. These race-conscious remedies would acknowledge the racial composition of neighborhoods and impose measures that further integration and ensure equal access to schools and other governmental services.

Courts once made modest efforts to craft and oversee this kind of remedy, ordering that communities take affirmative steps, namely busing, to integrate segregated schools. But once the Supreme Court opened the door to ending judicial oversight of school integration, courts began abandoning the project all together.⁷⁹ Then, in 2007, the Court made clear that school districts could no longer consider race in determining the composition of individual schools. Chief Justice John Roberts declared that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁸⁰ For today’s Court, the Equal Protection Clause must be colorblind; it cannot, as Justice Harry Blackmun once said: “[T]ake account of race” in order to “get beyond racism.”⁸¹ And because courts cannot “take account of race,” they cannot craft remedies that address structural racism.

The second reason the Equal Protection Clause cannot reach structural inequality is that plaintiffs must show more than discriminatory impacts. If the government acted pursuant to a facially neutral law or policy, the plaintiffs must prove that the government acted with the intent or purpose of discriminating on the basis of race.⁸² In Flint, because state and local officials did not explicitly deny safe drinking water to residents on the basis of race, plaintiffs will have to show that the government decisions that resulted in lead exposure were motivated by an intent to discriminate against African Americans. The irony, of course, is that African Americans were disproportionately affected by the contaminated water as a result of laws and policies that concentrated them in the city of Flint, but they cannot now challenge those intentional actions.⁸³

71. *See id.*

72. *See id.*

73. Jessica Trounstein, *How Racial Segregation and Political Mismanagement Led to Flint’s Shocking Water Crisis*, WASH. POST, Feb. 8, 2016.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See Boler v. Earley*, 865 F.3d 391, 398 (6th Cir. 2017).

78. *See* U.S. Census Bureau, *Quick Facts: Genesee County, Michigan*, <https://www.census.gov/quickfacts/fact/table/geneseecountymichigan,US/PST045219>.

79. *Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

80. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

81. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun J., concurring in part).

82. *See Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”).

83. Moreover, the state actors who exposed Flint residents to lead are not the same ones that protected residents of neighboring communities. This means that even if equal protection doctrine were to recognize disparate-impact claims, Flint residents would have difficulty establishing a prima facie case. Because all the residents of Flint—of all races—were treated the same way, they would struggle to show not only discriminatory purpose, but also discriminatory effect.

B. The Fair Housing Act

The stories of children exposed to lead paint hazards in New York City public housing were also shaped by intentional policies of racial discrimination. In the first part of the 20th century, public housing in New York was intentionally segregated. By the 1960s, the New York City Housing Authority (NYCHA) oversaw the largest public housing system in the country, housing about 500,000 residents, with minority residents outnumbering white residents. Although demographic data are hard to find, it is likely that minorities are disproportionately burdened by the lead paint hazards in NYCHA's apartments today.⁸⁴

Although affected families are suing NYCHA and city officials under the Fair Housing Act, they are not alleging discrimination based on race. All four plaintiffs are NYCHA residents with young children who allege that the children's elevated blood lead levels are the result of exposure to lead-paint hazards in NYCHA housing.⁸⁵ They claim that NYCHA's actions made housing unavailable to them because they have children, an allegation based on their "familial status," which is a protected class under the Fair Housing Act.

Enacted in 1968, the Fair Housing Act prohibits discrimination in housing based on race, color, national origin, religion, sex, familial status, and disability.⁸⁶ The Act was the last of the 1960s civil rights acts, and it almost did not pass. Two similar versions had failed in Congress. Social unrest and the assassination of Dr. Martin Luther King Jr. made Congress more receptive to President Lyndon B. Johnson's third, and ultimately successful, effort to push the legislation through Congress.

Although this legislation was an important step forward, it was a modest one. In response to widespread rioting and social unrest in 1967, President Johnson constituted a commission, often referred to as the "Kerner Commission," to study the causes of this unrest. The commission produced a report that clearly linked these social problems to racism, concluding: "White society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it."⁸⁷

The report documented the role of state institutions in creating residential segregation or what it called the "racial ghetto" and recommended that substantial governmental spending be devoted to the creation of opportunities for African Americans. It warned that failure to take bold action risked splitting the country into two deeply unequal, divided societies.⁸⁸ President Johnson essentially ignored the report and its call for government intervention,

annoyed that his appointed commissioners had attributed blame to a politically powerful group—the white middle class—rather than some outside force like communism.⁸⁹

As the Kerner Report noted, addressing structural inequality would require affirmative government action and economic resources devoted to creating opportunity. But remedies under the Fair Housing Act are much more limited. The Act prohibits (with some exclusions) intentional discrimination in the sale or rental of housing, including discriminatory advertising and racial steering by real estate agents and others.⁹⁰ It also prohibits policies that result in a disparate impact on a protected class unlike the Equal Protection Clause.

The disparate impact theory has been critical in challenging economic zoning ordinances that zone out multi-family housing and disproportionately affect minority groups.⁹¹ But the Supreme Court has recently curtailed this avenue of legal challenge by emphasizing that proof of a disparate impact in statistical terms is insufficient. The plaintiff must show that the challenged policy is the cause of the disparate impact.⁹² If courts interpret this to mean that plaintiffs must essentially rule out other potential causes, disparate impact cases will be much harder to win.

Any legal pathway to challenging housing discrimination, however inadequate, is still important. Intentional discrimination in the sale and rental of housing no doubt occurs. But studies suggest that it is not the only (or even the main) cause of continued residential segregation in metropolitan areas. This is especially true for segregation experienced by African Americans. Economist Stephen Ross concludes that "the legacy of past housing discrimination is almost certainly the central factor in explaining the high levels of residential segregation that developed during the last century and likely heavily influences the segregation experienced by African Americans today."⁹³ Moreover, he theorizes that historical residential segregation may be the cause of stereotyping that prevents white households from moving to integrated neighborhoods: "[W]hite households may stereotype . . . predominantly African American neighborhoods in terms of the quality of the neighborhood environment, which is based on the segregated urban environment that arises from such attitudes."⁹⁴ In other words,

84. See Luis Ferre-Sadurni, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES, July 9, 2018 (noting that by 1965, "a carefully selected tenancy of black and Puerto Rican residents accounted for the majority of public housing families").

85. Complaint ¶¶ 109-10, United States v. NYCHA, No. 18 Civ. 5213 (S.D.N.Y. June 11, 2018).

86. 42 U.S.C. §3604.

87. THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, KERNER REPORT (1968).

88. *Id.*

89. Alice George, *The 1968 Kerner Commission Got It Right, But Nobody Listened*, SMITHSONIAN MAG., Mar. 1, 2018, <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-no-body-listened-180968318/>.

90. 42 U.S.C. §§3603, 3604.

91. See, e.g., United States v. Black Jack, 508 F.3d 1179, 1184-85 (8th Cir. 1974).

92. Texas Dep't of Housing & Community Aff. v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2512 (2015) (stating that a "robust causality requirement" is essential if disparate-impact liability is to avoid constitutional questions).

93. Stephen L. Ross, *Understanding Racial Segregation: What Is Known About the Effect of Housing Discrimination*, in NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA 288, 300 (Harriet B. Newburger et al. eds., 2011).

94. *Id.* at 301. Since 2000, there is a notable but modest rise in African-American neighborhoods diversifying as a result of an influx of white residents, a trend affecting roughly one in six majority African-American census tracts. Many of these neighborhoods are in the urban core, an area once segregated and left to deteriorate as white families moved to the suburbs. "Reinvest-

structural racism has a pernicious way of perpetuating and sustaining itself. Remedies under the Fair Housing Act have thus far done little to break that cycle.

C. Title VI

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding from discriminating in the implementation of their programs.⁹⁵ The Supreme Court has made clear that any private right-of-action under the statute would require the plaintiff to prove intentional discrimination.⁹⁶ The Court did not, however, supplant administrative agencies' own implementing regulations under Title VI. Because EPA's regulations allow administrative complaints to proceed under a disparate-impact theory, residents of minority neighborhoods adversely affected by state permit decisions can file administrative complaints with EPA.

A disparate-impact complaint must allege that the permit—for example, a permit limiting emissions of pollutants under the Clean Air Act (CAA)—will have an impact that is both significantly adverse and sufficiently disparate (measured by comparing the affected population with a comparison population).⁹⁷ Although compliance with air quality standards can create a presumption of no adverse impact, EPA's Title VI draft guidance acknowledges that the presumption can be overcome.⁹⁸ In particular, the guidance recognizes the risk of cumulative exposure from multiple sources.⁹⁹ For example, a CAA permit that complies with the air quality standard for lead emissions may nevertheless have an adverse impact when a community is already exposed to lead via other media such as soil, water, or paint.¹⁰⁰

The problem with Title VI is its application in practice. An independent study of EPA's Title VI processes in 2011 found that just 6% of filed complaints (15 out of 247) were acknowledged within EPA's 20-day time frame. Additionally, EPA took one year or more to move half of the complaints “to accepted or dismissed status.”¹⁰¹ The report partially attributes this breakdown to the fact that EPA employees lack the scientific expertise necessary to analyze the technical complexity of complaints.¹⁰² EPA also lacked

the data and case management systems necessary to analyze, track, and resolve complaints.

Given the highly complex nature of an adverse impact analysis, Title VI complaints clearly require consistent funding and institutionalized processes to ensure efficiency. But a commitment of the necessary resources requires political will. Although progress was made under the Barack Obama Administration,¹⁰³ the Trump Administration targeted EPA and its environmental justice programming in particular for dramatic reductions in funding. In fact, the Trump Administration's first proposal for budget year 2018 included a 31% reduction to EPA's overall budget and essentially eliminated the Office of Environmental Justice.¹⁰⁴ In the wake of such clear political signals, an associate administrator who had helped establish the office resigned, warning in his resignation letter that many communities continue to suffer disproportionate adverse impacts under current environmental laws.¹⁰⁵ Fortunately, Congress has twice refused to cut EPA's budget to the extent requested by the Trump Administration.¹⁰⁶

The critical takeaway regarding Title VI's efficacy is that it is contingent on the White House's agenda. Since President Bill Clinton signed Executive Order No. 12898, ordering administrative agencies to consider questions of environmental justice,¹⁰⁷ EPA has made progress addressing disparate adverse impacts only when it is a presidential priority. Although career employees who are committed to these issues likely remain at EPA, the work they are able to do will often be constrained by a lack of political will and financial resources.¹⁰⁸

facts. In an amicus brief supporting a challenge to a natural gas compressor station in a historic African-American neighborhood in Virginia, the Sierra Club and others argue that state agencies used overly broad census data that situated the neighborhood at issue in a large majority white census tract. A local “door-to-door survey show[ed] that more than 83.5% of community members residing within a 1.1-mile radius of the proposed compressor station are people of color.” *Amicus Curiae* Brief of Va. State Conf. NAACP et al., *Friends of Buckingham v. State Air Pollution Control Bd.*, No. 19-1152, at 10 (4th Cir., June 7, 2019), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Buckingham%20amicus_Brief_FINAL_6-7-nd.pdf. Although a local study was available here, the necessary demographic analysis may require an agency to gather new data, a task most local agencies are not equipped to do.

103. See, e.g., U.S. EPA, *EJ 2020 ACTION AGENDA: THE U.S. EPA'S ENVIRONMENTAL JUSTICE STRATEGIC PLAN 2016-2020* (2016).

104. See Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 *WAKE FOREST L. REV.* 393, 401 (2019).

105. See *id.* at 401.

106. See *id.* at 401-02.

107. Exec. Order No. 12898 (1995).

108. Another example of how environmental justice concerns are dependent on presidential preferences is illustrated by the fate of the U.S. Department of Housing and Urban Development's (HUD's) 2015 Affirmatively Furthering Fair Housing Rule, an Obama-era rule designed to hold municipalities accountable by requiring that they document and assess local policies to further fair housing as a condition of their federal funding. In January 2018, under the Trump Administration, HUD suspended local governments' obligation to comply with the rule and has since proposed changes to the rule that it claims will reduce the “regulatory burden” on local governments. See Brakton Booker, *Ben Carson Moves Forward With Push to Change Fair Housing Rule*, NPR (Aug. 13, 2018), <https://www.npr.org/2018/08/13/638285344/ben-carson-moves-forward-with-push-to-change-fair-housing-rule>.

ment” in these neighborhoods frequently results in gentrification, a rise in property values attached to white ownership and made possible by the laws and policies that led to disinvestment in minority communities historically. See Emily Badger et al., *The Neighborhood Is Mostly Black. The Home Buyers Are Mostly White*, *N.Y. TIMES*, Apr. 27, 2019.

95. 42 U.S.C. §2000d.

96. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

97. U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, 65 *Fed. Reg.* 39650, 39676-77 (June 27, 2000).

98. *Id.* at 39680.

99. *Id.*

100. *Id.* at 39680-81.

101. DELOITTE CONSULTING LLP, *FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 25* (2011), https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr_20110321_finalreport.pdf.

102. For example, staff at the local and state levels may not be able to rely on existing census data to analyze whether a permit will lead to disparate im-

D. Roadblocks to Equal Opportunity: Formalistic Equality Norms and Resource Constraints

In 1978, Justice Blackmun warned against an equal protection jurisprudence that ignores the reality that contemporary American society has been profoundly shaped by notions of white superiority and endemic racism: “In order to get beyond racism, we must first take account of race. There is no other way. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”¹⁰⁹ He was warning against an anemic, formalistic view of equal protection that disregards the Fourteenth Amendment’s history as a response to states’ failure to protect formerly enslaved people from violence and guarantee them the basic civil rights enjoyed by white citizens. Like the authors of the Kerner Report, Justice Blackmun thought that “in order to treat some persons equally, we must treat them differently.” The only way to avoid a deeply divided nation is to acknowledge how the history of racism embedded in our urban landscape leads to inequality of opportunity.

Laws and policies that made homeownership available to white families, while denying opportunity to African-American families, have contributed to an alarming racial wealth gap: “The median average white family in the U.S. has approximately \$171,000 in net wealth, while the median African American family has approximately \$17,000.”¹¹⁰ Given this reality, it would be reasonable to support laws and policies that “take account of race” in choosing how to allocate resources and subsidies. Unfortunately, if the government explicitly did so, it would violate the Equal Protection Clause as the clause is understood today. Laws and policies cannot single out any racial group—even for the beneficial purpose of mitigating racial inequalities.

The failure of equal protection law to take account of race is not the only problem. Addressing the problem of residential segregation requires that localities confront a daunting social problem: a widespread lack of affordable housing. Affordable housing that meets basic standards is now out of reach for millions of Americans. According to the Center for Housing Studies at Harvard University, in 2017, 37.8 million Americans (or 31.5%) lived in unaffordable housing when measured by the conventional rule that an individual should not spend more than 30% of their income on housing.¹¹¹ Of that number, 18.2 million generally spent 50% or more of their income on housing.¹¹² Cost-burdened rental households outnumbered cost-burdened homeowners: “About a quarter of all renters—some

10.7 million households—faced severe housing cost burdens in 2017.”¹¹³

The study’s demographic analysis also reflects the history of legal discrimination in housing law and policy: “Fully 70 percent of poor blacks and 63 percent of poor Hispanics live in high-poverty neighborhoods, compared with just 35 percent of poor whites and 40 percent of poor Asians.”¹¹⁴ Income disparities among racial groups do not fully explain this distribution: “Some 48 percent of all blacks and 41 percent of all Hispanics live in high-poverty neighborhoods, compared with just 16 percent of all whites and 21 percent of all Asians.”¹¹⁵ Not surprisingly, a larger percentage of African Americans and Latino households are cost-burdened compared to white households: “The cost-burdened share is highest among black renters at 54.9 percent, followed closely by Hispanics at 53.5 percent,” and considerably higher than the white share of 42.6 percent.¹¹⁶ Lower average incomes contribute to this disparity, but do not fully explain it “since black and Hispanic households earning less than \$15,000 are still more likely to be cost burdened than whites at that income level.”¹¹⁷

Many of these disparities were produced by the housing laws and policies that created African-American ghettos and slums. In addition to creating the racial wealth gap, de jure segregation imposed greater housing costs on African Americans. In the 1920s and 1930s—and even into the 1960s—rent for deteriorating housing in the ghettos of many cities was higher than rent for decent housing in white neighborhoods.¹¹⁸ Even today, rent in poorer neighborhoods is only marginally less than that in wealthier neighborhoods. Moreover, subsidized and public housing falls short of addressing the need; only one in four eligible families who apply for assistance receives a housing subsidy.¹¹⁹

The bottom line is that a solution to the affordable housing crisis—and with it, viable solutions to residential segregation—requires an enormous commitment of resources. The federal budget for capital spending on public housing illustrates the severity of the shortfall. In 2019, Congress increased the U.S. Department of Housing and Urban Development’s funding by 2% to \$53.8 billion, including an increase in capital funds from \$25 million to about \$2.8 billion.¹²⁰ A 2018 study, however, projected the capital spending backlog in 2019 to be \$56.6 billion—a figure that is likely low given that in 2017, capital spending on public housing in New York City alone was assessed at \$31.8 billion over five years.¹²¹ Regardless, given the magnitude of the backlog, \$2.8 billion is not nearly sufficient.

Some local communities have tried to fill this gap. For example, communities in high-cost cities like Portland,

109. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun J., concurring in part).

110. Michaela Broyles, *A Conversation About the Racial Wealth Gap—and How to Address It*, BROOKINGS (June 18, 2019), <https://www.brookings.edu/blog/brookings-now/2019/06/18/a-conversation-about-the-racial-wealth-gap-and-how-to-address-it/>.

111. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *THE STATE OF THE NATION’S HOUSING* 31 (2019), <https://www.jchs.harvard.edu/state-nations-housing-2019> [hereinafter HARVARD HOUSING STUDY].

112. *Id.*

113. *Id.*

114. *Id.* at 16.

115. *Id.*

116. *Id.* at 32.

117. *Id.*

118. See MATTHEW DESMOND, *EVICTED* 75 (2016).

119. See *id.* at 59.

120. HARVARD HOUSING STUDY, *supra* note 111, at 34.

121. *Id.*

Oregon, have voted in favor of ballot initiatives that make funding available for affordable housing measures.¹²² States and municipalities have also passed laws that protect some renters by capping annual rent increases and reducing relocation costs.¹²³

Although zoning reforms are less common, many metropolitan areas are realizing that they are running out of housing options for their residents, in part because much of the land within their boundaries is zoned for single-family residences only.¹²⁴ Minneapolis, for example, recently passed zoning reforms that “upzone” about half of the city’s land, allowing for duplexes and triplexes on properties formerly restricted to single-family use and removing off-street parking requirements.¹²⁵ In addition, cities like New York have used inclusionary zoning, offering developers density bonuses in exchange for a certain percentage of affordable units.¹²⁶ This strategy has the potential to encourage more racially and economically integrated communities in cities where land is scarce, but may be less effective in cities with large amounts of undeveloped land.

IV. Disruptions in the Supreme Court’s Equality Jurisprudence

As discussed above, the “colorblind” interpretation of the Fourteenth Amendment’s promise of equality leads to the validation of facially neutral laws with discriminatory effects while invalidating race-conscious remedies for the structural inequalities that inscribe our urban landscapes. Although the Supreme Court is not likely to completely disavow this approach to equal protection anytime soon, its recent decision in *Obergefell* provides an opening for more nuanced views of due process and equality. In his majority opinion, Justice Kennedy declined to use the Equal Protection Clause alone to invalidate state laws that did not allow same-sex couples to marry.¹²⁷ Instead, he grounded his argument in a concept of “equal dignity” that draws upon both the Due Process and the Equal Protection Clauses.¹²⁸

This decision, which departs from traditional due process and equal protection analysis, is a *disruption* in modern Supreme Court equality jurisprudence, but one that resonates profoundly with the history of the Fourteenth Amendment and the racially discriminatory laws and practices it was designed to address. In connecting the liberty protected by the Due Process Clause with the equality protected by the Equal Protection Clause, Justice Kennedy

unsettled the doctrinal tests for both.¹²⁹ In his view, judicial recognition of a “fundamental” right does not turn on rigid notions of tradition, but is instead an exercise in “reasoned [judicial] judgment.”¹³⁰ This analysis pays particular attention to the “injury” and “stigma” that flow from the denial of the right.¹³¹ In *Obergefell*, state prohibitions on same-sex marriage infringe liberty because they “demean” or “stigmatize” same-sex couples.¹³² This unequal treatment (the denial of benefits afforded to opposite-sex couples) serves “to disrespect and subordinate” same-sex couples.¹³³

Scholars now refer to *Obergefell*’s recognition of the interdependence of liberty and equality as the “equal dignity” doctrine.¹³⁴ Laurence Tribe has argued that “*Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of ‘equal dignity.’”¹³⁵ At the heart of this double helix is what Kenji Yoshino calls the “anti-subordination principle.”¹³⁶ This principle frames Justice Kennedy’s response to the dissenting Justices’ charge that his approach has no limiting criterion because it is not anchored in tradition or history and does not require specific definition of the right.¹³⁷ As others have argued, the limiting principle in Justice Kennedy’s equal dignity analysis is its focus on whether liberty is being granted or denied to “historically subordinated groups.”¹³⁸

Placing an antisubordination principle at the center of a substantive due process inquiry has clear implications for formalistic equal protection doctrine. At the very least, its focus on the historical subordination of a group challenges the orthodoxy of the Court’s “colorblind” approach to equality. Perhaps most important, elements of Justice Kennedy’s opinion call into question whether governmental actors must *intend* to discriminate or deprive a group of its liberty interest. An equal dignity approach does not turn on whether the state originally intended to harm or stigmatize a given class of people, but on whether the challenged state law or practice has a stigmatizing *effect* today.¹³⁹

129. See *id.* at 2602-03 (explaining that the “interrelation of the two principles furthers our understanding of what freedom is and must become”).

130. *Id.* at 2598.

131. *Id.* at 2602.

132. *Id.*

133. *Id.* at 2604.

134. See, e.g., Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. 16 (2015); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015); Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323 (2019).

135. Tribe, *supra* note 134, at 17.

136. Yoshino, *supra* note 134, at 177.

137. *Obergefell*, 135 S. Ct. at 2618, 2620-21 (Roberts, C.J., dissenting); see also *id.* at 2640 (Alito, J., dissenting).

138. See, e.g., Yoshino, *supra* note 134, at 174 (arguing that after *Obergefell*, “one of the major inputs into any such [substantive due process] analysis will be the impact of granting or denying such liberties to historically subordinated groups”); *Equal Dignity—Heeding Its Call*, *supra* note 134, at 1331 (arguing that the “idea of group harm, or antisubordination, more traditionally seen as an equal protection concept, thus appears to justify when the substantive due process analysis can be freed from limitations of history and specificity”).

139. See *Obergefell*, 135 S. Ct. at 2598 (“The nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”).

122. *Id.* at 35.

123. *Id.*

124. See Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES, June 18, 2019.

125. See Jenny Schuetz, *Minneapolis 2040: The Most Wonderful Plan of the Year*, BROOKINGS (Dec. 12, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/12/minneapolis-2040-the-most-wonderful-plan-of-the-year/>; see also Badger & Quoctrung, *supra* note 124 (“Minneapolis’ new policy will end single-family zoning on 70 percent of the city’s residential land, or 53 percent of all land.”).

126. See Josh Barro, *Affordable Housing That’s Very Costly*, N.Y. TIMES, June 7, 2014.

127. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

128. *Id.* at 2608.

As other scholars have argued, in focusing on the “unintended effects” of a given law or practice, *Obergefell* may open the door to a disruption in equal protection doctrine: a challenge to the requirement that a plaintiff prove intentional discrimination.¹⁴⁰ If a plaintiff is a member of a historically subordinated group, *Obergefell* shifts the analysis from whether the state intended to discriminate to whether state law burdens the plaintiff’s liberty interests.¹⁴¹ This same logic would also shift the analysis in cases involving race-conscious remedies; instead of invalidating a remedy because it is not facially neutral, the antisubordination principle focuses the inquiry on whether the law or policy furthers the liberty interests of a historically subordinated group.

Obergefell may disrupt another strand of due process doctrine: the Court’s reluctance to recognize positive rights or liberties. The dissenting Justices in *Obergefell* objected to the majority opinion’s recognition of a right to a governmental benefit, as opposed to a right to be free from governmental interference.¹⁴² The U.S. Constitution clearly recognizes negative liberties (many of them are enumerated in the Bill of Rights), but the Court has long been wary of recognizing rights that impose positive obligations on the government such as the provision of housing or education, fearing that such recognition will open the litigation floodgates and supplant the lawmaking function of the legislative branch.¹⁴³

Obergefell is not likely to change this skepticism of positive rights, but it suggests that if the government chooses to provide a benefit, it must do so in ways that do not harm historically subordinated groups. One can imagine an argument, for example, that the government may not provide public housing that harms or demeans racial minorities by requiring them to choose between housing that presents serious health hazards or no housing at all.

140. See Tribe, *supra* note 134, at 19:

[I]n recognizing that even *unintended* effects can render a traditional practice or definition inconsistent with the Fourteenth Amendment, *Obergefell* may well have laid the foundation for reexamining a longstanding but always controversial doctrinal obstacle . . . requiring proof of *intentional* discrimination as an element of an asserted Fourteenth Amendment violation.

Although I think *Obergefell*’s “equal dignity” doctrine is disruptive, I do not mean to overstate the likelihood that it will replace the Court’s more formalistic approach to equal protection. The concept of “dignity” is a complicated and contested one in Supreme Court jurisprudence, often serving to protect historically powerful groups and state authority. See Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017).

141. See *Obergefell*, 135 S. Ct. at 2604 (concluding that “the challenged laws burden the liberty of same-sex couples” and “abridge central precepts of equality”).

142. See, e.g., *id.* at 2634 (Thomas, J., dissenting) (“In the American legal tradition, liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement.”).

143. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) (declining to recognize a fundamental right to education and emphasizing that state reforms in the area of education are matters of legislative judgment).

V. Conclusion

The dissenting opinions in *Obergefell* stress the importance of constitutional doctrine moored in history and tradition. Quoting substantive due process precedent, Chief Justice Roberts emphasized the importance of history and tradition in curbing the judicial activism associated with the *Lochner* era: “Our precedents have required that implied fundamental rights be ‘objectively, deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty’”¹⁴⁴ In his view, grounding a right in history ensures that judges do not expand or invent rights based on their own values.¹⁴⁵

Justice Kennedy’s response is that history and tradition matter, but they are not the end of the inquiry. Missing from this debate is the caveat that “history” is often defined by those in power. Moving forward, a robust antisubordination theory of liberty and equality would recognize the importance of historical narratives that reflect the lived experiences of historically subordinated groups.

These historical narratives are the stories that “disrupt” what appears natural and given in today’s urban landscapes. The structural inequalities that underlie residential segregation and environmental injustices in our urban spaces developed over time and are reinforced daily in both obvious and subtle ways. These are not problems that have easy or inexpensive solutions. But the first step to addressing these inequalities is to see them as products of intentional policies, rather than as a *natural* part of the way things are. With this recognition comes an openness to look beyond the surface and expose the *history* behind the racialized geography of our cities.

Another story about Richmond, California, illustrates how the willingness to see a place’s history from the perspective of subordinated groups can create openings for laws and policies to account for that history. In 2012, state and federal wildlife agencies began assessing natural resource damages to Castro Cove in San Pablo Bay, an area near Richmond contaminated by pollutants from the Chevron refinery.¹⁴⁶ To compensate for the damage, agency officials originally proposed restoring wetlands in San Pablo Bay National Wildlife Refuge about 10 miles north of Richmond.¹⁴⁷ The people of Richmond objected and advocated for the restoration of wetlands in close proximity to a predominantly African-American neighborhood in Richmond. At first, the policymakers rebuffed Richmond’s objections, citing the greater cost-benefit ratio of the refuge site and its relatively close location—only 10 miles away from Richmond.¹⁴⁸

144. *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting).

145. *Id.*

146. See Steve Hampton, *A Marsh in Richmond: What a Restoration Project Taught Me About Racial Bias, White Privilege, and Environmental Justice*, COTTONWOOD POST, June 1, 2019, <https://thecottonwoodpost.net/2019/06/01/a-marsh-in-richmond-what-a-restoration-project-taught-me-about-racial-bias-white-privilege-and-environmental-justice/>.

147. See *id.*

148. See *id.*

In the end, the compensation funds were split between the two sites. What changed? One California natural resource economist described why his thinking changed:

When the people we are supposed to be compensating are complaining about our proposal, that's a red flag that perhaps our criteria are biased, our evaluation is wrong, and that their values are not the same as our values. And they are the ones who matter. As trustees, we were supposed to

ensure the compensation of the impacted people. We are obligated to see the world through their lens.¹⁴⁹

To see the world through this lens is to see through the lens of history. Although half of a restoration project is a small step, it is a step nonetheless. It is also a reminder that laws and policies can leave room for people to act in ways that take account of race and structural inequality.

149. *Id.*