

Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development

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The ghetto is ferment, paradox, conflict, and dilemma The ghetto is hope, it is despair, it is churches and bars. It is aspiration for change, and it is apathy. It is vibrancy. It is stagnation. It is courage, and it is defeatism. It is cooperation and concern, and it is suspicion, competitiveness, and rejection.¹

I. Introduction

Although persistent inner-city poverty and underdevelopment have outlasted decades of serious legal scholarship and advocacy, proving to be largely unaffected by upturns in the economy, this Article offers a renewed commitment to legal perspectives on economic development. The growing emphasis on economic development work by lawyers challenges legal scholarship to erect a framework beyond traditional poverty and civil rights law tenets by joining the law's unique contributions with the many disciplines already active in community building or empowerment efforts. Successful development of a multidisciplinary framework requires comparative economic assessments that cross the ghetto's stark boundaries into the middle-class communities in which most of us live.

In an influential article and theoretical anthem to the tastes guiding middle-class life,² Charles Tiebout characterizes individuals as "con-

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¹ KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 11-12 (1965).

² See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

sumer-voters," then states an admittedly simplified thesis: "The consumer-voter may be viewed as picking the community which best satisfies his preference pattern for public goods."³ In Tiebout's model of local government, consumer-voters act on several normative assumptions about lifestyle and economic well-being: the mobility to choose suitable residential communities; knowledge of different revenue and expenditure patterns, as well as the supply of adequate public services; and freedom from strict constraints on employment.⁴ Both critics and admirers of Tiebout's model⁵ acknowledge an authentic resonance to his words, even if those words now need modification.

In contrast to the rational actors in Tiebout's model are the people who occupy antinorm status. By antinorm status, I mean socially marginalized, racially and ethnically disfavored, working-class, persistently poor, and relegated to America's ghettos.⁶ They too are consumer-voters. I prefer to call them consumers as well, though they live in neighborhoods where the middle-class lifestyle assumptions and most of the economic rules that flow from them act in reverse. The urban poor are not mobile, nor are their preference patterns seriously or regularly considered in public finance decision making. Their knowledge and reactions to differences in revenue and expenditure patterns are probably less generalizable; indeed, many people, conscious of their identification with anti-markets, know that the responsiveness of local government to their needs (let alone preferences) compares very unfavorably with government responses to the more affluent areas in the same city. The urban poor do not, in any event, share the expectations of governmental responsiveness that accompany knowledge of expenditure patterns. They are particularly limited by employment considerations. Finally, the public services supplied to middle-income markets often result in negative externalities on ghetto neighborhoods and vice versa. Middle-class consumers are usually willing to pay more to live as far away from, or as barricaded against, the urban poor as their means will allow.

In passing, Tiebout's model of the middle class acknowledges a point regarding noneconomic preference patterns that becomes highly relevant to this Article. He notes "this is also true of many non-economic

³ *Id.* at 418.

⁴ *See id.* at 419.

⁵ *See* ROBERT L. BISH, *THE PUBLIC ECONOMY OF METROPOLITAN AREAS* (1971); *LOCAL PROVISION OF PUBLIC SERVICES: THE TIEBOUT MODEL AFTER TWENTY-FIVE YEARS* (George Zodrow ed., 1983); *see also* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 415–35 (1990); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 218 n.72, 225 (1997); *see, e.g.*, Wallace E. Oates, *On Local Finance and the Tiebout Model*, AM. ECON. REV., May 1981, at 93.

⁶ For an insightful account of theories and measures of marginalized ghetto communities, *see* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1943–47 (1999).

variables. Not only is the consumer-voter concerned with economic patterns, but he desires, for example, to associate with 'nice' people."⁷ This Article focuses on the making of ghetto antimarkets and the role of law in inner-city economic development, both of which hinge on the interaction between economic and noneconomic preference patterns to which Tiebout alludes. For certain communities within the city, this interaction becomes significant because the assumptions held by Tiebout's rational actors define, by negative implication, the limited options available to those on the other side of the norm.

In this Article, I use markets as a metaphor for more than purely economic factors. Middle-class communities of cities and suburbs are premised upon culturally specific ideal structures that are realized through the support of legal, public, and private sector institutions. I characterize the combination of quantifiable submarkets (e.g., real estate, retail, public goods) and less quantifiable political market forces (e.g., homeowners associations and condominium boards) as *metamarkets*. Metamarkets have functioned in a real and illusory dynamic to produce spatial and economic stability for millions of middle-class American households. However, metamarkets have also produced their antithesis: ghettos. I refer to ghettos as *antimarkets* to express the powerlessness of these marginalized communities to play by the same rules of the metropolitan game that are available in middle-class metamarkets.⁸

A metamarket, then, describes the dynamic interaction of wealth- and welfare-enhancing public and private forces that stabilize life in middle-income neighborhoods. *Meta* links not only economic and noneconomic factors, but also the cultural, political, public, and private forces. A metamarket's specific elements reflect degrees of realized psychic and cultural ideals regarding "the good life." Across different types of middle-class urban areas, these ideals include ownership of single-family homes or apartments, access to a variety of quality private retail stores and services, maintenance of supportive public infrastructure (e.g., road repair and sanitation) and public goods (e.g., schools and recreation), family-conscious environmental considerations, and a relationship with government typically characterized by political participation and accommodation. The metamarket is premised on local control of community character and exclusion of undesirable people and uses. Historically, land use law and public finance have been the primary catalysts for metamarket development, but today urban metamarkets are increasingly sustained by consumption dynamics. With the ideal structures in place and firm obstacles excluding outsiders, the metamarket and its household

⁷ Tiebout, *supra* note 2, at 418 n.12.

⁸ Paul Brietzke summarized the relationship: "Just as the poor are in but not of the city, so are they in but not of the markets." Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 757 (1992).

and commercial consumers act primarily through private legal ordering to satisfy preferences and entitlements.

In contrast, the antimarket involves more than just ghetto. It is the antinorm of the metamarket, the urban place never designed to hold stability. The antimarket encompasses the economic, political, and psychic marginalization of inner-city consumers through the subversion of middle-class rules. Its elements typically include a low-credit, high-risk milieu of struggling stores, inadequate public and private services, a preponderance of undermaintained and disproportionately public rental housing, weak schools, unregulated and unlawful commerce, a lack of public safety, a dearth of political capital, and virtually no personal wealth. The antimarket is premised on a lack of community control and the chaotic mixture of unwanted people and uses operating at the city's isolated margins. Historically, public law such as housing and welfare statutes have governed life and business there, and little has changed. Consumers simply seek economic survival, rather than economic stability.

Painful economic realities force us to discuss markets. Market conceptions connote the quantitative, business-oriented approach our culture has increasingly taken toward producing the material good life.⁹ Scholars, activists, and policymakers who focus on economic discrimination against poor neighborhoods and economic self-sufficiency for poor people often use market improvement language.¹⁰ The emphasis on inner-city economic development is an outgrowth of these conceptual priorities, as well as of the unfinished agenda of the civil rights movement with respect to economic rights. Further, market emphases allow us to reposit poor people as consumers, just as we ordinarily do when we think about middle-class people.

I acknowledge that my construction of the metamarket/antimarket dichotomy presents an obvious oversimplification of complex societal arrangements, but it is a necessary narrative nonetheless. Other disciplines, or even current legal theory, might choose a different narrative premise for their roles in inner-city economic development—it is an academic realm with many actors. In the general context of ghetto poverty and the specific policies currently being advanced in the name of economic development, though, many established notions barely resonate. Rights narratives, for example, have problematic application, as there are few articulated rights to economic opportunity, rights against economic discrimination, or rights for spatial equality.¹¹ At any rate, I propose this

⁹ See *id.* at 746–51.

¹⁰ Indeed, for some scholars concerned with ghetto poverty, markets offer hope. See *id.* at 753 (“Markets are the original sources of an economic pluralism, a diversification of risks and opportunities that could be made to create more viable niches for the poor and powerless.”).

¹¹ See John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-*

dichotomy as a distinct paradigm large enough, I hope, to encompass institutional behaviors that systematically carve cities into favored and disfavored cells.¹²

The displacement of the object's subjectivity presents another problem with the practice of characterization and modeling, a concern that inheres in characterizing the experiences both of persistently poor people of color and of the predominantly white middle class. To declare that antimarkets are not really markets is not meant to deny their subjective validity as economic realms. Underground or informal economies, for instance, have economic identities independent of outsiders' labels. Consider, for example, a barbershop in Central Harlem where, in the course of a haircut, four different people come through the shop selling baby clothes, jewelry, bootleg videos, and taking bets on the "numbers" (or unofficial lottery). For the client who knows and perhaps lives in Central Harlem, this is routine commercial behavior, whereas an uninitiated observer might see only informal and even illegal transactions. Such characterizations demonstrate contrasting formulations of the acceptable rules of commerce. This difference in understanding, in turn, ultimately influences beliefs about the model of economic development that "should" take place in such a ghetto community.¹³

My characterizations both of middle- and low-income communities are primarily intended to identify the operant norms of the ideal structures responsible for creating metamarket stability and antimarket marginalization. The chief importance of the law in this endeavor may be the breadth of its narrative potential, which enables it both to incorporate political, cultural, and economic forces and to invalidate the ideal structures that subordinate poor urban communities.

to-the-Future Essay, 71 N.C. L. REV. 1487 (1993).

¹² This project results from a search for an appropriate narrative, where many exist and compete for primacy. Some narratives invoke history, which is an important but contested terrain. Historical perspectives entail selective remembrance, and collapsing too much can hide a lot. Yet, by rearticulating how past oppressions have produced marginalized people and places, the historical perspective enables one to view current efforts at empowering poor consumers and communities in a constructive context. I employ the historical perspective to emphasize process, so as to relate that which occurred in the past to what must happen in an uncertain future.

¹³ As for characterizations of the middle class, more care may be necessary than I have shown thus far. I deliberately employ the broad-brush term "middle-class." Yet there are many ways to be middle-class in a city. As discussed earlier, there are even distinct differences between black middle-class and white middle-class families in terms of their hold on that status. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 95-104 (1995). Middle-class people are not all of one stripe, leaping like lemmings in one concerted dive into the sanctuary of a gleaming new suburban mall. A full exploration of middle-class cultural and economic tastes and identities (or those of the ghetto poor, for that matter) lies beyond the scope of this Article. Suffice it to say, there are dangers in overgeneralization about either selfishly consumptive middle-class whites or downtrodden, perpetually victimized blacks in poverty.

This Article argues for a more distinctive role for the law and lawyers in inner-city economic development planning, beginning first with a descriptive explanation for understanding how middle-class neighborhoods and ghettos currently exist as a result of historical factors very much connected with law and culture. Although the law and lawyers historically have played significant roles in addressing urban poverty and vindicating, where possible, the rights of the poor and of disadvantaged minority groups against economic discrimination, we have not been as successful in articulating a systematic framework for evaluating and participating in the multidisciplinary work of inner-city economic development that the present realities of postindustrial cities demand.¹⁴

In Parts II and III of this Article, I establish the paradigm of metamarkets and antimarkets, respectively. Focusing primarily on land use law, I argue that the law has been used to create and sustain middle-class outcomes. I further address two variables critical to economic development: wealth formation and *consumer infrastructures*, the latter being a term invented to measure objectively the goods and services available within a given neighborhood.

The idea of middle-class life presented in this Article is both social and economic. The two spheres interact over ideal structures of what Americans think that it means to be middle-class and the economic markets in which those consumer ideas are realized. Ghettos, I argue, are the social and economic construction of myriad public and private forces, functioning historically as the repositories of middle-class negation. That is, they were created and are sustained as the antithesis of urban middle-class life; they are antimarkets. Where the middle-class metamarket sustains economically and socially desirable ways of life, long-term residents of antimarket communities live outside such privilege. The latter are bit players in the organized theater in which public goods are exchanged. They acquire little economic stake in private goods and services and, as an economic constituency, exert marginal leverage on traditional markets. Permanent outsider status often attaches to poor families and individuals as personal deficits, mirrored and compounded by the isolated status of the communities in which they live. Thus, the antimarket metaphor comprehends the well-documented informal and underground economies of alienated urban neighborhoods.¹⁵

I argue that this dichotomy is not entirely accidental or, even now, the sad result of global economic factors beyond any group's control. African American ghetto poverty remains the quintessential form of inner-city or "underclass" poverty because exclusion of, and discrimination

¹⁴ More often, policy debates occur among sociologists, economists, business developers, urban planners, and public health specialists, with lawyers left to labor in discrete areas of need or inequity, such as real estate transactions or housing discrimination.

¹⁵ See *infra* notes 239–244 and accompanying text.

against, African Americans have been the most essential means to sustaining middle-class metamarkets. In many respects, such as the siting of undesirable land uses¹⁶ or the deprivation of basic public infrastructure and maintenance services,¹⁷ ghettos have made middle-class residential markets possible. A comparative analysis is therefore critical to understanding inner-city economic development efforts. Moreover, the historical absence of blacks from the middle class persists, albeit without as much overt discrimination, in our postindustrial, highly privatized and suburbanized society, so that much of what continues to be identified as middle-class requires the almost complete absence of blacks. Even though land use law is not used as actively to promote exclusivity, middle-class hegemony over low-income neighborhoods occurs in a virtually self-executing consumerist dynamic, with substantial costs borne not only by cities instead of suburbs, but by ghettos rather than middle-class communities.

Part IV assesses the dichotomy in theoretical perspective, specifically challenging the narrative's assumptions about consumer-oriented approaches and the dangers of theorizing people into communal zones. In Part V, I apply the paradigm's tenets in a critique of the now dominant approach to inner-city economic development, Federal Empowerment Zones, in an effort to demonstrate how such well-intentioned policies likely fall short of their goals or even undermine community building precisely because they fail to acknowledge the structure of antimarkets. These approaches assume the same consumerist premises about persistently poor people that are commonly associated with middle-income people, which is problematic because what currently exists in postmodern American ghettos is more than simply market failure. Those potential markets—or, more accurately, the *metamarkets* of interacting ideals and submarkets—were deliberately broken, retarded, and robbed of the social and economic structures that have facilitated middle-class life. Thus, they are antimarkets that, in many essential ways, operate according to contrary rules and in the presence of often immovable market impediments that no middle-class neighborhood would ever tolerate.

Finally, in Part VI, I prescribe two related prongs for the role of law and lawyers within the multidisciplinary realm of inner-city economic development: adversariality in the eradication of discriminatory barriers to social and economic stability on the one hand and facilitation of community economic growth and planning on the other.

¹⁶ See *infra* notes 149–155 and accompanying text.

¹⁷ See *infra* notes 150–153 and accompanying text.

II. The Making of Middle-Class Metamarkets and Ideal Structures

Several decades before the Supreme Court put its imprimatur on the practice of zoning in *Village of Euclid v. Ambler Realty Co.*,¹⁸ and even prior to the issuance in New York City of the 1913 Heights of Buildings Commission report that led to the nation's first zoning ordinance,¹⁹ an increasingly urbanized, economically powerful culture sought ways to order people, space, and uses in its cities. By the turn of the century, the corresponding growth of cities and the economic benefits of industrialization seemed to indicate a necessary evolution. Rational control over such evolution became one of the root assumptions of the American urban planning movement during this period.²⁰

In this Part, I argue that the utilization of land use planning techniques, particularly zoning, to achieve such rational controls during the first decades of the twentieth century entailed a semiscientific codification of social and economic ordering, which ultimately found political and spatial expression in the middle-class residential market. The courts supported, but did not lead, this process. Through decisions such as *Euclid*, they came to articulate and substantiate the ideal structures that enabled the American dream, the normative presumptions that governed urban middle-class communities across the United States. These ideal structures refer particularly to what constitutes and who is included in a middle-class neighborhood, as well as what and whom is excluded and how those decisions are customarily effectuated. Sometimes these understandings are explicit; perhaps more often they are implied. In either case, judicial opinions in support of residential zoning repeated the idealized imagery of middle-class life, affirmed the expectations of its residents and aspirants alike, and greatly insured its virtual permanency. The legal rationales developed during this process were motivated by the desire to formalize consensus among various local public and private actors and, thus, preserve and expand stable socioeconomic living environments, not necessarily by a conscious desire to define middle-class life. The result, however, is a fairly identifiable set of spatial, social, and material relationships that I refer to as urban middle-class metamarkets.²¹ These legal foundations lead to the formulation of

¹⁸ 272 U.S. 365 (1926) (finding comprehensive zoning a constitutional exercise of state police power).

¹⁹ See EDWARD M. BASSETT, *ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 20-23* (1936).

²⁰ See SEYMOUR TOLL, *ZONED AMERICAN 18-19* (1969).

²¹ The foundations for this argument have been well established in legal literature. Indeed, Peter Abeles, for example, wrote that "[t]he basic purpose of zoning, and its related planning tools, was to maintain and defend the American Dream." Peter Abeles, *Planning and Zoning*, in *ZONING AND THE AMERICAN DREAM* 134 (Charles M. Haar & Jerold S. Kayden eds., 1989). See also RICHARD F. BABCOCK, *THE ZONING GAME* 115 (1966).

Many others have pointed out the necessary normative connection between patterns of

middle-class residential areas as urban metamarkets with their dynamic exchange of goods and services, runaway consumer engine, and regulation by government that have made possible ghetto antimarkets, the subject of the next Part.

A. *The Zoning Idea of Spatial and Social Ordering*

To reach the rational schema Tiebout eventually would describe,²² and well before the Supreme Court could legally sanction zoning's distribution of social, economic, and political relationships, cities had to resolve growing tensions at the production centers of a rising industrial power's geography of functional space. Between the turn of the century and the *Euclid* decision in 1926, the problems of burgeoning industrial cities had become manifest. The cities were too crowded, too dirty, and too unplanned; their chaotic growth posed significant threats to public health, safe housing arrangements, the already volatile relations among classes and races, and the interests of industrial capital.

Professional urban planning offered rational solutions to these expansion problems. These solutions were expressed through an improvement mentality that sought to impose discipline upon capitalists and workers alike, promote local public expenditures for infrastructure, articulate a mandate for certain environmental controls, and even enhance the network of services addressing health, education, and housing conditions.²³ Enter the theoretical benefits of early zoning: "Zoning, the division of the American city into a structure of cells, hierarchically controlled and re-arranged," writes M. Christine Boyer, "was a technical solution meant to secure an orderly and stable development of the urban land market."²⁴ Zoning mechanistically encouraged boundary making designed to increase land values and encourage functional interrelations through a model of public decision making that somewhat radically involved regulatory control and enforcement of partly public, but mainly private, resources.²⁵

The conceptual premise for land use planning in general, and zoning in particular, is the segregation of desirable from less desirable uses.²⁶

planning for residential areas, judicial support for openly exclusionary practices, and the implications for class stratification. See Gerald E. Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1068 (1996); J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761; see also *infra* notes 43–45 and accompanying text.

²² See Tiebout, *supra* note 2.

²³ See M. CHRISTINE BOYER, *DREAMING THE RATIONAL CITY* 6–7 (1983).

²⁴ *Id.* at 153.

²⁵ See *id.* at 97–98.

²⁶ Compare this with the three main purposes of city planning according to Thomas Adams: (1) stabilization of economic conditions and control of land uses; (2) provision of facilities for industry; and (3) securing of wholesome housing conditions and home owner-

One of the first expressions of this ideal, according to Seymour Toll, involved the preferences of wealthy Fifth Avenue merchants preserving the swank character of their retail corridor from encroachment by the hustle and bustle and immigrant laborers of the growing garment district on lower Broadway in New York City.²⁷ The 1913 Report of Heights of Buildings Commission recognized that maintenance of the posh retail markets along Fifth Avenue necessarily entailed some systematic exclusion of uses deemed incompatible with the character of such an area—namely, light-blocking skyscrapers and congested pedestrian traffic caused by immigrant workers.²⁸ The example is instructive in that the report's conclusions about the necessity of exclusivity signaled the idea that urban markets require a degree of government regulation in order to thrive. Further, in a classic illustration of zoning's democratic but often elitist process, the report also reflected the domination of a strong constituency's political will over weaker interests.²⁹

The New York City Board of Estimate largely adopted the Commission's findings, resulting in the country's first comprehensive zoning ordinance,³⁰ which offered an example that other cities rapidly duplicated.³¹ The 1916 ordinance invoked the rhetoric of preserving neighborhood character, yet wisely buttressed its terms against constitutional attack by bundling them in comprehensive language. Thus, confiscatory land regulation was viewed as a justifiable exercise of police power authority, provided that it was reasonably related to the general welfare and was comprehensive, not arbitrary, in scope.³² The apparently rational planning logic of commercial and industrial use segregation was soon applied to the social ordering of residential space and used to define the character of communities.³³

ship. See Thomas Adams, *Modern City Planning*, 11 NAT'L MUN. REV. 157, 158-59 (1922).

²⁷ See TOLL, *supra* note 20, at 115-16.

²⁸ See *id.* at 152-54.

²⁹ See *id.* at 147-48; see also BOYER, *supra* note 23, at 167 ("Since zoning was supported by financial and banking interests as a guarantor of property values, it necessarily meant economic and racial segregation.").

³⁰ See BASSETT, *supra* note 19, at 23.

³¹ By 1929, three-fifths of the country's urban population was covered by zoning regulations. See TOLL, *supra* note 20, at 193; see also BASSETT, *supra* note 19, at 28.

³² See *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209, 210 (N.Y. 1920) (validating the New York ordinance).

³³ Indeed, planned neighborhoods for the upper class already existed in such places as Brookline, Massachusetts and Forest Hills Gardens, New York, where land use controls maintained strong property values. See BOYER, *supra* note 23, at 101. As factories were forced out of Manhattan, a strict residential purpose dominated zoning policies there as in other pioneering cities, such as Los Angeles, Seattle, Minneapolis, and Baltimore. See *id.* at 94.

Richard Briffault argues that the economic incentives to exclude were profound, if for no other reason than that they preserved interlocal wealth differences. "Because, for any given level of service, tax rates will be lowest when per capita property values are highest, local governments have 'natural economic interests' in excluding potential new residents

B. Euclid and the Federal Role in Legitimizing the Single-Family Detached Home Ideal

Although zoning and most land use planning regulations are creatures of state and local governance,³⁴ the full-scale use of techniques common to state enabling acts could not have succeeded in institutionalizing middle-class ideal structures without strong federal support both from courts and federal agencies. The Supreme Court's decision in *Euclid*³⁵ repeats and reinforces many of the themes evident in the 1913 New York commission report. Indeed, Ambler Realty's challenge to the village's zoning ordinance was a literal, rather than metaphoric, challenge to the use of government zoning to determine the character of economic markets.³⁶ While Ambler Realty sought to maximize the value of its land by putting it to multiple uses and directly in the path of Cleveland's expanding industrial base, the village ordinance instead contemplated a quiet town of small lots and single-family homes.³⁷ The Court's decision upheld the ordinance as a permissible regulation, representing local majority preferences consistent with acceptable general welfare factors.³⁸ This victory affirmed the concept of segregated land uses that has since dominated land use law. The general welfare factors identified in Justice Sutherland's opinion, such as reducing traffic congestion, decreasing noise, decluttering access routes for fire and police services, and generally preserving a more favorable environment for raising children,³⁹ have come to constitute a logical hierarchy of land uses so familiar to most of us as to require little justification.

Central to this hierarchy in the early development of middle-class residential ideal structures is *Euclid's* preference for single-family detached homes over apartment houses,⁴⁰ an arbitrary distinction that had little to do with general welfare rationales and much to do with constructing, literally and figuratively, the good life. Upholding single-family homes as the highest and best use of land in the village, Justice Sutherland went so far as to exclude apartment houses from being a use appropriate for any residential districts.⁴¹ This view reflected not only a bias against the character and quality of life associated with tenements

who would bring down the local wealth average." Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 21 (1990).

³⁴ See Briffault, *supra* note 33, at 3.

³⁵ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³⁶ See *id.* at 384.

³⁷ See *id.* at 380–84.

³⁸ See *id.* at 390–95; see also *Nectow v. Cambridge*, 277 U.S. 183 (1928) (invalidating zoning ordinance that so devalued landowner's parcel as to contravene the public good).

³⁹ See *Euclid*, 272 U.S. at 392.

⁴⁰ By the mid-1920s to early 1930s, single-family housing was "officially acknowledged and promoted as the cornerstone of the American way of life." Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENVTL. L. & POL'Y 161, 207 (1983).

⁴¹ See *Euclid*, 272 U.S. at 394–95.

(large families, immigrant laborers, working-class blacks), but also, perhaps more importantly, an aspirational ideal in a country experiencing rapid growth.

Justice Sutherland's *Euclid* narrative should be read as much for what it omits as for what it explicitly conveys. The opinion focuses on zoning's theoretical benefits outside of downtown districts. For these purposes, the opinion is a thoughtful and elegant articulation of middle-class residential norms-in-progress, many of which were, at the time, (and, for many, remain) aspirational ingredients of consumers' American dreams. The Court chose, however, not to address the social and economic assumptions on which this narrative is premised.

In the court below, Judge Westenhaver had acknowledged these assumptions: "The courts never hesitate to look through the false pretense to the substance."⁴² In this context, the substance was discriminatory social ordering:

The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.⁴³

Judge Westenhaver's narrative describes what might have seemed a typical constellation of urban classes at a time when most suburban land was undeveloped. He understood, however, that the potential for segregation evoked by the ordinance was not strictly economic.⁴⁴ Nevertheless, Westenhaver continued, "[a]side from contributing to these results and furthering such class tendencies, the ordinance has also an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful."⁴⁵ Therein lay essential elements of the ideal structure behind "the pre-

⁴² *Ambler Realty Co. v. Village of Euclid*, 297 F. Supp. 307, 314 (N.D. Ohio 1924).

⁴³ *Id.* at 316.

⁴⁴ Judge Westenhaver based many of the court's arguments about the segregating dimensions of urban zoning on the Supreme Court's decision several years before in *Buchanan v. Warley*, 245 U.S. 60 (1917), which found unconstitutional a Louisville, Kentucky, racial zoning plan. See *Euclid*, 297 F. Supp. at 313. For a fictionalized narrative account of the circumstances and relationships involved in *Buchanan*, see David Dante Troutt, *The Bargain*, in *THE MONKEY SUIT AND OTHER SHORT FICTION ON AFRICAN AMERICANS AND JUSTICE* (1998).

⁴⁵ *Euclid*, 297 F. Supp. at 316.

tense": community control of aesthetics, profamily surroundings, freedom from unwanted and dangerous land uses, stable property values, and middle-class homogeneity.

If the Court's affirmation of middle-class ideal structures gave legal support to private sector constructions of consumer housing tastes, the participation of the Federal Housing Administration ("FHA") in devising mortgage lending criteria made endorsement complete and made full-blown middle-class expansion to the suburbs possible.⁴⁶ The 1938 Underwriting Manual⁴⁷ presented a socioeconomic scheme so detailed as to suggest scientific manipulation of middle-class outcomes, if not direct social engineering, by loan officers. Following but codifying practices used by bank underwriters prior to 1938, the manual directed the evaluation both of locations and prospective buyers. In location rating sections, the manual walked underwriters through eight "features" for evaluating neighborhoods, the first two receiving 60% of the weight: (1) relative economic stability; (2) protection from adverse influences; (3) freedom from special hazards; (4) adequacy of civic, social, and commercial centers; (5) adequacy of transportation; (6) sufficiency of utilities and conveniences; (7) level of taxes and special assessments; and (8) appeal.⁴⁸

These criteria present a cogent list of factors any buyer or underwriter would use even today as a framework for evaluating the strengths and weaknesses of a home's location. Indeed, the criteria are an early demonstration of the idea that housing choice reflects a vast number of social, political, and economic considerations, such as the proximity to religious institutions, planning for the physical limitations of old age, getting to work, raising children, and, perhaps most importantly, investing for uncertain futures.⁴⁹ From aesthetics to optimal densities, from

⁴⁶ The discriminatory effects of the federal government's involvement and, specifically, the FHA's encouragement of racially and economically homogenous neighborhoods and suburban communities has been well chronicled in legal and other scholarly literature. *See, e.g.,* KENNETH JACKSON, CRABGRASS FRONTIER 196-213 (1985) (describing the history and mechanics of the federal government's intensive programs to generate suburban homeownership); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 51-55 (1994) (detailing the FHA's adoption of the Home Owners' Loan Corporation's discriminatory rating formula). The FHA's bias toward suburban residential lending is generally attributed to its market preference for single-family detached homes over multifamily homes, for new housing over rehabilitated existing housing, and, in its lending risk rating system, for homes in all-white neighborhoods over homes in neighborhoods where blacks lived. *See* OLIVER & SHAPIRO, *supra* note 13, at 17-18. The success of the FHA loan programs was unprecedented. The FHA's new lending model allowed for smaller down payments, lower interest rates, longer repayment periods, and full loan amortization, making it easier for many homeowners to buy rather than rent. *See id.* Between 1936 and 1941, housing starts in the United States increased from 332,000 annually to 619,000 annually. *See id.*

⁴⁷ Federal Housing Administration, Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act § 9 (1938) [hereinafter FHA, Underwriting Manual].

⁴⁸ *See id.*

⁴⁹ *See infra* notes 115-122 and accompanying text.

distances between zones to distances between lots, the manual quantified the social and physical characteristics of ideal urban (and suburban) middle-class environments in ways convertible to market variables. The rating criteria and application principles described in the manual thus demonstrate a pre-World War II conception of community ideals.⁵⁰

During this time, the overwhelming concern of underwriters was the long-term stability of neighborhood metamarkets and the diminishment of risks. Location criteria indicate that risk evaluations focused on the probability of maintaining a suitable balance of municipal services, such as fire protection, sanitation, and street paving,⁵¹ while providing access to quality neighborhood amenities, such as schools, shopping centers, libraries, and parks.⁵² It was thought that the physical character of a neighborhood was further stabilized by adequate zoning and deed restrictions, preventing "the infiltration of business and industrial uses[.]"⁵³ Further, the manual explicitly instructed underwriters about their social and economic market-making role by reminding them repeatedly that stability demands the exclusion of undesirable people. "[L]ower class occupancy . . . and inharmonious racial groups" frustrated the emerging middle-class homogeneous ideal.⁵⁴ "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 contributes to instability and a decline in values."⁵⁵

The 1938 manual formalized an already rigid construction of middle-class residential markets by conditioning the federal government's support, which became critical during the imminent postwar housing boom, on a neighborhood's adherence to an increasingly complex set of middle-class ideals. By making the rules of homeownership subject to a myriad of spatial and socioeconomic factors, underwriting rules and land use policy practices combined with cultural norms to produce a self-perpetuating dynamic in which the needs and desires of middle-class consumers reinforced the demands of stable neighborhood markets. That blacks and other undesirable groups were systematically excluded from

⁵⁰ The manual itself makes frequent use of the market metaphor, sometimes in striking ways. For example, in describing basic principles of neighborhood rating, the manual directs: "As a general rule, the attitude of the market reflects the degree of acceptability of prevailing conditions, providing the market is reasonably cognizant of its needs. However, acceptability and tolerance are not synonymous." See FHA, UNDERWRITING MANUAL, *supra* note 47 at ¶ 908.

⁵¹ See *id.* at ¶ 961.

⁵² See *id.* at ¶ 949.

⁵³ *Id.* at ¶ 935.

⁵⁴ *Id.* at ¶ 935.

⁵⁵ *Id.* at ¶ 937. These distinctions were refined in the sections for rating the economic background of neighborhood residents. Underwriters were urged to inspect the stability and sufficiency of local family incomes as well as the "social characteristics" of neighborhood occupants. "By social characteristics are meant the moral qualities, the habits, the abilities and the social, educational and cultural backgrounds of the people." *Id.* at ¶ 929.

this good life ideal is not yet the focus of this analysis. Further, I do not assert that everyone who subscribed to or benefited from these rules objectively belonged to the middle class. Rather, it is simply important here to acknowledge that the judiciary and the federal government supported zoning practices that were both driven by private interests and central in defining middle-class ideal structures.

C. Judicial Deference to Civic Self-Determination and the Idealized Scheme

1. State Cases

The entrenchment of residential zoning as a community's chief means of defining its living arrangements is hardly surprising, given the contractual bonds that accompanied homeownership and the wealth rewards that accrued from it.⁵⁶ What seems less inevitable in hindsight is why the concerns expressed by Judge Westenhaver in 1924 continued to be ignored by courts.⁵⁷ As a general matter:

[z]oning, which initially sought the separation of inconsistent uses within a jurisdiction but not the total exclusion of otherwise lawful land uses, was transformed to permit a community, separated only by "invisible municipal boundary lines" from the rest of the region, to maintain itself as an exclusively residential place. . . . The cases ratified the emergence of all-residential communities, treated them as typifying local government, and then relied on the all-residential model to sustain local legislation intended to mandate and continue that all-residential character.⁵⁸

Critical to the argument that residential spatial arrangements constituted the institutionalization of middle-class ideal structures (and ultimately metamarkets of consumer stability) is the advancement and articulation of their underlying norms by state and federal courts after *Euclid*. That deference to middle-class structures, in the face of a variety of legal challenges, was for decades undisputed, and it legitimated the public and private forces that constructed separate worlds.⁵⁹

⁵⁶ See *infra* notes 115–122 and accompanying text.

⁵⁷ See MASSEY & DENTON, *supra* note 46, at 42–45; see also JACKSON, *supra* note 46, at 238–45; EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 74–78 (1994).

⁵⁸ Briffault, *supra* note 5, at 369 (quoting *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441, 446 (N.J. 1954)).

⁵⁹ In fact, it is doctrine. See, e.g., *Zygmunt v. Planning and Zoning Comm'n*, 210 A.2d

The legal language effectuating segregated uses, as we have seen, is instructive. Among the state courts that have heard the vast majority of zoning-related disputes, the case law often evokes the imagery of peaceful surroundings while invoking *Euclid's* police power justifications for zoning practices. For instance, before it upheld a town's right to pass a zoning amendment that required one-acre minimum lots, the Massachusetts Supreme Judicial Court opined that, in addition to better play areas for children, the zoning requirement might create "more inducement for one to attempt something in the way of the cultivation of flowers, shrubs and vegetables."⁶⁰ Such language is far from rare, and courts continually deferred to police power enactments to control community character.⁶¹ In the postwar period, state courts continued to expound upon the basic ideals structuring middle-class life, primarily in common suburban disputes such as minimum floor space requirements,⁶² minimum lot sizes,⁶³ exclusions of multifamily housing,⁶⁴ bans on mobile homes,⁶⁵ and any proscribed uses that might reduce property values or aesthetic integrity.⁶⁶

Although many of these state court cases involve suburban areas and may seem inapplicable to a more urban context, they remain relevant for at least two reasons. First, courts weighing urban land use disputes themselves resort often to the more bountiful precedent developed on the urban periphery.⁶⁷ Second, both the legal principles and cultural values lurking in suburban case law are prominently on display in important Supreme Court adjudication of disputes over the preservation of middle-

172, 175 (Conn. 1965) ("The courts do not and should not substitute their judgment for that of the local authority.").

⁶⁰ *Simon v. Town of Needham*, 42 N.E.2d 516, 518 (Mass. 1942).

⁶¹ See, e.g., *Berenson v. Town of New Castle*, 341 N.E.2d 236, 241 (N.Y. 1975) ("The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land."); *Flora Realty and Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 776 (Mo. 1952) ("Any intrusion of smaller lots into such an area will have the effect of materially impairing the value of the buildings already constructed. . . . The zoning ordinance has tended to stabilize and preserve the value of the property in the several districts."); *Duffcon Concrete Products, Inc. v. Borough of Cresskill*, 64 A.2d 347, 350 (N.J. 1949) (taking judicial notice of facts showing that the concrete mixing at issue in residential town could be performed more suitably in other nearby municipalities).

⁶² See *Lionshead Lake, Inc. v. Township of Wayne*, 39 A.2d 693, 697 (N.J. 1952).

⁶³ See *Bilbar Constr. Co. v. Board of Adjustment*, 141 A.2d 851 (Pa. 1958); *Honeck v. County of Cook*, 146 N.E.2d 35 (Ill. 1957); *Fisher v. Township of Bedminster*, 93 A.2d 378 (N.J. 1952).

⁶⁴ See *Beaudoin v. Rye Beach Village Dist.*, 369 A.2d 618 (N.H. 1976); *Rademan v. City of Denver*, 526 P.2d 1325, 1327 (Colo. 1974); *Fanale v. Borough of Hasbrouck Heights*, 39 A.2d 749 (N.J. 1958).

⁶⁵ See *State ex rel. Wilkerson v. Murray*, 471 S.W.2d 460, 462 (Mo. 1971); *Vickers v. Township Comm.*, 181 A.2d 129 (N.J. 1962).

⁶⁶ See, e.g., *Stewart v. Inhabitants of Durham*, 451 A.2d 308, 310 (Me. 1982).

⁶⁷ "Judicial treatment of the suburbs as the paradigmatic local government helps to explain the localist results in many cases, much as the political power of suburbs contributes to the localism of state legislation." Briffault, *supra* note 5, at 356.

class ideals applicable to most communities, including cities, during the post-1960s period of settled suburban expectations.⁶⁸

2. Supreme Court Cases

A quartet of cases from the late 1970s to early 1980s is illustrative of the preservation of middle-class ideals: *Village of Belle Terre v. Boraas*,⁶⁹ *Moore v. City of East Cleveland*,⁷⁰ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁷¹ and *Memphis v. Greene*.⁷² The first pair is profamily, while the second pair is racially contentious.

Belle Terre presents the modern Court's imprimatur on the ideal structures gently supported by Justice Sutherland and hotly disputed by Judge Westenhaver in *Euclid*. The *Belle Terre* Court upheld the Long Island village's ordinance prohibiting unrelated persons—specifically, college roommates—from cohabiting in neighborhoods zoned for single families. Justice Douglas, in his own pass at florid, family oriented imagery, distinguished “urban problems” from the ideals of the suburban community at issue:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.⁷³

Rather than sounding a vulgar defense of elite exclusivity, the language of the *Belle Terre* opinion illustrates the Court's conception of community self-determination and offers the college students an aspirational lesson in the spatial prerequisites of middle-class life.

Moore, in a plurality decision, struck down a city ordinance that limited acceptable living arrangements within families. East Cleveland's zoning ordinance defined families in ways that excluded certain extended family members, such as the grandson over whom Inez Moore had guardianship since the death of his mother when the child was an infant. The city defended its ordinance on the strength of *Belle Terre*. Justice

⁶⁸ The Supreme Court did not decide another zoning case for forty years after 1928. See DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 42 (2d ed. 1986).

⁶⁹ 416 U.S. 1 (1974). *Accord* Oxford House-C v. City of St. Louis, 77 F.3d 249, 252 (8th Cir. 1996).

⁷⁰ 431 U.S. 494 (1977).

⁷¹ 429 U.S. 252 (1977).

⁷² 451 U.S. 100 (1980).

⁷³ *Belle Terre*, 416 U.S. at 9.

Powell's opinion strained against the dissenters to locate the decision outside of the traditional *Euclid* test of rationality and into the higher scrutiny demanded by privacy issues. By introducing privacy concerns, the Court's decision to hold the ordinance unconstitutional squared with *Belle Terre*: communities do, in effect, have the right to define the character of their neighborhoods, so long as they respect the bounds of family.

More importantly for the purposes of this Article, the fact that the police power includes the right to determine family configurations at all and to legislate the boundaries of community character is what unites the two cases in defense of middle-class ideal structures. The decisions are primarily distinguishable by matters of degree. East Cleveland's legislative rationale—to prevent overcrowding, to minimize traffic and parking congestion, and to avoid undue financial burden on the city's schools⁷⁴—wandered over the line into the family regulation that *Belle Terre* purportedly respected. However, in a concurring opinion, Justice Brennan confronted the underlying sociology by calling the nuclear family configuration in the city's ordinance a product of "white suburbia,"⁷⁵ and raised two factual issues omitted in the main opinion. First, Ms. Moore was black.⁷⁶ Second, black families in 1977 were five times as likely as white families to live among relatives in extended family units that might run afoul of ordinances like East Cleveland's.⁷⁷ In effect, East Cleveland was making a cultural statement in code by configuring families this way.⁷⁸

Arlington Heights, in which the Court rejected equal protection challenges to a Chicago suburb's zoning ban on multifamily housing, demonstrates the Court's willingness to ignore context and uphold middle-class preferences by limiting efforts of desegregation and poverty advocates.⁷⁹ Having recently restricted the standard for proving racial discrimination in *Washington v. Davis*,⁸⁰ the Court mechanically applied its new intent burden to evidence offered by the unsuccessful nonprofit housing developer.⁸¹ The decision is particularly relevant because it takes

⁷⁴ See Moore, 431 U.S. at 499–500.

⁷⁵ *Id.* at 508 (Brennan, J., concurring).

⁷⁶ See *id.* at 510 (Brennan, J., concurring).

⁷⁷ See *id.* (Brennan, J., concurring).

⁷⁸ Justice Stewart appropriately countered Justice Brennan by asking whether East Cleveland, a predominantly black suburb with a predominantly black governance, was not constitutionally entitled to follow the "pattern" of "white suburbia." *Id.* at 537 n.7 (Stewart, J., dissenting). The exchange suggests, perhaps, that the ideal structure may be as class coded as it is racial.

⁷⁹ However, in *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), which was tried instead under the Fair Housing Act, 42 U.S.C. §§ 3601–14 (1995), plaintiffs prevailed.

⁸⁰ 426 U.S. 229 (1976) (holding that an official action will not be held unconstitutional solely because it has a racially disproportionate impact).

⁸¹ Though the village's decision did arguably bear more heavily on racial minorities, the housing developer's evidence of statements made by the Plan Commission and village board members did not support an inference of invidious purpose. See *Arlington Heights*,

a narrow view of history, not only of this particular village's racial and economic homogeneity, but of so many others like it that were continuing to develop at the time.⁸² However, it bears some emphasis here, in light of the Court's own suggestion that, given the sensitivity of racial inquiries, "[t]he historical background of the [local legislative] decision is one evidentiary source[.]"⁸³ Fifty years after Judge Westenhaver exposed the exclusionary edifice of zoning for the middle class, the Court once again appeared worried homeowners by reaffirming the comfort of *Euclid*.

In another decision upholding the application of middle-class ideal structures on behalf of white homeowners, the majority in *Memphis v. Greene* held that neither Section 1982 of the Civil Rights Act of 1866⁸⁴ nor the Thirteenth Amendment⁸⁵ was violated by the city's approval of a plan to close off a thoroughfare in a white neighborhood to traffic from an adjacent black neighborhood. The Court stated that the rerouting of what white property owners called "undesirable" traffic from the black neighborhood was a mere "inconvenience"⁸⁶ incidental to the city's legitimate interest in increasing child safety and neighborhood tranquility. The majority endorsed the district court's finding that the racially particularized inconvenience was no more than geographical accident, not unlawful disparate treatment.⁸⁷ Further, the majority discounted evidence that the city council's action deviated significantly from administrative procedure;⁸⁸ the Court also discounted a predicted decline in property values in the black neighborhood to the north.⁸⁹ "In this case," Justice White explained, "the city favored the interests of safety and tranquility" and expanded the ideal of the suburban home as a "castle" into urban

429 U.S. at 269.

⁸² Legal scholars have aptly demonstrated this ahistorical tendency in post-Warren Court decision making. See, e.g., Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 406 (1989) (discussing the dueling versions of relevant historical background presented by Justices Scalia and Marshall).

⁸³ *Arlington Heights*, 429 U.S. at 267. Narrowly construed, this factor may apply only to the history of a specific legislative action, rather than its place amid a pattern of legislative effects.

⁸⁴ "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1994).

⁸⁵ "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

⁸⁶ See *Memphis v. Greene*, 451 U.S. 100, 112 (1980).

⁸⁷ See *id.* at 108-09.

⁸⁸ See *id.* at 142-43 (Marshall, J., dissenting) (noting that no notice was given to black property owners north of the proposed boundary, that owners did not participate in a public hearing until they were finally allowed a fifteen-minute slot, and that the city had never before closed a street for traffic control purposes).

⁸⁹ See *id.* at 117.

areas.⁹⁰ Whatever differences that existed were rendered irrelevant in a case about mere traffic flow.⁹¹

Of course, *Greene* concerns far more than traffic patterns, such as the economic and racial segregation of neighboring communities within a city's boundaries, the official regard for such local decisions about space, and the resulting diminution of power and money in the public and private markets struggling within the confines of racially determined spaces. The case is an unusually stark illustration of the relationship between maintaining middle-class ideals and fitting the geographic and political boundaries of ghettos. The Court was willing to acquiesce in the white community's psychic needs, expressed through the coded antitheses of undesirable traffic and safety and tranquility interests despite little supporting evidence of necessity. However, its concern for the psyche was used up by the time that evidence of black psychological injury was presented and dismissed.⁹² These expressions of judicial attitude are very important because the psychological motives and legally protected rights crafted from them are the very lynchpin of community metamarkets. After all, no party to the action had empirical proof of either an increase in property values in the white neighborhood or a decrease in the black one; it was purely speculative.

3. Civic Participation

Underlying all four Supreme Court decisions is a firm normative appreciation of the value that civic participation has among middle-class ideal structures. "[T]he American ideal of homeownership," writes Constance Perrin, "is equally the idea of perfected citizenship."⁹³ Homeownership, or perhaps stakeholdership, in middle-class residential markets implies an optimized participation in local affairs. For middle-class stakeholders whose participation is equally premised on residency and ownership,⁹⁴ local affairs have been constituted publicly and privately. That is, ownership of the home validated the family's political identity in the sense that most interests in public decision making flow from that personal economic stake. Since those interests center on milieu—for instance, the racial and economic composition of neighbors, neighborhood

⁹⁰ *Id.* at 126–27.

⁹¹ "Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group." *Id.* at 128.

⁹² See *id.* at 139–40 (Marshall, J., dissenting) ("The psychological effect of this barrier is likely to be significant.").

⁹³ CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 72 (1977).

⁹⁴ For a discussion of which status provides a more efficient basis for local decision making, see Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1539–54 (1982).

amenities, public goods, preserving or increasing property values—governance concerns turn less on a public/private distinction than on the homeowner's determination of the vehicles available to protect her interests, the degree of that protection, and whether or not she has a say. As we have seen, public vehicles included zoning restrictions that excluded undesirable people and uses. Private vehicles included racially restrictive covenants and deed restrictions, as well as homeowner, condominium, and neighborhood associations.⁹⁵ Voting on local issues is, of course, an important exercise in political participation that middle-class constituents have always vigorously pursued. However, middle-class people are acutely aware that, by aggregating the individual power of voting with the collective power available through privatized, contractually defined relationships, such as homeowners associations, one exerts far greater pressure on political elites to protect one's interests.

While the suburban middle class began with strong political power to enforce their interests⁹⁶ and continues to seek the greater protections that privatization affords,⁹⁷ the political interests of the urban middle class are subject to much less certainty and control. Urban middle-class neighborhoods neither possess the legal authority to exclude undesirables through zoning, nor are able consistently to count on their clout as a local political bloc to halt construction of every unwanted facility or store. With few exceptions, they cannot even be assumed to share the same interests in the physical landscape. Beyond voting, then, how is their participation measured in maintaining the stability of urban metamarkets?

They organize, delegate, and occasionally initiate protest, or, as Tiebout posited⁹⁸ and many mayors have discovered to their horror, they leave. Urban middle-class ideal structures may not mirror suburban ideal structures exactly, but they share enough similarities in terms of home values, infrastructure services, and available retail markets to engender private organizing similar to that of the suburban middle class. Typically, those urban organizations, such as block and neighborhood associations and condo and coop boards, operate through a delegation of power from members. On their members' behalf, they manage distinctly local functions, such as the proposed street closing in *Greene*. When more substantial threats loom, such as the proposed siting of a homeless shelter or waste treatment facility, many individuals accustomed to delegating authority to others choose to initiate concerted protest (if not litigation), and the local functions of private associations temporarily become much larger. The perceived threat, I argue, is not merely a threat to one's im-

⁹⁵ See MCKENZIE, *supra* note 57, at 68–78.

⁹⁶ See Briffault, *supra* note 33, at 57. This simply reflects the legal autonomy that a municipality has relative to neighborhoods within a city.

⁹⁷ For example, consider the steady growth of common-interest developments and residential private governments. See MCKENZIE, *supra* note 57, at 106–21.

⁹⁸ See *supra* notes 2–7 and accompanying text.

mediate quality of life; it is a threat to the middle-class lifestyle. As many city politicians well understand, enough threats and an exodus of critical taxpayer consumers ensues.⁹⁹

D. Market Realization of Aspirational Ideals

Today, involvement in defining neighborhood character may be less formal or frequent among consumers, many of whom have come to expect metamarkets capable of fulfilling deeply felt ideals about the social and economic interaction between a life and a place. Evidence suggests that the sense of middle-class status associated with owning a home in a particular place is not always consciously appreciated,¹⁰⁰ leading to even further psychic implications for landowners: on some level, middle-class consumers seek out neighborhoods as mirrors of themselves—or at least themselves as they aspire to be.

The idea that middle-class ideal structures can be collapsed into a market metaphor for the purpose of understanding economic development frameworks has theoretical as well as practical significance. Theoretical analysis of underlying land use norms demonstrates a clear intent to create and sustain a middle-class idealized metamarket. When measured by wealth acquisition and growth for its participants, that intention has been realized.

1. Market Maintenance and the Purpose of Land Use Regulation

Most consumers compare and evaluate the extant web of locationally defined markets for the public and private goods and services that they value the most. Land use decisions contribute to stable outcomes by honoring the underlying ideal structures that fuel, sometimes unconsciously, these myriad preferences. Others have described the role of land usage differently. Charles Haar, for example, asserts that

[t]he land-use control system especially encompasses the assumption of individual sovereignty: as possessive beings, people best express themselves through the operation of the unfettered market. The land-use control system in the United States stands

⁹⁹ Of course, this has led to a movement for economic development outside ghettos. As cities have competed for the middle class, the policy goals have been to retain businesses, bring in new investment, and encourage gentrification. See Briffault, *supra* note 5, at 411.

¹⁰⁰ See PERIN, *supra* note 93, at 50.

on a base of a remarkably unified cultural and political tradition. The Lockean view of inherent rights dominates.¹⁰¹

What I refer to collectively as ideal structures, Haar calls Lockean or classical liberalism. In his view, the preference for an unfettered market is the preference for the freedom to do on one's land what one wants when one wants to do it. "The predominant philosophy of land-use reflects the overall societal emphasis of [sic] the hedonistic pursuit of material well-being."¹⁰² If his assertion is true, then it is fair to view these middle-class believers in the spatial ideal structures of the American dream as consumers. Material well-being, reduced to its earthly basics, can be bought. However, that does not resolve the question about the purpose of land use regulation. If middle-class consumers (or Tiebout's consumer-voters) want unfettered markets—and it may not matter so much if they do—why is community membership based as much on owning a home or apartment as participating in making (or endorsing) the surrounding onerous regulations on personal freedom?¹⁰³ One answer is that the market is really a metaphor, and what the consumer actually seeks is what metamarkets provide through the intervention of land-use controls. Thus, Haar states:

[Z]oning can be justified as expunging imperfections in the market, rather than replacing it wholesale or interfering with its operations. The real estate market is traditionally an inefficient one—primarily local, characterized by imperfect knowledge of supply and pricing, and dominated by lack of data or awareness of national trends. Hence there is a need for legislative enactment to rectify these shortcomings, but one that still owes allegiance to the untrammelled theory of the market.¹⁰⁴

¹⁰¹ Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1018 (1996).

¹⁰² *Id.* at 1018–19.

¹⁰³ Homeownership in a city or suburb is nearly always accompanied by rules, such as permissible yard furniture, move-in times, subletting limitations, animal bans, fence coloring, and flip taxes, the latter of which is just one example of many costs and periodic assessments to which owners implicitly assent when they contract to become members of homeowner, condominium, or cooperative associations. However, by these examples, I do not mean to confuse private regulation of shared quarters (common areas, subdivisions, etc.) with public regulation of public areas for which residents do not contract. The latter occur through a different delegation, i.e., to a public (sometimes elected) body, such as a zoning commission. Seismic academic debates hang on this public/private distinction. Compare Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) with Ellickson, *supra* note 94 (arguing contrasting views of decentralized decision-making). My point is a fence-sitting position: the consumer-owners' proclivity to adopt freedom-constraining regulations transcends the public/private distinction; they seek and accept regulation in both.

¹⁰⁴ Haar, *supra* note 101, at 1030.

Because, "[l]ike American society, zoning is profoundly middle-class and liberal in its basic orientation towards rights,"¹⁰⁵ Haar's assertions about the nature of zoning are not applicable to the vast majority of Americans. The making of middle-class metamarkets in residential urban and suburban areas, based on idealized notions of self-worth and the good life, was not merely illusory. Selectivity and exclusivity, as we have seen, were institutionalized not only through the pattern of homeowner association decisions, but also through the willingness of courts and government bodies to enforce the ideals and real estate developers' willingness to market to those associations. Stability was the point of intersection for each institutional force. Stability, however, can be measured in market terms. Indeed, the function of the market in middle-class neighborhoods is to perpetuate stability. Middle-class homeowners expect stable residential markets in home prices, food shopping, personal services, police and fire protection, public education, and street maintenance. Some of the items on this partial list of what I call quantifiable components of metamarkets might be termed private and public amenities. However, to the extent that they represent an interdependent array of goods and services for consumers with a sense of status entitlement (whatever it might be) and desire for psychic satisfaction, these amenities and other factors fairly constitute a middle-class metamarket.

The metamarket, however, is not a free market. Government regulation and provision of public goods and services also perpetuate stability. Without assurances that sanitation codes will be enforced or that roads will be maintained by the municipality, the businesses and landowners operating within their respective markets (e.g., retail clothing and rental housing) will either leave, reduce their investments, or risk that the area will become less than middle-class.¹⁰⁶ Indeed, without the active participation and regulation of government and quasi-government functions, they risk declining into "bad" neighborhoods. Therefore, through the combined private and public forces of a metamarket dynamic, middle-class urban neighborhoods (consumers and institutions) must protect their status or go bust (e.g., via stagnating property values, physical deterioration, a decline in the quality of services, leaving or changing businesses, or waning concerns with family life).¹⁰⁷

¹⁰⁵ *Id.* at 1020.

¹⁰⁶ Business and capital exit may not be limited to a perceived decline in neighborhood metamarkets, as entire cities, such as Newark and Detroit, experienced following riots in 1967. See *supra* notes 2-7 and accompanying text.

¹⁰⁷ For an interesting contemporary example, see Amy Waldman, *Bronx Neighbors Spar over School*, N.Y. TIMES, Feb. 25, 1999, at B1. In a New York City dispute between predominantly white residents of an upper middle-class Bronx area, Riverdale, and largely lower-income black and Latino residents of Marble Hill, Riverdale community board advocates used the occasion of the building of a proposed new middle school in their shared district to urge the break-up of the school district itself. The new boundaries of the proposed Riverdale district would double the current percentage of white students to approxi-

2. Market Implications for Wealth Attraction and Accumulation

The practical meaning of the middle-class metamarket concerns two major considerations: the relative health of the local consumer infrastructure in which some socioeconomic "rights" are exchanged and the material wealth accumulation that the "rights-holders" expect to accrue there.

Although neighborhoods are rarely economically self-sufficient, instead integrated by proximity and more or less comprehensive planning with interdependent sectors of the city and region, most middle-class consumers seek complementary goods and services close to home. They pay for them, whether they are public goods and services (such as schools or road repair) or private ones (such as restaurants, dry cleaners, and supermarkets). This arrangement of goods and services can be aggregated or quantified comprehensively into what I have called the consumer infrastructure of a given part of a city or suburb. Its specific ingredients may vary according to the inquiry,¹⁰⁸ but, in general, the consumer infrastructure includes baseline categories that matter most to consumers with a choice of where to live. Food, banking, schools, health care, recreational space, housing inventory, and police, fire, and sanitation services comprise a representative list.¹⁰⁹ When one speaks colloquially about what tends to make a neighborhood "nice,"¹¹⁰ these baseline factors are usually what is meant.

Private investment decisions are made based on the quantifiable data about these specific aspects of the local landscape. In turn, these investors, namely banks, businesses, and developers, become economic stakeholders in the stability of the community, contributing their power, influence, and, perhaps most importantly, reinvestments. In the sum dy-

mately 30–40% of middle-school students and exclude many of the poorest and underperforming students from Marble Hill. Under the reorganization, Marble Hill would receive a new middle school whose population would be overwhelmingly poor and minority, while Riverdale would receive an "academy" attended by a much higher number of its own residents. Proponents argued that, without such a change, many young Riverdale families would abandon the area altogether. They also argued that opponents were motivated by economic jealousy, and risked losing a badly needed new facility. Marble Hill residents, on the other hand, called the plan racist.

¹⁰⁸ This caveat is particularly relevant to the comprehensive planning discussion of what makes an adequate consumer infrastructure in neighborhoods of extreme poverty. See *infra* notes 226–260 and accompanying text.

¹⁰⁹ In a comparative study of the consumer infrastructures in middle-income and low-income neighborhoods of Oakland and Los Angeles, I arbitrarily chose a market basket approach (i.e., the public and private goods and services for which average households spend a substantial portion of their monthly income) consisting of five categories: food, housing, banking and credit services, health facilities, and basic neighborhood goods and services (e.g., dry cleaners and pharmacies). Admittedly, that list was limited. See *infra* notes 292–310 and accompanying text; see also DAVID DANTE TROUTT, CONSUMERS UNION, *THE THIN RED LINE: HOW POOR CONSUMERS STILL PAY MORE* (1994).

¹¹⁰ See Frug, *supra* note 21, at 1047 ("Everyone knows which parts of the metropolitan area are nice and which are dangerous.").

namics of these metamarket actors, shorthand measurements, such as tax base,¹¹¹ have come to describe them. Some of these neighborhood attributes may simply make life easier, such as convenient shopping, while others, such as quality emergency services, may save lives.

While all of this may seem a rather unsophisticated characterization of neighborhood economic markets in the conventional use of the term, it is important to keep in mind that these quantifiable metamarket components are closely linked to Tiebout's "tiny point" about noneconomic variables, or what I include within the notion of ideal structures. The point is that middle-class consumers, particularly families, can expect to obtain stability and support in the form of the commercial investment climate and political responsiveness of city agencies that make possible a fairly typical assortment of similar public and private goods and services. Such a metamarket, from the perspective of consumer tastes, can be said to hold sufficient wealth.

The second dimension of the wealth of a community's metamarket is its direct implications for the accrued wealth of individual middle-class households. Generally speaking, scholars often define middle-class status along three related measures: income, occupation, and education. Broadly, the income range is \$25,000–50,000 per year.¹¹² A college degree is also typically considered a prerequisite to being middle-class.¹¹³ Occupationally, middle-class means working in white-collar jobs, including self-employment.¹¹⁴ However, from the perspective of expectations, family resources, and the relationship between community metamar­kets and consumer well-being, wealth is a more telling measure of class than income or job status.

Wealth formation represents the cumulative rock of financial readiness over time.¹¹⁵ It is, therefore, an important end goal of household stability, while the absence of wealth formation refers chronically to a family's desperation and inability to plan, build, or endure beyond the fact of uncertainty. In their study of the sociology of wealth and racial inequality, Melvin L. Oliver and Thomas M. Shapiro observe that:

¹¹¹ See Arthur Lyons, *Development Effects of the Assessment and Property Tax System*, in CHALLENGING UNEVEN DEVELOPMENT: AN URBAN AGENDA FOR THE 1990s 133 (Philip W. Nyden & Wim Wiewel eds., 1991) [hereinafter CHALLENGING UNEVEN DEVELOPMENT] ("The most common measure of the tax base is 'market value[.]' . . . the price actually paid for a recently sold parcel of property that is similar to the one being assessed[.]").

¹¹² See OLIVER & SHAPIRO, *supra* note 13, at 70.

¹¹³ See *id.*

¹¹⁴ See *id.* at 94.

¹¹⁵ This is the driving hope of a family's ability to move to a better neighborhood and may define social mobility. "By drawing on the benefits acquired through residential mobility, aspiring parents not only consolidate their own class position but enhance their and their children's prospects for additional social mobility." MASSEY & DENTON, *supra* note 46, at 150.

[w]ealth signifies the command over financial resources that a family has accumulated over its lifetime along with those resources that have been inherited across generations In this sense the command over resources that wealth entails is more encompassing than income or education, and closer in meaning and theoretical significance to our traditional notions of economic well-being and access to life chances.¹¹⁶

Of course, wealth is not important merely as the symbolic condition and incidence of middle-class membership; wealth also has practical dimensions. The ability to draw on assets transforms the meaning of an unexpected tragedy, such as loss of a job or a catastrophic illness, into an exercise in crisis management, rather than devastation. Wealth buys time while options can be explored and postpones the finality of a fall.

The vast bulk of middle-class America's wealth consists of homes, representing 43% of median household assets in 1988.¹¹⁷ There is an important historical slant to this: because home prices tripled during the 1970s,¹¹⁸ people born between 1929 and 1938 accumulated more wealth at a greater rate than other age groups as their earnings accrued during the strongest periods of economic growth.¹¹⁹ This, of course, is the frontier generation born into the ideal structures protected by *Euclid*. "[T]he process of asset accumulation that began in the 1930s has become layered over and over by social and economic trends that magnify inequality over time and across generations,"¹²⁰ thus enabling many working-class and blue-collar white families to attain middle-class outcomes for themselves and their children.

The opportunities discussed herein were not made uniform until the years immediately after World War II, when the combination of trial and error, judicial deference, federal and state intervention, economic necessity, highway infrastructure, and political alignment took predictable root in land to produce an identifiable American dream.¹²¹ Out of chaos came

¹¹⁶ See OLIVER & SHAPIRO, *supra* note 13, at 2.

¹¹⁷ See *id.* at 63.

¹¹⁸ See *id.* at 49, 108.

¹¹⁹ See *id.* at 73.

¹²⁰ *Id.* at 51.

¹²¹ Michael Sherraden is less sympathetic to notions of individual thrift or choice in his summary of the effectiveness of middle-class asset accumulation—primarily through homeownership and retirement pensions.

[T]he middle class accumulates its wealth, not so much through superior individual investment, but through structured, institutionalized arrangements that are in many ways difficult to miss Some few people do manage to lose it all through profligacy or an ill-advised investment, but they are the exception rather than the rule Without a structure to facilitate asset accumulation, much of it simply would not occur.

aspirational ideals of stability: the single-family detached home, low taxes, nice neighbors, civic participation, good schools and services, no unwanted uses or undesirable social groups, maximized self-worth, conflict avoidance, and, beneath it all, rising property values. In turn, the metamarket was premised on legal and policy instruments that promoted comprehensive land-use planning, class and racial homogeneity, a distinct profamily bias, and the accumulation of community wealth. Although they are not personal, constitutional, property-based, or even civil in origin, middle-class consumers nevertheless think of these cherished benefits of the market as inalienable rights.¹²² To possess these rights is simply to be within the norm—to be normal.

This description of a metamarket model of middle-class communities is not offered as a critique, nor do I mean to suggest moral criticism of the underlying ideal structures for which it stands. The metamarket simply is what it is. Its relevance to the project of contemporary paradigms for the economic development of inner-city neighborhoods is, in fact, the ability of middle-class metamarkets to bring goods and services. The metamarket model has brought stability to millions, if not most, American neighborhoods and teaches a great deal about what processes should also occur in unstable communities. As I will discuss in Part IV, such market-oriented notions presently dominate strategies for ghetto revitalization. However, it is important to acknowledge that ghettos are not simply failed middle-class markets. Ghettos are antimarkets, the subject explored in Part III.

¹²² Briffault discusses this ambiguous rights orientation within the particular context of localism and interlocal relations. "Localism reifies local borders, using invisible municipal boundary lines to delimit the range of local concern and the proper subjects of local compassion and treating the creation and maintenance of local borders as a basic right." Briffault, *supra* note 5, at 444. Localism further translates discussions of government structure and responsibility into rights language. Thus, local self-determination fuses with individual autonomy, and control over schools and land use are defended against state interference as if they fell under the penumbra of personal privacy rights. *See id.* at 445.

III. The Making of Ghetto Antimarkets

If ghettos could be defined primarily by the economic and racial homogeneity of the people living within the relative isolation of known physical boundaries, it might be possible to dispense with the term altogether and treat them as a species of enclave, not conceptually dissimilar to an upper-middle-class suburb.¹²³ What makes ghettos fundamentally different is the extent to which they constitute the antithesis of the middle-class metamarket described in the previous part. As communities, they were developed through different rules and they continue to play outside of the game. If being middle-class constitutes the norm among consumers in the United States, then to be raised and to live in a ghetto is to be the antinorm. That is why I refer to ghetto communities as antimarkets. Yet, in order to be useful, the term cannot only mean that such neighborhoods merely function differently and according to different rules than middle-class areas. It also means that the antimarket operates in functional opposition to middle-class markets and helps to make the thesis of such communities possible.

In the previous part, I argued that the middle-class metamarket was built upon many public and private elements that served developing ideal structures. These primarily included segregated land uses (through zoning regulation and civic participation); governmental and private economic assistance for investments in favored residential arrangements (e.g., the single-family detached home); legalized exclusion of market depressors (e.g., judicial deference to anti-industry ordinances and apartment houses); and the provision of municipal services to facilitate the growth of consumer infrastructures. This part explores how these same elements were used against, or denied to, predominantly black urban neighborhoods throughout the twentieth century. Before taking each factor in turn, however, I will engage in a brief discussion of the role of *de jure* segregation's in cementing the spatial ordering of the black poor and contributing to the antimarket. Indeed, some of the scholars cited below argue powerfully that segregation is the descriptive paradigm that matters in evaluating ghetto poverty.

¹²³ This remains, however, an interesting conceptual intersection, because the two often share very similar attributes, including relative uniformity of housing type, racial and economic homogeneity, well-defined borders (though ghettos tend to be less static), a population disproportionately composed of family households, a relative dearth of retail services in close proximity to where people live, and, one might add, distinctive community character.

A. Segregation and the Coding of Undesirables in Law and Business

The process of creating and sustaining antimarkets in ghetto areas began with the coding of blacks and their neighborhoods as *prima facie* undesirable.¹²⁴ The term coding suggests that such pejorative labeling was typically masked, which, across most of the United States during the pre-civil-rights industrial age, was hardly the case. Open racial hostility and violence toward blacks were distinct methods of spatially ordering blacks out of the rationally planned communities developing during the early decades of the twentieth century.¹²⁵ The ratings system adopted by the Home Owners' Loan Corporation ("HOLC") and the FHA did not merely define criteria for good life ideals, but explicitly coded blacks as undesirable neighbors whose presence would have a direct impact upon the market by making loans virtually unavailable to them.¹²⁶ The federal government's policies in this regard alternately influenced and mirrored those of neighborhood "improvement associations,"¹²⁷ blockbusting real estate developers,¹²⁸ and private lending institutions,¹²⁹ giving rise to an inflated residential market in overcrowded black neighborhoods.¹³⁰ Whether the coding of a black presence translated directly into profits or was simply one stable measure of antinormative status, it is clear that the country's early twentieth-century blueprint for making and sustaining the American dream was built in part on the nineteenth-century edifice of "badges and incidents of slavery."¹³¹

¹²⁴ See Frug, *supra* note 21, at 1088 (arguing that zoning and redevelopment policies have been "dominated for decades by a connection between the same two images: 'nice' neighborhoods, property values, and economic growth, on the one hand, and the exclusion of 'undesirables' on the other").

¹²⁵ See MASSEY & DENTON, *supra* note 46, at 34-35 (noting how generalized violence that was used to contain blacks in all-black areas of cities gave way to more targeted acts of personal and property destruction after 1920).

¹²⁶ One may argue that the ratings systems used by HOLC, the FHA, and the private lenders that followed suit were focused more on the exclusion of blacks and other undesirables than on a professional assessment of the good middle-class borrower. See JACKSON, *supra* note 46, at 196-217.

¹²⁷ "Neighborhood improvement associations," the precursors to contemporary homeowners associations, were instrumental in keeping black residential expansion within established borders. See MASSEY & DENTON, *supra* note 46, at 35. Using economic leverage and well-organized civic involvement, such groups lobbied local politicians, boycotted real estate brokers that rented or sold to blacks, bought out black purchasers, and pushed for public investments in infrastructure amenities to increase property values beyond the reach of black buyers. See *id.* at 36.

¹²⁸ The practice of blockbusting involves a concerted effort by real estate brokerages to target an area for racial turnover by buying a sale property in a white area, selling or renting it to a selected black family (or families), then reaping the economic benefits of home sales created by the manipulated hysteria of fleeing white homesellers. See *id.* at 37-38.

¹²⁹ See *id.* at 54-55.

¹³⁰ See *id.* at 37.

¹³¹ Civil Rights Cases, 109 U.S. 3, 20 (1883). Indeed, this is the crux of the more contemporary dispute between Justice Marshall and Justice White in *Memphis v. Greene*, 451 U.S. 100 (1980). See *supra* notes 84-92 and accompanying text.

In their groundbreaking study, *American Apartheid*, Douglas Massey and Nancy Denton attribute these developments to the past and continuing segregation that takes the institutional form of the black ghetto.¹³² The historical trajectory of coordinated exclusions that continued past *Euclid* and *Buchanan v. Warley*¹³³ into such commonly used devices as restrictive covenants,¹³⁴ deed restrictions,¹³⁵ urban renewal policies,¹³⁶ public housing,¹³⁷ and rampant private discrimination expanded the sheer size of black ghettos¹³⁸ and entrenched the negative "concentration effects"¹³⁹ of their social and political isolation.¹⁴⁰ Over time, the community's impoverishment became self-executing:

¹³² See MASSEY & DENTON, *supra* note 46, at 8.

¹³³ 245 U.S. 60 (1917). Racial zoning did not end with the Supreme Court's decision in 1917, which some localities read to allow some leeway. As a result, Miami's segregated zoning restrictions were not prohibited until 1945. See *State v. Wilson*, 25 So. 2d 860 (Fla. 1946). Additionally, the City of Birmingham tried to appeal revocation of its segregated zoning ordinance to the United States Supreme Court in 1951. See *Monk v. City of Birmingham*, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951).

¹³⁴ Ruled an unconstitutional limitation of 14th Amendment rights to property in *Shelley v. Kraemer*, 334 U.S. 1 (1948), restrictive covenants were contractual terms agreed upon by a majority of relevant property owners forbidding the sale or lease of the subject dwelling to a person of African descent. Despite the Supreme Court's decision, such covenants continued to be enforced in some communities well into the 1950s. For a rich historical analysis of the development and continued use of restrictive covenants, see MCKENZIE, *supra* note 57, at 29–55.

¹³⁵ Deed restrictions, unlike restrictive covenants, applied only to a single subject property in prohibiting sales to blacks and other racial, ethnic, and religious groups. See MASSEY & DENTON, *supra* note 46, at 36.

¹³⁶ See *infra* notes 145–161 and accompanying text.

¹³⁷ See *infra* notes 162–174 and accompanying text.

¹³⁸ Massey and Denton describe the typical phases that many urban geographers use to describe neighborhood transition in neighborhoods where blacks were permitted to live or began to establish a presence: all-white, invasion, succession, consolidation, all-black. The simultaneous demographic shifts of black urban in-migration and white suburbanization produced a great expansion of the ghetto in large cities during the 1950s and 1960s. See MASSEY & DENTON, *supra* note 46, at 45.

¹³⁹ This is a term fairly attributable to sociologist William Julius Wilson's thesis regarding the cumulative layering of disadvantage that occurs in areas populated disproportionately by households in extreme poverty. Generally, the effects include such factors as: the outmigration of nonpoor households; an increase in the number of residents who become poor while living in a poor area; immigration of poor people; and changes in the age structure. See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 58 (1987); see also *infra* notes 184–194 and accompanying text.

¹⁴⁰ A practical consequence of racial and spatial isolation is the limited capacity to engage in coalitions and a corresponding diminution of interest group power. "The residential segregation of blacks . . . provided no basis for pluralist politics because it precluded the emergence of common neighborhood interests; the geographic isolation of blacks instead forced nearly all issues to cleave along racial lines." MASSEY & DENTON, *supra* note 46, at 155. Briffault makes an analogous assertion in the economic context of discredited claims: "By forcing residents of these poorer municipalities to rely primarily on local resources and discrediting their claim to a share of the resources of the region, state or nation, localism further disempowers the weak." Briffault, *supra* note 5, at 453. See also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

When the rate of minority poverty is increased under conditions of high segregation, all the increase is absorbed by a small number of neighborhoods. When the same increase in poverty occurs in an integrated group, the added poverty is spread evenly throughout the urban area, and the neighborhood environment that group members face does not change much.¹⁴¹

A segregation analysis contributes crucial insights into the processes of ghetto formation. Beyond the isolated ghetto, still visible residential segregation reminds us that the ideal structures supporting middle-class realities included stark and persistent racial discrimination. Further, segregation analysis undermines assertions either that all middle-class gains were self-made or that all ghetto poverty is self-deserved.¹⁴² However, to the extent that a segregation analysis of persistent urban poverty points away from in-place economic development models in favor of integrative or mobility-oriented approaches,¹⁴³ the instant analysis continues with a focus on the relationship between markets and antimarkets—a relationship, like segregation, that is too rarely acknowledged.¹⁴⁴

¹⁴¹ MASSEY & DENTON, *supra* note 46, at 12.

¹⁴² Indeed, Oliver and Shapiro, for example, view the divergent racial paths toward and away from wealth formation as evidence of both unearned privilege and the sedimentation of racial inequality.

What is often not acknowledged is that the accumulation of wealth for some whites is intimately tied to the poverty of wealth for most blacks. Just as blacks have had "cumulative disadvantages," whites have had "cumulative advantages." Practically, every circumstance of bias and discrimination against blacks has produced a circumstance and opportunity of positive gain for whites The cumulative effect of such a process has been to sediment blacks at the bottom of the social hierarchy and to artificially raise the relative position of some whites in society.

OLIVER & SHAPIRO, *supra* note 13, at 51.

¹⁴³

Mobility relief refers to efforts to make housing available for black or Hispanic victims of discrimination in the federally subsidized housing program in areas where their race does not predominate. Such efforts tend to take one of two principal forms: (1) interdevelopment or interproject transfers, which provide a tenant with the opportunity to move into a new or vacant unit in a development (or a project within a development), in which the tenant's race does not predominate; and (2) provision of Section 8 certificates or vouchers, which provide a tenant with an opportunity to secure federally assisted housing in nonracially impacted areas.

Michelle Adams, *Separate and Unequal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 447 (1996) (citations omitted).

¹⁴⁴ Although this turning point among scholars interested in ghetto poverty sometimes reflects ideological differences, it may also reflect narrative differences. A full discussion of the comparative merits of mobility versus in-place approaches is beyond the scope of this Article. However, I note in passing that the two need not be exclusive of each other.

B. Civic Participation and the Investment Landscape

In large measure, the supportive institutions of the middle-class metamarket did not function to strengthen collective action in black neighborhoods, denying the ideal of perfect citizenship, realized through homeownership, to early black residents of the twentieth century ghetto. While it was theoretically possible that a country simultaneously seeking urban order and ghetto containment could have made available to segregated black residents the same comprehensive planning techniques and control over the community that favored family-oriented environments in middle-income areas, this country did not.

Blacks have primarily inherited housing and the communities in which they live, and the price of inheritance is high. By the processes of coding and obsolescence, ghetto housing (with the exception of public housing discussed later) is older housing¹⁴⁵ with higher maintenance costs.¹⁴⁶ As a result of rampant lending discrimination and officially sponsored redlining, blacks were not only barred from obtaining more suitable housing in better maintained parts of the city or suburbs, but they were unable to qualify for home repair loans on affordable terms as well. Although blacks certainly organized into volunteer associations for the benefit of community residents,¹⁴⁷ few, if any, had the systematic influence over local policymakers or the economic leverage to engage in the self-help that white middle-class communities did. Moreover, the widespread tendency for residents of black ghetto communities to lack experience with zoning meant that important opportunities for citizen participation in land use decisions were lost.¹⁴⁸ The city just did things to these areas whether or not the actions were responsive to community needs.

What cities often did to the residential and commercial landscape in poor neighborhoods had much deeper antimarket effects than the deprivation of local decision making. Urban policy too often depressed the physical environment for families and businesses by a combination of three critical developments that would hardly have been tolerated in the

¹⁴⁵ See PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 93 (1997); see also Troutt, *supra* note 109, at 46 (identifying age disparities in housing between homes in low-income subject areas compared to middle-income neighborhoods).

¹⁴⁶ See JARGOWSKY, *supra* note 145, at 94 (suggesting that because the median value of units in high poverty areas is \$38,188 compared with \$123,043 for units in low poverty areas, there are lower financial incentives to invest in home repair). Cf. MASSEY & DENTON, *supra* note 46, at 132–34 (discussing research on collective abandonment thresholds, or *tipping points*, among ghetto landlords).

¹⁴⁷ See, e.g., JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY, FROM SLAVERY TO THE PRESENT* 228–31 (1985) (describing both formal and informal networks among poor blacks in the 1930s).

¹⁴⁸ See generally Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid, in ZONING AND THE AMERICAN DREAM*, *supra* note 21, at 101 (describing pattern of rezoning as commercial and industrial formerly residential zones being occupied by blacks).

middle-class market schema: the mixture of incompatible uses, the devastation of urban renewal projects, and the design and siting of public housing.

Whereas middle-class communities in both cities and suburbs fight hard (and well) to exclude locally unwanted land uses ("LULUs")¹⁴⁹ from endangering the safety of their children, tearing up their streets with heavy truck traffic, or imperiling the stability of their property values, no such attention to a family environment was bestowed on cities' low-income areas. The urban landscape undoubtedly provides fewer opportunities than autonomous suburbs to exclude all LULUs from any neighborhood regardless of the class composition. In addition, although the traditional settling of poorer manufacturing workers close to a city's industrial ring¹⁵⁰ implies a certain degree of "coming to the nuisance,"¹⁵¹ the literature on "environmental justice"¹⁵² is replete with examples of disproportionate siting of LULUs near residential areas that are high poverty and high minority.¹⁵³ Not only do low-income urban areas carry a

¹⁴⁹ See Vicki L. Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

¹⁵⁰ See John D. Kasarda, *Urban Change and Minority Opportunities*, in THE NEW URBAN REALITY 33, 36-42 (Paul E. Peterson ed., 1985) (describing the phases of residential development in cities as a progression of rings emanating from the industrial core of older cities where manufacturing workers lived to suburbs of increasing affluence).

These settlement patterns also indicate the common presence of a postindustrial land use nuisance, the "temporarily obsolete abandoned derelict site" ("TOADS"). See MICHAEL R. GREENBERG & DONA SCHNEIDER, ENVIRONMENTALLY DEVASTATED NEIGHBORHOODS: PERCEPTIONS, POLICIES, AND REALITIES 24 (1996) ("TOADS and the social decay associated with TOADS have reached unprecedented levels in large U.S. cities . . . [b]ecause big-city governments cannot control TOADS and the accompanying problems they create, such as lead and asbestos inhalation in many older neighborhoods."). TOADS may be abandoned industrial facilities as well as abandoned housing. See *id.* at 168.

¹⁵¹ Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1017 (1993). But see Rabin, *supra* note 148.

¹⁵² Others refer to this pattern of decision making as racism:

Environmental race discrimination, also referred to as "environmental racism," comprehends the disproportionate placement of toxic hazards in minority areas, the exclusion of people of color from environmental planning, and the destruction of many traditional communities. The result of these patterns is that minorities pay the pollution costs of industrial production, while the benefits accrue to society in general.

Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271, 272-73 (1992).

¹⁵³ See Been, *supra* note 151, at 1012-15 (discussing findings of multiple local studies); Luke W. Cole, *Environmental Justice and Three Great Myths of White Americana*, 3 W.-N.W. J. ENVTL. L. & POL'Y 449, 452 (1996) (noting that environmental hazards are disproportionately placed in minority and low-income communities and that local government, through permitting, has endorsed each decision); Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771 (1994); see also COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NAT'L REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987). Cf. Reich, *supra*

disproportionate burden of regionally necessary LULUs,¹⁵⁴ they also disproportionately experience chaotic arrangements of industrial, commercial, and residential uses. As the brownfields disputes demonstrate,¹⁵⁵ the ground beneath the potential market for viable commercial and consumer infrastructures in inner-city neighborhoods was sacrificed and now hinders the more residentially favored development that many public advocates of community economic development currently seek.

Residentially favored development, such as new housing, small businesses, and public infrastructure, once justified the aims of the Slum Clearance and Community Development and Redevelopment program of Housing Act of 1949.¹⁵⁶ Though the inequities of urban renewal and its implementation by U.S. cities have been well chronicled,¹⁵⁷ the program has not received as much attention for its destructive effects on the possibility of establishing viable markets in black communities. Again, the rationales of removing blight, clearing slums, and even reinvigorating downtown areas in order to attract the middle class and their employers back to cities reflected sound fiscal principles consistent with the improvement mentality that transformed cities in the early decades of the century. The inevitable choices cities made in tearing up neighborhoods, reminiscent of the choices made during federal highway construction,¹⁵⁸

note 152, at 274–75 (citing studies demonstrating that race, more than household income or property values, is the most important factor in location decisions).

¹⁵⁴ See, e.g., GREENBERG & SCHNEIDER, *supra* note 150, at 169 (“Camden [New Jersey] is now the place to site facilities no one else wants, such as the Camden County incinerator, prisons, and a sewage treatment plant.”); Reich, *supra* note 152, at 287 (“Racially disparate hazard siting is essentially an issue of the maldistribution of environmental costs and benefits: minorities pay the costs of industrial production—pollution—while society in general accrues the benefits—consumer goods, employment, and revenue.”).

¹⁵⁵ The term *brownfields* is used to denote contaminated urban land that is functionally and economically obsolete due to past industrial uses and abandonment. For fear of entering the chain of title, and thus becoming potentially liable for clean-up costs, prospective purchasers have avoided taking on the challenge of remediating these sites. Currently, federal and state laws are being changed to address some of these issues and to make clean-up of these sites more attractive to investors and entrepreneurs.

¹⁵⁶ Housing Act of 1949, 42 U.S.C. § 1441 (1994).

¹⁵⁷ See generally MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN REMOVAL* (1964); J. MOLLENKOPF, *THE CONTESTED CITY* 97–212 (1983); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 768 (1993) (discussing how, in urban and poorer areas, federally funded renewal and highway programs displaced about 100,000 families and 15,000 businesses per year from 1949 to 1961); Frug, *supra* note 21, at 1084–87.

¹⁵⁸ See generally HAROLD MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* 100 (1994); Aoki, *supra* note 157; Julian Bond, *A Call in Defense of Affirmative Action: Just Spoils of a Righteous War*, 34 *GONZ. L. REV.* 1, 6 (1998–1999); Peter L. Strauss, *Symposium: Contemporary Issues in Administrative Adjudication, Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 *UCLA L. REV.* 1251, 1289 (1992) (discussing the local political choices necessary to construct a highway through Memphis); Mike Jones, *Public Roads: We're on the Eve of Construction*, *PUBLIC ROADS*, Nov. 1, 1998, available in 1998 WL 12292069 (discussing impact on families and persons displaced by federally funded high-

fell hardest on black neighborhoods. The sobriquet "Negro Removal" described how the program's highly political implementation worked to shift the ghettos' boundaries in favor of white institutions, while increasing the population densities of black neighborhoods beyond levels imaginable even in white working-class areas.¹⁵⁹

In addition to the tremendous instability wrought upon families uprooted by urban renewal, the near evisceration of black commercial foot-holds is particularly relevant here. Though limited by staunchly segregated business markets, many black businesses had managed a degree of stability by the 1950s and early 1960s that provided wealth to merchant and professional households, a local employment base, and what we now call stakeholderism in the urban areas in which they were invested.¹⁶⁰ Urban renewal all but wiped out many of these achievements. In some cities, long-established black-owned businesses were forced to relocate, often at a significant, if not insurmountable, loss. Many had already contended with mob violence and property damage that was sometimes orchestrated by white competitors.¹⁶¹ The combination of public sector attacks, first from the federal legislative scheme and then through manipulation by local elites,¹⁶² fatally undercut black-owned business's contributions to market making in ghetto areas.

The design and siting of federally funded public housing projects is another way that public and private forces created the antimarket. If, as Justice Sutherland suggested in *Euclid*,¹⁶³ multifamily apartment houses are unfit structures for healthy community living, then locating the high-rise form of densely settled housing projects in segregated black neighborhoods across American cities assured these neighborhoods their role outside of stabilizing markets.¹⁶⁴ The concentration effects of high-rise projects on poverty became increasingly apparent as federal guidelines altered the eligibility rules used by local public housing authorities in selecting tenants. The Housing Act of 1937¹⁶⁵ was revised in 1949 to include fixed income ceilings and to give preference to families displaced by slum clearance.¹⁶⁶ The central city bias favoring middle-class neighborhoods and suburbs arose in part from the statute's equivalent elimina-

way projects).

¹⁵⁹ See MASSEY & DENTON, *supra* note 46, at 55-57.

¹⁶⁰ See OLIVER & SHAPIRO, *supra* note 13, at 49.

¹⁶¹ See *id.*

¹⁶² See ANDERSON, *supra* note 157, at 9-13, 218-19.

¹⁶³ 272 U.S. 365, 394-95 (1926).

¹⁶⁴ See MASSEY & DENTON, *supra* note 46, at 56; Jon Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 754 (1993).

¹⁶⁵ United States Housing Act of 1937, 42 U.S.C. § 1401 (1937), amended by 42 U.S.C. § 1437 (1994).

¹⁶⁶ See 42 U.S.C. § 1437 (1994); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1294 (1995).

tion requirement,¹⁶⁷ by which one unit of substandard housing had to be replaced by a unit of new public housing.¹⁶⁸ This requirement meant public housing would be built on relatively more expensive urban land. Some commentators attribute the resulting towerlike design of much public housing to efforts to economize land.¹⁶⁹

While the increased concentration of very poor, sometimes unstable households stacked densely atop one another contributed to public housing's destructive effects in ghetto neighborhoods, the spatial concentration of such economically concentrated projects was an equally important factor in creating antimarkets.¹⁷⁰ Attention to the beneficial distribution of land uses so prevalent in middle-income neighborhoods—including considerations about the combination and proximity of housing type—was noticeably absent from local government officials' public housing decisions. No ideal of family orientation, uncluttered streets, or practical convenience worked to alter the illogic of building large public housing projects almost exclusively in the heart of already destabilized black neighborhoods.¹⁷¹ The same civic-minded shields used to preserve middle-class markets, such as comprehensive planning principles, were turned consistently into swords against less powerful, segregated neighborhoods.¹⁷² The federal role in such discriminatory siting decisions, even when it resulted from lack of oversight,¹⁷³ was significant¹⁷⁴ and encour-

¹⁶⁷ See United States Housing Act of 1937, ch. 896, § 10 (a), 50 Stat. 888, 891–92 (1937) (current version at 42 U.S.C. § 1437h (1994)).

¹⁶⁸ See Schill & Wachter, *supra* note 166, at 1292–93.

¹⁶⁹ See *id.* at 1293. Others describe both the design and effect as more akin to prison architecture. See, e.g., OSCAR NEWMAN, DEFENSIBLE SPACE 107 (1972).

¹⁷⁰ After all, the high-rise apartment building may pervert suburban notions of middle-class life, but many middle- and high-income city residents live in buildings of great size and population density. The vast differences, however, may be measured by income, building management and maintenance, or the multiplicity of institutional supports in the surrounding neighborhoods.

¹⁷¹ See MASSEY & DENTON, *supra* note 46, at 56–57. In most cases, public housing was deliberately racially segregated. See Dubin, *supra* note 164, at 752–53. For a defense of the practice on separate-but-equal grounds, see *Favors v. Randall*, 40 F. Supp. 743, 747–48 (E.D. Pa. 1941).

¹⁷² See, e.g., *Arthur v. City of Toledo*, 782 F.2d 565, 567–68 (6th Cir. 1986) (affirming District Court's finding that city referendum repealing sewage extension to public housing sited outside of the central city did not have a racially discriminatory intent or effect); *United States v. City of Parma*, 661 F.2d 562, 568 (6th Cir. 1981) (finding that city engaged in years of refusals to enter into cooperation agreements to site public housing even when a demonstrable need existed); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1370 (S.D.N.Y. 1985) (finding that Yonker's housing and schools were intentionally segregated by race). Cf. *Kennedy Park Homes Ass'n. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (finding that where city had deliberately rezoned property that plaintiffs had selected for housing project as a park and recreation area and had declared a moratorium on new subdivisions in order to deny decent housing to poor and minority families, the city was in violation of various civil rights statutes).

¹⁷³ See Schill & Wachter, *supra* note 166, at 1295.

¹⁷⁴ See *Hills v. Gautreaux*, 425 U.S. 284 (1976) (finding that the U.S. Department of Housing and Urban Development permitted violations of the Constitution and federal statutes by knowingly sanctioning and assisting the Chicago Housing Authority's racially

aged the pattern so common to contemporary ghetto landscapes. In contrast, more recently constructed public housing projects occupied primarily by low-income whites are often superior to those in ghetto neighborhoods; with augmented facilities, services, designs, and amenities, the physical ingredients of middle-class ideal structures were not denied to all poor people.¹⁷⁵

Ghetto antimarkets, then, were made black not by blacks themselves, but by a similar combination of public and private forces that made middle-class areas desirable. This lack of choice stands in stark contrast to the tenets of middle-class status.¹⁷⁶ The cultural preferences behind (or sometimes being manipulated by) the middle-class market—what I call the public's ideal structures—were shared by blacks and others, but largely frustrated by forces beyond these subordinated consumers' control.¹⁷⁷ The following represent defining characteristics of black neighborhoods both before and after they became full-fledged ghettos: typically overcrowded, price-inflated rental dwellings; land uses incompatible with residential life, such as railway yards and sanitation facilities; poor or nonexistent infrastructure maintenance; grossly inferior municipal institutions, such as hospitals, schools, and libraries; the absence of useable open space, such as parks; and, not surprisingly, a private sector composed either of businesses owned by commercial interests that reinvest profits elsewhere or of locally owned businesses that are vulnerable to the slightest downward shifts in the regional economy.¹⁷⁸ The rules of

discriminatory public housing program); see also *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). *Smith* is one of the rare instances in which the case record contains evidence of overt racial discrimination, including the town's polling residents about the proposed site, as well as testimony from white residents that they did not want "coons either next door or in town." *Id.* at 1062.

¹⁷⁵ See Adams, *supra* note 143. Public housing changed in significant ways following the federal government's experimentation with public-private developments in the 1950s and 1960s. See *id.* at 440. Privatization was accomplished through "Section 8 Certificates," housing subsidies issued pursuant to Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (1994). In 1994, the Section 8 program was modified to include housing vouchers. See 42 U.S.C. § 1437f (o) (1994). Subsidized private housing projects are superior in design, amenities, and location to the older ones. However, occupancy has been racially skewed in favor of white, often elderly, tenants. Some of these changes have occurred in response to criticisms of older, high-rise multifamily projects isolated in ghettos and urban renewal areas. See Adams, *supra* note 143, at 443. One investigation concluded that "virtually every predominantly white-occupied housing project was significantly superior in condition, location, services and amenities to developments that house mostly blacks and Hispanics." Craig Flournoy & George Rodriguez, *Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing*, DALLAS MORNING NEWS, Feb. 10, 1985, at 1A. For an excellent discussion of the relevant studies and applicable law, see Adams, *supra* note 143, at 440-46.

¹⁷⁶ See *supra* notes 2-7 and accompanying text.

¹⁷⁷ As Massey and Denton observe, "What set ghetto blacks apart from other Americans was not their lack of fealty to American ideals but their inability to accomplish them." MASSEY & DENTON, *supra* note 46, at 171.

¹⁷⁸ See, e.g., Patrick Lee, *Recession Strikes Minority Businesses with Extra Fury; Economy: Entrepreneurs Who Often Face Racial Barriers Find Their Problems Com-*

residential development that governed middle-class metamarkets and pertained to the degree of consumer choice, the efficacy and frequency of civic participation, the comprehensively planned segregation of incompatible uses, and the private, governmental, and legal maintenance of stability were radically altered in ghetto antimarkets.

Did the existence of this spatial, social, economic, and racial antithesis, the ghetto, contribute to the viability of the thesis of urban middle-class neighborhoods and suburbs? For now, the full answer probably lies in the content and endurance of the underlying ideal structures. As a theoretical matter, Briffault suggests that Tiebout's model of consumer-voter exit implies interlocal competition among suburban municipalities seeking to retain and attract like-minded stakeholders.¹⁷⁹ To a similar (but lesser) degree, the same may be said for middle-class areas of cities; the preoccupations of city governments during the years of urban renewal and again amid the urban renaissance campaigns of the 1980s and 1990s is evidence of a concern with making cities (and their downtowns) attractive again to middle-class households.¹⁸⁰ These incentives for the middle class, with few exceptions, rely upon one of the same formative elements of the middle-class ideal: exclusion of undesirables who bring crowding, high taxes for social services, subachieving schools, crime, and difference. Exclusion, usually economic and often racial, continues to be the single most important principle sustaining middle-class notions of stability.

pounded by Downturn, L.A. TIMES, May 29, 1992, at A1 (discussing precariousness of minority businesses during the 1990-91 recession); Bernice Stengle, *Minority Businesses Forge Relationships*, ST. PETERSBURG TIMES, Sept. 20, 1992, at 11 (quoting minority business center director, "Once the whole economy catches a cold, the effect on minority business] is pneumonia[.]"); Laurel Touby, *Blacks: Being Left Behind*, CRAIN'S N.Y. BUS., Nov. 20, 1991, at 132 (describing disproportionate toll of recession on black-owned businesses).

¹⁷⁹ See Briffault, *supra* note 5, at 403. "As a result, localities will draw the people that most resemble existing local majorities and fail to attract people who do not agree with local public decisions. Localities will tend to become more homogenous, thus reducing political externality costs within each jurisdiction." *Id.* at 52 (citing BISH, *supra* note 5). This is also a description of the white flight dynamic.

However, it is important to note that the converse is true, at least at the state level, regarding the current welfare laws' incentives to "race to the bottom." Here, the model operates to prevent low-income outsiders from seeking better services and benefits either by lowering benefits or, as recently held unconstitutional by the Supreme Court, by limiting the social service benefits available to newly arrived residents. See *Saenz v. Roe*, 526 U.S. 489 (1999) (upholding the 14th Amendment right to travel and concomitant right to equal treatment in a new state of residence).

¹⁸⁰ See BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 259-86 (1989); Brietzke, *supra* note 8, at 749; Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 33 (1998); see also Suzette Hackney, *Report: Entertainment Spurs Resurgence of Detroit*, DETROIT NEWS, Dec. 29, 1996, at A10 (describing stadiums, casinos, and museums used to revitalize city); Roger K. Lewis, *Baltimore Looking for Another Fresh Start*, WASH. POST, Mar. 6, 1999, at G12 (chronicling city revitalization efforts focused on recreation, culture, and new commerce).

As a practical matter, the ideal of middle-class life has become so fixed on material benefits of the physical landscape that even public and private facilities of citywide utility, such as LULUs,¹⁸¹ and other necessities of the American socioeconomic strata, such as public housing or homeless shelters, often cannot be located within the invisible boundaries of middle-class markets if these markets' attributes and characteristics are to be maintained. Disproportionately, these undesirables are found in ghettos, their destabilizing presence significantly helping to sustain and define the market neighborhoods across the tracks.

C. The Persistence of Antimarkets Amidst the Rise of Consumerism

Since the early 1970s, the geography of inner-city ghettos has been radically transformed, resulting in younger, poorer, more isolated concentrations of relatively fewer families and individuals spread across more desolate urban land. Residents of the inner city find themselves lost amid broad changes in the national and global economy, the triumph of suburbanization, and the flight of middle-class blacks. This group of persistently poor individuals—referred to by some as the urban underclass¹⁸²—lives in neighborhoods whose near total marginality constitutes ghetto antimarkets unimaginable at the release of Senator Patrick Moynihan's 1965 report on the state of black families in poverty.¹⁸³ Over time, constraints on these communities have worsened while their capacities have weakened. This section analyzes the economic geography of inner-city ghettos, including a discussion of the cumulative wealth dimensions previously introduced and the antimarket economies of these communities.

1. The Antimarket's Statistical Landscape

William Julius Wilson, in the single most constructive analysis of persistent, inner-city poverty, draws primarily upon studies of Chicago neighborhoods to describe critical facts in the social landscape and to delineate a framework for analyzing them.¹⁸⁴ Wilson's work highlights a

¹⁸¹ See Reich, *supra* note 152.

¹⁸² This heavily used term, attributed to the writer Ken Auletta, has enjoyed an ambivalent popularity and outright criticism. See KEN AULETTA, *THE UNDERCLASS* (1982); see also Calmore, *supra* note 6, at 1952 ("The underclass label is problematic in various ways . . . [Labels] carry judgmental and normative connotations that can influence societal institutions and individuals to punish those who are stigmatically labeled."). I also dislike this term because it is not one that those who reside in inner-city ghettos have chosen to define themselves.

¹⁸³ OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

¹⁸⁴ See WILSON, *supra* note 139. Wilson followed up on this work by expanding his

number of changes that have occurred in inner-city ghettos. The total populations of the ghettos themselves, and of many of the cities in which they are located, have steadily decreased.¹⁸⁵ The age structure of ghettos has changed, with sharp increases in the proportion of children and teenagers compared to adults.¹⁸⁶ The numbers of female single-headed households, rates of welfare reciprocity, births to teenagers, and infant mortality have all skyrocketed.¹⁸⁷ The number of children living in poverty—many of whom are now coming of age—has also grown significantly.¹⁸⁸ Most importantly, joblessness has become so prevalent that a majority of young adults in ghetto areas simply do not work.¹⁸⁹ Wilson and others attribute the profound increase in joblessness to structural changes in the economy, which has been transformed from one which manufactures goods to one which provides services and information.¹⁹⁰ Jobs available to undereducated, comparatively unskilled workers in the inner city are generally very low paying and are increasingly located in suburban areas that pose difficult and expensive commuting costs.¹⁹¹ In addition, welfare benefits are low for families that still qualify. Thus, it is difficult for many inner-city families to have stable incomes above the poverty line even when work is available.¹⁹²

theories of concentration effects. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 42 (1996).

¹⁸⁵ See NORMAN J. GLICKMAN ET AL., OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND URBAN DEV., *THE STATE OF THE NATION'S CITIES: AMERICA'S CHANGING URBAN LIFE*, tbls. D1, D2 (1996); WILSON, *supra* note 184, at 14.

¹⁸⁶ "In short, much of what has gone awry in the inner-city is due in part to the sheer increase in young people, especially young minorities." WILSON, *supra* note 139, at 36–37 (correlating changes in age structure to increases in serious crimes).

¹⁸⁷ See *id.* at 26–29.

¹⁸⁸ See CHILDREN'S DEFENSE FUND, *CHILD POVERTY DATA FROM 1990 CENSUS* (1992).

¹⁸⁹ See WILSON, *supra* note 139, at 42–43. Wilson's more recent research follows this development. Wilson argues that joblessness persists in urban ghettos despite the general economic boom that most Americans have enjoyed, recharacterizing the joblessness as "the new urban poverty." WILSON, *supra* note 184, at 19.

¹⁹⁰ See WILSON, *supra* note 139, at 39–41; John Kasarda, *Industrial Restructuring and the Changing Location of Jobs*, in *STATE OF THE UNION: AMERICA IN THE 1990s* (Reynolds Farley ed., 1995).

¹⁹¹ This phenomenon is often referred to as the "spatial mismatch" between where jobs are located and where inner-city residents reside. See Briffault, *supra* note 5, at 420.

¹⁹² In a national study of welfare-reliant and working mothers, Kathryn Edin and Laura Lein found that most poor mothers work, plan, and persevere regardless of their welfare status, yet still cannot escape poverty. See KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* (1997). Among 214 welfare-reliant families interviewed over several months in four U.S. cities, the authors found that Aid to Families with Dependent Children ("AFDC"), food stamps, Supplemental Social Security Income ("SSI") and the Earned Income Tax Credit ("EITC") account for only 66% of their monthly expenses. See *id.* at 44. Work-based strategies account for 15%, network-based strategies (e.g., friends, extended families, boyfriends) account for another 17%, and agency-based strategies (e.g., food kitchens, church daycare) cover 4%. See *id.* Additional U.S. House of Representatives studies indicate that, among those wage-reliant mothers who leave welfare, one in three will remain below the poverty line in the first year, and most have incomes only slightly above the poverty line. See *id.* at

Ghettos can be characterized by areas of *high poverty* (census tracts in which at least thirty percent of total households have incomes below the federal poverty line) and *extreme poverty* (census tracts in which at least forty percent have below-poverty incomes).¹⁹³ Between 1970 and the mid-1980s, the number of high- and extreme-poverty census tracts within a given neighborhood increased dramatically.¹⁹⁴ These tracts of persistent and spatially concentrated poverty isolate residents from job networks and tend to compound family difficulties.¹⁹⁵

It is the growth of the high- and extreme-poverty areas that epitomizes the social transformation of the inner-city, a transformation that represents a change in the class structure in many inner-city neighborhoods as the nonpoor black middle and working classes tend no longer to reside in these neighborhoods, thereby increasing the proportion of truly disadvantaged individuals and families.¹⁹⁶

Cut off from the city and regional economy, the social isolation of ghetto communities also renders them politically weak, in part because they share even fewer spatial interests with neighboring constituencies. As the antithesis of self-sustaining middle-class metamarkets, ghetto antimarkets contain the elements of perpetual decline.¹⁹⁷ Though the ghetto population has not increased, the concentrated areas in which the poor find housing have spread within a larger ghetto that has become even more vast and vacant than it once was.

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¹⁹³ See WILSON, *supra* note 139, at 46.

¹⁹⁴ See *id.* For example, examining New York, Chicago, Los Angeles, Philadelphia, and Detroit census tracts between 1970 and 1980 alone, Wilson found that "the population living in poverty areas grew by 40 percent overall, by 69 percent in high poverty areas . . . , and by a staggering 161 percent in extreme-poverty areas[.]" *Id.*

¹⁹⁵ See MASSEY & DENTON, *supra* note 46, at 118, 139-40.

¹⁹⁶ WILSON, *supra* note 139, at 55.

¹⁹⁷ Massey and Denton make similar arguments within the analytic context of segregation as the primary factor causing concentrated poverty.

Segregation . . . is crucial to understanding why a self-perpetuating spiral of neighborhood decline is built into urban black communities. The socioeconomic health of black neighborhoods is fragile and easily jolted into a pattern of decay In essence, segregation and rising poverty interact to deliver an exogenous shock to black neighborhoods that pushes them beyond the point where physical decay and disinvestment become self-perpetuating.

2. *Wealth, Again*

Wealth is as important a concept for community economic development as income has always been for poverty law. Wealth connotes investment by businesses and households that helps to stabilize a community by increasing the proportion of stakeholders within it. Thus, a primary goal of economic development advocates, as will be fully discussed later, is commercial investment by businesses and wealth formation for ghetto households (usually in the form of housing ownership).

Persistent antimarket forces have historically hindered and continue to thwart wealth formation in ghetto neighborhoods. In contrast, millions of white families began accruing wealth in home assets during the 1930s and 1940s, creating a foundation for the economic prosperity of successive generations. During this time, white families received support from federal programs whose rules were skewed against black workers and veterans. The FHA's redlining practices and the Veterans Administration's refusal to back mortgages sought by returning black war veterans provide evidence of discrimination.¹⁹⁸ Yet, even when blacks owned homes, their value was often undermined by arbitrarily discounted appraisals¹⁹⁹ or inequitably high property tax assessments.²⁰⁰ Further, the Social Security Act of 1935²⁰¹ excluded many blacks (and many Latinos) until fairly recently because it did not cover domestics and agricultural workers or those whose wages were so artificially depressed by employers that their earnings did not enable them to qualify for benefits.²⁰² Even Aid for Families with Dependent Children ("AFDC"), which was withheld from black families during the early years of its administration, systematically deprived poor families of accumulating any meaningful asset wealth.²⁰³

¹⁹⁸ See Dubin, *supra* note 164, at 751-52 (discussing official policies that led the FHA and VA frequently to deny mortgages to blacks); see also MASSEY & DENTON, *supra* note 46, at 51-55.

¹⁹⁹ See, e.g., *United States v. American Inst. of Real Estate Appraisers of Nat'l Ass'n of Realtors*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (finding that appraisers systematically decreased values in neighborhoods occupied by blacks).

²⁰⁰ See, e.g., LYONS, *supra* note 111, at 135-39 (describing methodological and political reasons for discriminatory assessments, including replacement cost depreciation, use of arbitrary floors for assessment values, infrequent reassessments, and the general tendency of middle-class homeowners to be more politically vocal than poorer residents and apartment owners).

²⁰¹ The Social Security Act of 1935, 42 U.S.C. § 301 (1991).

²⁰² See OLIVER & SHAPIRO, *supra* note 13, at 38.

²⁰³ Throughout its history, the AFDC means test has required that personal assets, such as a car, a home, and some types of personal property, count against the amount of the monthly support payment. Accumulation of assets, even where possible, would effectively remove a recipient from the rolls. See *id.* at 42 ("The result is that AFDC has become for many women, particularly African-American women, a state-sponsored policy to encourage and maintain asset poverty."); see also SHERRADEN, *supra* note 121, at 129-31; see generally VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 193-95 (1994).

Not surprisingly, it is extremely difficult for blacks in particular, and poor people of color in general, to accumulate much asset wealth, even compared to poor whites. Comparing homeownership for households with incomes below \$11,611 in 1987, poor whites owned homes at a rate of 47.3% versus just 27.4% for poor blacks.²⁰⁴ Similarly, 63.2% of all blacks had zero or negative net financial assets ("NFA")—assets that can be made liquid fairly easily—compared to 28% of whites.²⁰⁵ Whites with incomes at the poverty level had a mean NFA of \$26,683 in 1988, while blacks in the highest earning income categories had a mean of \$28,310.²⁰⁶

In the last decade, however, redlining of predominantly black and Latino neighborhoods by banks and insurance companies has received considerable attention because it prevents the accumulation of wealth within the ghetto.²⁰⁷ In addition to the pernicious effect of institutional redlining on asset formation by ghetto households, reverse redlining perpetuates the denial of middle-class ideal structures in inner-city areas by threatening those assets that ghetto residents do hold. Reverse redlining also provides the opportunity for fraud because the market is unregulated. Home repair loans are the primary example. Traditional redlining limits access to conventional financing and forces ghetto homeowners to deal with predatory home repair companies who act as both finance company and contractor.²⁰⁸ Because home repair companies charge exorbitant rates and fees for both the initial loan and the repair costs, it is not unusual that homeowners—who have qualified for the loan by putting their homes up as collateral—ultimately default and risk losing the only asset most of them have.²⁰⁹ Not only are many of these repair/finance compa-

²⁰⁴ See OLIVER & SHAPIRO, *supra* note 13, at 108–09. The homeownership rates for moderate (\$11,611–24,999) and middle-income (\$24,999–34,999) blacks were also lower than for poor whites—40.8% and 45.4%, respectively. See *id.* at 109.

Methodological note: Oliver and Shapiro culled most of their data on wealth from the 1987 Panel of the U.S. Survey of Income and Program Participation. 11,257 households were interviewed for the Survey in 1987 and were then reinterviewed two years later for a total of eight interviews per subject. See *id.* at 56. The authors also conducted in-depth interviews with families in Boston and Los Angeles. See *id.* at 53–55.

²⁰⁵ See *id.* at 100–02.

²⁰⁶ See *id.*

²⁰⁷ See Bill Dedman, *The Color of Money*, ATLANTA J. & CONST., May 1-4, 1988, at A1.

²⁰⁸ See OLIVER & SHAPIRO, *supra* note 13, at 19–23; see also Christine B. Whelan, *FTC Cracks Down on Lending Abuses in Subprime Area*, WALL ST. J., July 30, 1999, at C10:

Subprime loans . . . make up more than 10% of the mortgage market, or more than \$150 billion. Subprime loans, which carry high interest rates, are generally issued to low-income, elderly and inner-city homeowners with significant credit problems. The FTC is investigating cases in which lenders defrauded homeowners into signing loan agreements they couldn't reasonably meet, ending in default and foreclosure on their homes.

²⁰⁹ See, e.g., Randy Kennedy, *Borrowers Beware: A Special Report; Suits Say Unscrupulous Lending Is Taking Homes From the Poor*, N.Y. TIMES, Jan. 18, 1999, at A1 (chroni-

nies unlicensed and unregulated by state authorities, but their loans are frequently repurchased by the same banks that refuse to maintain a physical presence in the ghetto neighborhood that repair and finance companies serve.²¹⁰

The importance of focusing on wealth accumulation within antimarkets becomes clearer when we accept that neighborhood poverty is as much family poverty as anything else. Conceptually, as I discussed in Part II, this presents no difficulty for middle-class ideal structures. The metamarkets in those neighborhoods defend, support, and facilitate family life and are explicitly and implicitly justified on that basis. The same supports should be available to ghetto families who struggle against harsher constraints with considerably less capacity to withstand them.

Sherraden's work presents several reasons why wealth accumulation is relevant to economic development. First, assets improve household stability by lessening the repercussions of economic setbacks, such as job loss and the depression that may ensue from it.²¹¹ Second, assets help family members pursue a process of constructing future possibilities.²¹² They live, cognitively, through the presumption that long-term buffers exist, can be had, yet must be maintained for both known and unforeseeable events that might occur.²¹³ Third, the possibility of tangible assets, particularly homeownership, encourages people to improve themselves.²¹⁴ Fourth, assets (almost magically) increase social influence²¹⁵ in the sense that they may transform one's sense of powerlessness to confidence in a given transaction, which may also be perceived by the opposite party in situations where the "back-up" asset is disclosed.²¹⁶ Fifth, assets increase

clinging lawsuits that challenge the relationship between Delta Funding, an aggressive lender to low-income borrowers, and large bank investors, such as Bankers Trust, to which it sells large numbers of mortgages converted into securities).

²¹⁰ See *infra* notes 228–232 and accompanying text. Paul Brietzke describes these economic actors as market surrogates:

These surrogates spring up because the formal structure of the ghetto economy has collapsed, yet ghetto residents remain segregated from conditions in the "real" markets, such as "below-market" interest rates designed to sell overpriced cars and car lease terms that confer tax breaks as "business" expenses. The surrogates erect barriers to entering the real markets and perpetuate the separate (under)development of poverty.

Brietzke, *supra* note 8, at 758.

²¹¹ See SHERRADEN, *supra* note 121, at 149.

²¹² See *id.* at 152.

²¹³ See *id.* at 155.

²¹⁴ See *id.* at 156. Sherraden situates this point differently, as an end in itself, which seems unnecessarily compartmentalized. What I believe is most important is that, because "assets allow greater prediction and control" and can "serve as a counterweight to learned helplessness and vulnerability[.]" their existence can promote greater personal efficacy among family members. *Id.* at 161.

²¹⁵ See *id.* at 164.

²¹⁶ See *id.* at 164 (discussing the use of assets as "back-up"). Knowledge and disclosure of asset accumulation goes a long way in altering perceptions of hierarchy in those

political participation,²¹⁷ as I discussed in Part II, because people with assets believe that they have a right to protect those assets through political and legal avenues of redress.²¹⁸

3. Consumer Infrastructures and Poor People's Money

In the neighborhoods of low-income, low-wealth families, the dynamics of the antimarket are manifest through overlapping economies, only some of which are formal enough to play by middle-class rules, while the others are informal or *underground*.²¹⁹ Consistent with the antimarket thesis, however, even formal economic activity is laden with consumer pitfalls that increase costs, diminish the quality of basic goods and services, and drain economic resources away from the community. Since it is the focus of much community economic development work, I begin with the formal economy and draw again on the concept of consumer infrastructures that I introduced earlier.²²⁰

Poor people in poor neighborhoods have always had money to spend. Although businesses operating in areas with high proportions of public assistance recipients have had to adhere to different rules,²²¹ the tattered, chaotic commercial landscape of inner cities can support profitable businesses.²²² After decades of redlining and disinvestment by banking institutions and retail concerns, many companies are now discovering (or being exhorted to discover) the potential profits to be made in ghetto communities.²²³ The consumer infrastructure in ghettos vastly

same transactions.

²¹⁷ See SHERRADEN, *supra* note 121, at 165.

²¹⁸ See *supra* notes 99–105 and accompanying text.

²¹⁹ The underground economy refers to organized and unorganized illegal activity and is a topic beyond the scope of this Article. However, I note that this economy encompasses far more than the sale of drugs, but includes the hawking of socks, baby clothes, and bootlegged movie videos to potential customers sitting in or standing at barber chairs, as well as *running the numbers*—i.e., the illegal lottery.

²²⁰ See *supra* notes 108–111 and accompanying text.

²²¹ Perhaps the best example of this is the federal food stamps program, by which food stamps rather than cash regulate the types of purchases consumers can make with a currency that a proprietor is then obligated to convert into cash reimbursement. Retailers must abide by stringent requirements about the specific kinds of purchases eligible under the program or risk fines, suspensions, or removal from the program. See ZELIZER, *supra* note 203, at 195.

²²² See, e.g., TROUTT, *supra* note 109, at 31 (In three different low-income neighborhoods of Oakland, Calif., 62% of businesses surveyed reported earning a profit in 1992, 30% broke even, and only 8% lost money.).

²²³ See, e.g., John M. Broder, *Clinton, in Poverty Tour, Focuses on Profits*, N.Y. TIMES, July 7, 1999, at A14 (discussing release of HUD report indicating more than \$300 billion in pent-up retail demand as a result of historic disinvestment in poor cities such as East St. Louis, Ill.); Ronald Brownstein, *An Idea Grows in Brooklyn*, U.S. NEWS & WORLD REPORT, July 27, 1998, at 30 (explaining the economic impacts of local development corporations in the Cypress Hills neighborhood); Bob Herbert, *Ending A Retail Drought*, N.Y. TIMES, July 5, 1998, at D11 (discussing retail efforts of community development corporations in New Haven); Bob Herbert, *Saving the Cities*, N.Y. TIMES, July 2, 1998, at A21

underserves local consumers, while exhibiting the characteristic scarcity of quality resources and instability that is the primary target of economic development initiatives.²²⁴

The most apparent indicators of the formal economy's deficiency pertain to those consumer goods and services that ordinary consumers prioritize for their family's monthly welfare. For example, food, which may consume nearly as much disposable income as housing,²²⁵ is routinely available not in supermarkets, but rather in small neighborhood markets or *bodegas*, where quality and selection are limited and prices are high.²²⁶ Those ghetto supermarkets that exist consistently sell poor quality goods at such high prices that ghetto consumers will construct elaborate schemes to reach supermarkets in middle-class areas.²²⁷ In addition, the absence of banks has created multiple problems and incentives for economic exploitation.²²⁸ Check cashing centers—many physically occupying former bank buildings and relying upon traditional banks for fee-based receipt processing²²⁹—charge exorbitant fees for basic banking services,²³⁰ but provide no means of savings or credit. The unavailability of credit, in turn, provides incentives for often unregulated finance com-

(describing the work of organizations such as LISC); Abraham McGlaughlin, *Retailers Thrive in Inner City*, CHRISTIAN SCI. MONITOR, Aug. 10, 1998, at 1 (describing Chicago's predominantly Hispanic "Little Village" section).

²²⁴ See *infra* notes 350–372 and accompanying text.

²²⁵ See EDIN & LEIN, *supra* note 192, at 32.

²²⁶ See TROUTT, *supra* note 109, at 42–43.

²²⁷ See *id.* at 43–44. In Oakland, for example, many low-income consumers carpooled to middle-class areas. See *id.*

²²⁸ See Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465 (1994). Taibi describes the financial institutions' behavior toward poor consumers in the absence of banks as a connection between the profitability of antimarket financial institutions and the complicity of banks:

The lack of interest that banks show toward these markets helps create the demand for fringe banking services; conventional financial institutions then cash in on the fringe banking boom by issuing lines of credit to finance companies, providing transactional services to check-cashing outlets, purchasing high-interest notes from second mortgage companies, and pursuing other such business services. Thus, conventional financial institutions do help service those markets—but in an indirect way that permits unscrupulous operators to extract a middleman's profit while the banks keep their hands clean.

Id. at 1510–11 (citations omitted).

²²⁹ See TROUTT, *supra* note 109, at 67 n.5.

²³⁰ See *id.* at 64–65. The fee ranges from 1% to 21% of the face value of the check in three low-income areas of Oakland and the Broadway-Manchester district of South Central Los Angeles, but the ordinary fee outside of these areas is five to ten percent. A particular danger with the proliferation of check cashing centers, other than crime-related implications of a nearly all-cash economy, is that many residents of low-income neighborhoods represent a generation that has never known banks or held bank accounts. See *id.* The lack of a savings alternative is precisely the kind of consumer behavior that Sherraden fears in his hopes for developing wealth among low-income families. See SHERRADEN, *supra* note 121.

panies to defraud consumers or charge above-market financing fees.²³¹ Banks, where they do exist, frequently collect higher fees²³² and may also charge higher finance costs²³³ to poor and minority residents of ghetto areas than to middle-class customers.

Consumer infrastructures in the formal economy should include not only private goods and services, but public goods as well. Street cleaning and lighting, police and fire protection, and schools are amenities that determine the quality of a consumer's living environment. A full discussion of these factors is beyond the scope of this Article. Examples of the disparity in services, discussed in Part VI, are the unavailability of public transportation that exacerbates the spatial mismatch between residents and job locales;²³⁴ unpaved streets that decrease property values;²³⁵ poor fire protection that destroys lives and housing inventory;²³⁶ rising incidence and perceptions of police abuse that can create a palpable antagonism between residents and the municipality itself;²³⁷ and a lack of open or recreational space that unmistakably signifies a neglect of family needs and a visible suspension of middle-class ideal structures.²³⁸

Related to disparate services and the institutionalized deficiencies of the ghetto's formal economic structures is the web of informal economic

²³¹ See *supra* notes 207–210 and accompanying text.

²³² See TROUTT, *supra* note 109, at 66. The average monthly fee for low-income consumers was \$5.13 compared to \$4.73 for middle-income customers; median monthly fees were \$5.00 and \$0, respectively. See *id.*

²³³ Oliver and Shapiro report that “[o]verall, blacks pay a 0.5 percent higher rate on home mortgages than whites.” OLIVER & SHAPIRO, *supra* note 13, at 142.

²³⁴ See *supra* note 190 and accompanying text.

²³⁵ See, e.g., *Johnson v. City of Arcadia, Fla.*, 450 F. Supp. 1363 (M.D. Fla. 1978) (holding that black Arcadia residents, who were two and a half times more likely than white residents to live in a house fronting on an unpaved street due to a policy that designated dead-end streets as lowest paving priority, were unlawfully discriminated against by that policy).

²³⁶ See *Baugh v. City of Milwaukee*, 823 F. Supp. 1452 (E.D. Wis. 1993).

²³⁷ See David Dante Troutt, *Screws, Koon and Routine Aberrations: The Use of Fictional Narratives in Federal Prosecutions of Police Brutality, Prevalence and Perceptions of Police Brutality*, 74 N.Y.U. L. REV. 18, 98–105 (1999).

²³⁸ Robin D. G. Kelley offers a fascinating observation of the reconstruction of ghetto “leisure” activity by mainstream sports product advertisers:

Parks and schoolyards are full of brown bodies of various hues whose lack of employment has left them with plenty of time to “play.” In other words, while obscuring poverty, unemployment, racism, and rising police repression, commercial representations of the contemporary “concrete jungles” powerfully underscore the link between urban decline, joblessness, and the erosion of recreational spaces in the inner city. At the same time, they highlight the historic development of “leisure time” for the urban working class and, therefore, offer commodities to help fill that time.

Robin D.G. Kelley, *Playing for Keeps: Pleasure and Profit on the Postindustrial Playground*, in *THE HOUSE THAT RACE BUILT* 196 (Wahneema Lubiano ed., 1997). See generally Regina Austin, “Not Just for the Fun of It!”: Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space, 71 S. CAL. L. REV. 667 (1998).

arrangements that prevail in these areas.²³⁹ Daycare networks, *cundina* and *kye* communal financing groups,²⁴⁰ under-the-table construction contracting, home-based beauty and barber salons, some livery (or "gypsy") taxis,²⁴¹ street vending, dollar vans,²⁴² food preparation, auto mechanics, moving and carting services, landscaping, and room rentals all represent the array of untaxed and unregulated goods and services that cater to consumers in underserved communities.²⁴³ Regina Austin has characterized some of this activity, particularly street vending, as integral to a "black public sphere" that, in staking a claim to economic survival, "fills a small part of the void created by the economic marginalization of black Americans as workers, owners, and consumers."²⁴⁴ Austin recognizes that, apart from the cultural attachments and consumer responsiveness of

²³⁹ Off-the-books work or under-the-table help are not unique to low-income neighborhoods. However, the place of such activity in the overall landscape is quite different. In ghettos, such informal activity is integral, sometimes a source of bonding, often egalitarian between the parties and not at all sneaky, whereas such hush-hush arrangements among the middle class are minimized, grudgingly accepted, and hierarchical.

²⁴⁰ These are informal, trust-based lending circles used primarily by immigrant groups borrowing from homeland practices, often in order to overcome barriers to obtaining traditional financing. Although these kinds of group financing may not be easily categorized as commonplace aspects of inner-city informal economic activity, the *cundinas* or *tandas* are sometimes used by Central American immigrants in low-income areas, and the primarily Korean use of *kye*, a centuries-old tradition, has been instrumental in financing many small grocery stores in low-income neighborhoods of cities such as Los Angeles and New York. See TROUTT, *supra* note 109, at 37-39; Robert J. Lopez, *The Bucks Start Here: Unable to Obtain Traditional Loans, More Entrepreneurs Are Taking a Chance on Cash Pools*, L.A. TIMES, May 23, 1993, at 14. Lawsuits alleging fraud suggest that informal financing is not without significant risks. See Kenneth Reich, *Private Investment Pools Dealt Blow; Finances: Judge Rules There Is No Legal Recourse to Collect Debts, Financing in Minority Communities Could Be Affected*, L.A. TIMES, Sept. 25, 1993, at B1.

²⁴¹ Even formal businesses operate within uncommonly harsh economic constraints simply by locating in underserved low-income areas, such as the established Liberty City taxi company whose drivers combat violent crime ferrying working-class passengers to jobs outside of the ghetto, while Miami-Dade County is passing new taxi laws that may put them out of business. See Rick Bragg, *For Black Taxi Company in Miami, a County Law Is the Latest Threat*, N.Y. TIMES, June 8, 1999, at A20.

²⁴² *Dollar vans*, as they are popularly known, are private vans operated sometimes by sole proprietors, sometimes by small fleet owners. They emerged in cities such as New York in the early 1990s and transport passengers from predominantly poor neighborhoods that are not well served by public transportation to job and retail centers. The services provided by dollar vans range from licensed operations that stop only along designated points on an established route to vans of unknown origin, possibly uninsured, that recklessly heed hails anywhere. Their history of acceptance, rejection, official harassment, and proposed regulation is occasionally chronicled in litigation and the press. See, e.g., *Manti v. New York City Transit Authority*, 165 A.D.2d 373 (1990) (finding that plaintiffs' allegations that the transit authority engaged in repeated pattern of harassment would constitute a cognizable constitutional injury); see also James Barron, *Crackdown Set on Vans Serving as Gypsy Buses*, N.Y. TIMES, July 24, 1990, at B2 (reporting that Mayor Dinkins claims "nearly 80%" violate regulatory requirements).

²⁴³ Perhaps these goods and services supplement the incomes of ghetto residents making ends meet in ways that reflect culturally necessary attachments to vernacular tradition and neighborhood, if not community, cohesion.

²⁴⁴ Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2123 (1994).

informal economic activity, street vendors and other folks regularly involved in it pay no rent, wages, utility bills, taxes, or other overhead costs, nor do they offer warranties on their goods.²⁴⁵ The informal economy of the inner city is an expression of its resistance to chronic marginalization, and it does more than provide goods and services; it also represents a will, a way, and a heritage of survival for inner-city residents. I leave undecided for the purposes of this Article the question of whether consumers would trade some of their discounts and tax savings for an economic reality in which their tort and contractual rights had recourse and their expenditures were recaptured within an integrated municipal economy that returned the benefits of regulatory inclusion, product and environmental safety, and responsive city services. Instead, it is only important to note that such informal economic activity can only become normal in an antimarket, unwatched by, and excluded from, the social and economic dynamics beyond its borders.

IV. The Metamarket/Antimarket Dichotomy in Theoretical Perspective

The antimarket construct offers a theoretical measure of marginalization. It demonstrates that the institutionalized ideals of American middle-class life have produced stable communities through the interaction of sound social ordering devices and powerful racial and economic oppression. As the century progressed, metamarkets and antimarkets developed simultaneously as negative reflections of each other. The dichotomy directs us to interrogate the ongoing relationship between the two. For one, what began as careful land use planning with civic and institutional supports became self-executing sectors of homogenous security and increased consumerism. For the other, what started with sometimes coded, often overt, racial discrimination became its own spiral into spatialized instability and metropolitan irrelevance.

Assessing both poor neighborhoods and middle-class areas simultaneously requires a distinctive ambidexterity because it requires joining two limbs of potentially equal capabilities and mutual significance. In this analysis, the goal is to formulate practical approaches to ghetto poverty that produce a diversity of metamarkets in concentric patterns across the entire metropolitan area, connected yet differentiated by competing ideas about what constitutes the good life. In order to build metamarkets out of isolated ghetto neighborhoods, these communities need to adopt many of the legal protections and institutional objectives that systematically sustain middle-class cities and suburbs. Metamarkets contain a great many features that should be duplicated in inner-city ghettos, such

²⁴⁵ See *id.* at 2124.

as family-focused land use planning, public regulation of hazardous uses, infrastructure maintenance, and access to credit, capital, and information.

At the same time, however, two fundamental aspects of the creation of metamarkets and antimarkets must be acknowledged. First, central to the middle-class schema is the coding of undesirables and their devaluation and exclusion. These principles should not be carried forward. Second, ghetto communities have their own experience-based subjectivity, which consists of both empowering and destructive tendencies. These should somehow not be ignored. Some must be nourished by the process of growth, others transformed. Ghetto communities will never be rebuilt and incorporated into the economy around them by steadfast mimicry of white middle-class spatial norms.

There are many compelling ways to understand spatial, racial, and economic relations in cities. This section begins by setting forth a legal framework for inner-city economic development and planning. The metamarket/antimarket dichotomy described earlier has led to two different legal regimes that operate today, which I describe in the next section. I then go on to evaluate the tenets of these two legal systems in view of concerns about consumer-oriented approaches and the risks of zoning communal spaces.

A. The Dichotomy Between Private and Public Legal Ordering

Before we can analyze antimarkets and metamarkets fully, we must address a distinction between them: they come from different bodies of law. Parts II and III delineate the primary features of both areas, touching at times on the relevance of law in creating and sustaining each. Yet, any attempt to put the dichotomy into a theoretical framework also requires a recognition that urban communities divided by class, race, and location not only function along different political and economic rules, but they are governed by different legal rules.

In general, what distinguishes one from the other is the extent of private versus public ordering. The main elements of metamarkets provide very little room for public law intervention. Law enters middle-class urban life in very limited areas, such as business and other voluntary associations, consumer finance, banking and credit regulation, property law, common law contract, and commercial law. Each of these areas is acutely private and based largely on individual transactions. They are rarely determined by courts, and most legal arrangements are not easily reduced to public record. The only public laws that govern metamarkets involve land use, public finance, and taxation. Indeed, these areas of law were indispensable in the very creation of urban and suburban metamarket communities.²⁴⁶

²⁴⁶ See *supra* notes 101–122 and accompanying text.

The ratio of public to private laws shifts dramatically in antimarkets, with public laws predominating over private ordering. In inner-city ghettos, public laws include housing subsidization and landlord/tenant rules, welfare regulation, school finance, family law, and immigration.²⁴⁷ Public laws and regulations within ghettos are subject to public scrutiny and political pressures that transcend the ghetto's boundaries. The public at large, not merely welfare recipients or undocumented immigrants, help to determine welfare and immigration policy. Fights over continued housing programs and subsidies, as well as school finance, are not simply community based, but rather the subject of great legislative debate. What happens to the poor, as a matter of law, theoretically concerns the entire body politic. This is markedly different from middle-class metamarkets, where important legal interactions tend to be private interactions.

The different role that law plays in metamarkets and antimarkets has tremendous significance for understanding the comparative well-being of inner-city and middle-class communities. On the most basic level, it means that, to the extent that the lives of the poor are affected by law, they are not shielded by privacy. The more public information that we have about the poor, the more likely we are to believe that our judgments of them are informed and, since the power resides with voters and their special interests, to engineer their lives in ways that the larger public deems appropriate.

Public information about inner-city inhabitants also reveals flaws in the very design of American community life because the legal rules governing the culture's norm radically contradict the antinorm and render people that make up the antinorm *de facto* (if not *de jure*) wards of the state. The ghetto poor are uniquely isolated in a public sphere which permeates, if not intrudes upon, most important aspects of their lives in ways that members of a metamarket community would see as disruptive, unfair, and un-American.

B. Antimarkets and Consumer-Oriented Approaches to the City

The metamarket/antimarket dichotomy holds that one important way to understand the needs and deficiencies of neighborhoods is to assess objectively the consumer infrastructures that currently sustain those neighborhoods.²⁴⁸ I would further argue that conceptualizing ghetto residents as consumers of public and private goods and services (rather than

²⁴⁷ Arguably, one might also include the prevalence of criminal law in the lives of the urban poor. Further, urban geographers might well include civil rights laws—not for their direct impact on antimarkets, but for their indirect effect in providing opportunities for the exodus of working and lower middle-class households. See *supra* notes 184–194 and accompanying text.

²⁴⁸ See *supra* notes 219–245 and accompanying text.

by racial or income identity alone) is an important factual reality that contributes much to considerations of community building. However, in this context, a number of objections to the consumer-oriented model also need to be addressed.

In his article *City Services*, Gerald Frug associates a consumer-oriented approach with public choice theorists who, he asserts, defend its inherent tendency toward fragmentation on the basis of consumer choice.²⁴⁹ Frug rightly argues that the trend toward viewing public as well as private goods and services as a choice that consumers make perpetuates a shopping mentality in which self-interest increasingly dictates racially and economically homogenous outcomes. "[T]he consumer-oriented model of city services creates a dynamic that makes it increasingly difficult for anyone who can afford to leave to remain in America's diverse cities."²⁵⁰ This is a problem not only for the distribution, financing, and governance of essential services, but it also threatens to commodify the lives of citizens. Frug writes that "it is widely recognized, in political theory as well as daily life, that reducing human experience to the act of consumption falsifies it."²⁵¹

The quandary over the meanings and extent of consumerism in contemporary America reveals formidable differences in the lives of inner-city residents and middle-class Americans, as well as the power of comparative analyses. Much of what Frug asserts about the perils of consumerism is that it is not only corrosive of city life in general, but that it contributes to the isolation of ghetto neighborhoods. Yet not all consumption is the same, and all consumers do not stand on equal footing in the urban economy for public goods and services, let alone private ones. The criticism of the consumer-oriented framework, then, depends a lot on the particular idea of consumption and the particular socioeconomic class of consumer that one thinks predominates the urban economy. If one assumes a middle-class professional couple with two preschool age children, certain preferences and expenditures come to mind, such as the effect of local taxes on the ability to buy a home or apartment, to save for college funds, or, as in many cities, to send one's children to an expensive private school instead of having them publicly educated. In this example, Frug's lament is clearly evident:

Residents of America's metropolitan areas themselves often consider city services to be consumer goods. They evaluate them by deciding whether they are getting what they pay for and, if they think they aren't, they vote for a more business-like mayor or move to a city that is doing better. Many of them—

²⁴⁹ See Frug, *supra* note 180, at 33.

²⁵⁰ *Id.* at 38.

²⁵¹ *Id.* at 32.

particularly those who reside in America's most prosperous suburbs—also act as if the cities in which they live are like voluntary associations. They decide where to buy a house by picking a community filled with the kind of people with whom they want to associate. Once there, they support rules of exclusionary zoning that allow the city's residents to keep "undesirable" people from moving to town.²⁵²

But imagine instead that you are that "undesirable" family of four with a modest, but inconsistent, income from which you pay sales and income taxes (lessened, if you qualify, by the Earned Income Tax Credit). The view of your consumption habits from outside of your home in the ghetto is that you overindulge in conspicuous products such as clothes and the latest basketball shoes, when in reality you rarely purchase such luxuries. The public goods that you desire, such as paved streets, reliable public transportation, and regular sanitation, are provided to the average middle-class city resident at satisfactory levels. The effect of regarding you as a consumer, even a consumer-voter, might benefit you and your community enormously as both a matter of equity and community building in your neighborhood. The point, of course, is that denying a more broadly defined consumer-oriented approach to residents of antimarkets is unjust to those who reside in these communities.

However, it is not necessary to endorse consumerism fully in order to prevent such unfairness. On a theoretical level, one would hope that, by combining traditional definitions of markets with the culturally based ideal structures that nourish and complement them, the idea of growing concentric metamarkets throughout the city would help ultimately to eliminate any conception of consumerism. In the long run, consumer-oriented development might destroy urban fragmentation. On a practical level, however, community building urgently demands that we take seriously the public and private consumer needs of inner-city neighborhoods and its residents.

C. Antimarkets and Zoning Communal Space

By beginning with land usage and zoning and concluding with an evaluation of empowerment zones as one formula for in-place development efforts, this analysis, like many others concerned with spaces and places, could still risk inadvertently promoting fragmentation. An assessment such as this is similar to the "gilded ghetto" debates of the late 1960s, where the dangers of promoting improvement and enrichment of

²⁵² *Id.* at 29.

segregated, marginalized zones of the city suggested that goals such as self-determination imply self-containment.²⁵³ Even with the addition of the comparative framework introduced in this Article, a zoning mentality invites efforts to make suburbanlike enclaves within the ghetto's already rigid boundaries.

However, legally and economically, ghettos are not suburbs. Indeed, to focus too much on zoning-based notions would reduce the idea of in-place development merely to an optimized segregation and distort viable meanings of self-sufficiency. Being among the inner-city poor is not like belonging to other associations;²⁵⁴ it is neither voluntary nor involuntary, fortuitous nor fully coerced. In these communities, preferences are replaced by need, and marginalization results in a lack of belonging and the inordinate life struggles that often flow from such vulnerability. The goal of developing alternative metamarkets that are integrated with the surrounding economy and institutions mitigates the excesses of an in-place focus. In contrast to some exhortations to "buy black" in a nostalgic but blurred gaze back at pre-civil-rights ghettos,²⁵⁵ ghetto transformation through metamarkets does not assume that the most marginalized communities can defeat their subordination relying exclusively on internal resources. Inner-city ghettos cannot only look to informal resources, nor should they attempt such a challenge. The metamarkets in middle-class and affluent areas rely on a host of continuing relationships across their borders in order to create or take advantage of employment opportunities, provide public services, and finance commercial markets.²⁵⁶ Through efforts such as modified competitive advantage clustering,²⁵⁷

²⁵³ John O. Calmore raises similar concerns throughout his article. See Calmore, *supra* note 11.

²⁵⁴ This is in marked contrast to assumptions underlying Robert Ellickson's characterizations of voluntary associations. See Ellickson, *supra* note 94.

²⁵⁵ For complicated examples of an apparently straightforward message, see Dan Barry & Jonathan P. Hicks, *Protester Is Caught in Fatal Fire's Glare; New Look at a Harsh Message*, N.Y. TIMES, Dec. 15, 1995, at B1 (describing an area businessman's "buy black" message in the wake of arson and murder at a white-owned store in Harlem). See also Noam M. Neusner, *Blacks Don't Buy from Blacks; Black Purchasing Power Will Hit \$427 Billion in 1996, But Not Much of That Money Goes into the Pockets of Black Business Owners*, TAMPA TRIB., Sept. 24, 1996, at 1 (despite "buy freedom" campaigns, survey data shows little willingness by black consumers to patronize black-owned businesses); Brietzke, *supra* note 8, at 762-63 ("Although the creation of minority-controlled neighborhoods, businesses, and labor markets would undoubtedly improve the economic position of minorities, it would also further entrench the dualism of a separate development that has already been exacerbated by recent economic and political changes.").

²⁵⁶ See, e.g., Briffault, *supra* note 5, at 375-82 (discussing state subsidization of suburban communities).

²⁵⁷ See Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., May-June 1995, at 55. Drawing on his theories about the competitive advantages of nations' business development, Porter advocates for similarly designed economic development strategies in inner-cities, which take advantage of urban location by focusing private enterprise development on "clusters" of competitive businesses within industries that already have a presence in the metropolitan region. "Integration with regional clusters is potentially the inner city's most powerful and sustainable competitive advantage over the

community development financial institutions ("CDFIs"),²⁵⁸ networking home-based businesses, certain public-private partnerships, and targeted regional planning agreements,²⁵⁹ the links between poor neighborhoods and metropolitan resources can lead to metamarkets that reflect the needs and aspirations of residents without forfeiting cultural or neighborhood autonomy.

Thus, it is imperative to have comprehensive community planning, which is a belabored term that originated in the early planning movement's improvement mentality, and a statutory requirement underlying most land use regulation.²⁶⁰ Rarely were ghetto neighborhoods affirmatively planned; rather, they were modeled on the negation of all the consumer preferences of middle-class ideal structures. Lack of planning, as I have argued, deprived residents of experience in participatory democracy and the rights-like determination of their community's character. The lack of planning has led inner-city residents to feel powerless and leads them to believe that the physical and institutional world in which they live just happens around them. It would be presumptuous to argue for greater participation in planning processes and then prescribe what such planning should achieve. The framework that I propose suggests that, like the metamarket model of neighborhood development, the ingredients of planning are as varied as the needs of resource-poor residents, and the scope goes well beyond new supermarkets and small business incubators. In fact, many well-intentioned community economic development projects focus in a piecemeal way on small tracts over which their sponsors have some control, which often leads to turf tensions and haphazard, uncoordinated, stand-alone development that ultimately disappoints the expectations of inner-city residents. In short, what is required is to get as close to ground zero, bottom-up community planning as possible. Because the market metaphor is central to the currently dominant approach

long term." *Id.* at 61. However, Porter is critical of a social rather than a business orientation. "Businesspeople, entrepreneurs, and investors must assume a lead role; and community activists, social service providers, and government bureaucrats must support them. The time has come to embrace a rational economic strategy and to stem the intolerable costs of outdated approaches." *Id.* at 71. His ideas, which severely limit community organizations and government to roles that merely facilitate business efficiency, have earned him considerable criticism. For critical evaluations of his approach, see *THE INNER CITY: URBAN POVERTY AND ECONOMIC DEVELOPMENT IN THE NEXT CENTURY* (Thomas D. Boston & Catherine L. Ross eds., 1997).

²⁵⁸ For discussions of these community-based banks and other lending institutions, see Rochelle E. Lento, *Community Development Banking Strategy for Revitalizing Our Communities*, 27 U. MICH. J.L. REFORM 773 (1994); Peter R. Pitegoff, *Urban Revitalization and Community Finance: An Introduction*, 27 U. MICH. J.L. REFORM 613 (1994).

²⁵⁹ See Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL'Y REV. 11 (1997).

²⁶⁰ See, e.g., Maine's enabling statute, 30-A M.R.S.A. § 4352 (2) (1999) ("A zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.").

to inner-city economic development efforts, I critique federal empowerment zones through the lens of antimarkets.

V. Empowerment Zones vs. Zones of Empowerment

The metamarket/antimarket dichotomy is particularly salient now with the ascendance of market-based government interventions, chiefly in the form of empowerment zones ("EZs"). After the Reagan and Bush administrations cut federal funding for the remnants of President Johnson's Model Cities program and Nixon's Community Development Block Grant program by 54% between 1980 and 1990,²⁶¹ the Clinton administration finally succeeded in passing EZ legislation in 1993.²⁶² From an urban perspective, the ten-year EZ status enjoyed by the six urban zones designated in 1995²⁶³ provides the single most important coordinated federal, state, and local government response to persistent inner-city poverty for the foreseeable future. I do not intend to recanvass ground well traveled by other commentators who detail the program's specific provisions.²⁶⁴ After a brief overview and summary of established critiques, I will demonstrate the weaknesses of the EZ approach in accordance with three analytic constants of antimarket advocacy: the lack of a sufficient antidiscrimination nexus, the incomplete vision of growth facilitation, and the still grudging unwillingness of the private and public sectors to extend planning priorities to inner-city families and individuals.

A. Empowerment Zones as Doctrine and Critique

Although the Clinton administration has shown appropriate willingness to develop policy aimed at opening suburban opportunities to inner-city families long deprived of such mobility choices, the EZ program represents decidedly in-place development priorities. Although much of

²⁶¹ See Demetrios Caraley, *Washington Abandons the Cities*, 107 POL. SCI. Q. 1, 9 (1992).

²⁶² See Omnibus Budget Reconciliation Act of 1993 ("OBRA"), 26 U.S.C. §§ 1391-97D (West Pocket Part 2000), amended by Taxpayer Relief Act of 1997, 26 U.S.C. §§ 1391 & 1396 (West Pocket Part 2000). Social services block grant appropriation is codified at 42 U.S.C. § 1397f (West Pocket Part 2000).

²⁶³ The urban zones include Atlanta, Baltimore, Chicago, Detroit, New York City, and Philadelphia/Camden. See HUD's December Announcement on Urban Empowerment Zones, TAX NOTES TODAY, Feb. 3, 1995, at 36-51.

²⁶⁴ For a discussion of the specific provisions of the EZ legislation, see Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. CAL. L. REV. 1341 (1993); Otto J. Hetzel, *Some Historical Lessons for Implementing the Clinton Administration's Empowerment Zones and Enterprise Communities Program: Experiences from the Model Cities Program*, 26 URB. LAW. 63 (1994); Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143 (1998); Audrey G. McFarlane, *Empowerment Zones: Urban Revitalization Through Collaborative Enterprise*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35 (1995).

the legislation's programmatic thrust is reminiscent of Model Cities approaches to ghetto poverty,²⁶⁵ the legislation's early British vintage²⁶⁶ and stewardship by Congressional Republicans²⁶⁷ reflect the distinctive flavor of business climate promotion and the less government and more privatization model of centrist governmental decision making in the era of political devolution ("the new federalism").²⁶⁸ Given its scope, its range of priorities, and the compromises necessary to achieve such potentially costly federal interventions on behalf of the poor, EZs represent a remarkable effort at coordinating government resources with private local ones in an attempt to address ghetto poverty, perhaps America's single most intractable political quandary since the civil rights movement.

The EZ legislation provides for three categories of incentives to invest or start small mixed-use businesses within a geographically fixed area of statutorily defined need: labor,²⁶⁹ capital,²⁷⁰ and financing.²⁷¹ These primary incentives are tax-based, establishing employer deductions for employees who live and work within zone boundaries, depreciation advantages for equipment purchased for use in zone businesses, and tax-

²⁶⁵ For example, the Model Cities program in the Demonstration Cities and Metropolitan Development Act of 1966, Title 1, § 101, 80 Stat. 1255, *repealed* by 42 U.S.C. § 5316 (1995), had, as one of its main objectives, correcting the failure of local government to deliver necessary services to inner-city areas, seeking instead to increase coordination among the federal, state, and local agencies and to provide greater financial assistance to local governments for use in housing construction, job training, health facilities, recreation, welfare programs, and education. *See* S. REP. NO. 89-1439, at 5 (1966).

²⁶⁶ EZs are conceptually linked to British urban planner Peter Hall, whose ideas were first applied to abandoned industrial areas rather than heavily populated urban areas. *See* Hyman, *supra* note 264, at 146-47.

²⁶⁷ The first EZ bill was introduced by Congressman Jack Kemp 13 years before passage of the current legislation. *See* H.R. 7240, 96th Cong. (1980).

²⁶⁸ *See* Brietzke, *supra* note 8, at 748-51 (describing the current trend of reliance on private capital to spur urban development).

²⁶⁹ The Empowerment Zone Employment Credit is available only to employers that locate within the zone. It is a 20% credit against income tax liability for the first fifteen thousand dollars of qualified wages to full or part-time qualified zone employees; qualification criteria relate to exemptions of certain kinds of employers and employees in certain kinds of businesses (e.g., suntan facilities, golf courses, gambling operations, or stores principally engaged in the sale of alcohol for off-premises consumption). The credit will be phased out between 2002 and 2004. *See* 26 U.S.C. § 1396 (West Pocket Part 2000).

²⁷⁰ Under section 179 of the Internal Revenue Code, 26 U.S.C. § 179 (West Pocket Part 2000), businesses may elect to expense up to \$17,500 of the cost of depreciable property used in a trade or business, provided that the property was acquired after the date of the EZ designation, the property was originally used in the EZ business, and the property is substantially used in the active conduct of a qualified business. *See* 26 U.S.C. § 1397C (a) (1) (West Pocket Part 2000). The complex definition of a qualified business is contained in § 1397B.

²⁷¹ Enterprise Facility Bonds constitute a new category of tax-exempt private activity bond. Lenders receive a lower interest rate on the bond because the interest is exempt from both federal and state taxes, provided that 95% of the net proceeds of the bond is used to finance zone property from a zone business. *See* § 1394 (a). However, there is a state volume cap for such bonds, and the aggregate face amount of all outstanding EZ facility bonds cannot exceed \$3 million for each zone or community. *See* 26 U.S.C. § 146 (West Pocket Part 2000); § 1396 (c). They are, therefore, highly restricted and limited.

free interest on private activity bonds. The program also provides one hundred million dollars in social services block grants to the six urban zones for use in a variety of need areas, which are defined by statute to include drug treatment, job training and counseling, and programs to foster entrepreneurship and self-employment.²⁷²

Besides tax-based incentives and block grants, the program's strategic requirements envision multiple partnerships among all levels of government, the community itself (primarily through the work of community-based organizations ("CBOs") and community development corporations ("CDCs")), and the metropolitan business community as central to the EZ's community-building doctrine.²⁷³ These requirements appear to incorporate interlocking, if even at times contradictory, premises of development lore that have waxed and waned in popularity over nearly four decades of antipoverty interventions. That is, they codify beliefs in self-determination with coordinated public and private supports, while simultaneously satisfying the view either that revitalized neighborhoods produce a positive externality beneficial to all and to which government should contribute, or simply that the benefits of the free market will come to those communities in which it is hard to do business by removing the tax and regulatory constraints to entry.²⁷⁴ The philosophies then converge at a point of practical consensus: that ghetto redevelopment, like much development work in bureaucracy-laden cities, requires the streamlined, deregulated efficiency of one-stop shopping for everything from community consensus to construction permits.²⁷⁵

²⁷² The social service block grants available under the Social Security Act encompass four main areas of need: (1) residential and nonresidential drug and alcohol prevention and treatment that offer comprehensive services to mothers and their children; (2) adult and youth job training in housing development, entrepreneurship, and self-employment; (3) after-school programs; and (4) adult and youth counseling services in employment, transportation, housing, financial management, and business. See U.S.C.A. § 1397f (b).

²⁷³ An EZ application must include a strategic plan that:

describes the coordinated economic, human, community and physical development plan and related activities proposed for the nominated area, (B) describes the process by which the affected community is a full partner in the process of developing and implementing the plan and the extent to which local institutions and organizations have contributed to the planning process, (C) identifies the amount of State, local and private resources that will be available in the nominated area and the public/private partnerships to be used, which may include participation by, and cooperation with, universities, medical centers, and other private and public entities, (D) identifies the funding requested under any Federal program in support of the proposed economic, human, community, and physical development and related activities; (E) identifies baselines, methods and benchmarks for measuring the success of carrying out the strategic plan, including the extent to which poor persons and families will be empowered to become economically self-sufficient

26 U.S.C.A. § 1391 (f) (2).

²⁷⁴ See Aprill, *supra* note 264, at 1343.

²⁷⁵ See Hetzel, *supra* note 264, at 79.

This ambitious array of considerations has not precluded extensive criticism. On its own terms, the EZ program has been attacked for providing too few real incentives to business location, start up, and financing²⁷⁶ because most of the tax incentives benefit only profitable businesses, an unlikely scenario in any community but particularly in depressed areas.²⁷⁷ Some commentators have taken aim specifically at the character of the incentives in light of recent trends in job creation, finding that the EZ program overemphasizes investment in machine-intensive industries rather than labor-intensive services.²⁷⁸ Further, commentators charge that, by requiring businesses to operate within the zone's boundaries, the program encourages "traditional line" businesses at the expense of the "emerging line" businesses more likely to remain profitable and employ workers of color.²⁷⁹ Others have pointed to the program's cost calculus, suggesting that it unnecessarily dooms it to failure when compared to its benefits.²⁸⁰ Finally, even the extraordinary planning provisions have garnered caveats that they be exercised with restraint,

²⁷⁶ See *id.* at 68, 78-79.

²⁷⁷ See Aprill, *supra* note 264, at 1346, 1348-49 (comparing the experience of state enterprise zones, which rely more on property and sales tax incentives, rather than income tax incentives, and have had little effect, even though their incentives avoid the necessity of profitability); Hyman, *supra* note 264, at 151-53 (describing the mixed findings and wealth of methodological criticisms of the General Accounting Office's study of Maryland and Marilyn Rubin and Regina Armstrong's study of New Jersey).

²⁷⁸ See Aprill, *supra* note 264, at 1358.

²⁷⁹ Professor Hyman criticizes the EZ program as fundamentally encouraging the wrong kinds of black businesses. He posits two types: *traditional line* and *emerging line*. Traditional line black businesses are typically small-scale, labor-intensive personal services businesses that are commonly found in inner-city neighborhoods: barbershops, beauty salons, and small retail stores that serve primarily local clientele. See Hyman, *supra* note 264, at 160. The problems with these businesses is that they produce few jobs, are run by personnel and owners with low levels of education, and have limited growth potential. See *id.* at 160-61. The emerging line businesses, on the other hand, are far more sophisticated, located outside of predominantly low-income neighborhoods of color, and are more heavily capitalized. See *id.* at 162. Because their owners operate in fields such as business services, finance, wholesaling, and manufacturing, it is not surprising that they have greater education and lower failure rates. See *id.* These businesses, Hyman believes, should be the focus of EZ's, but they currently are not and, therefore, encourage the creation of poor paying, low-benefits, low-mobility jobs. See *id.* at 163. But see Peter G. Gosselin, *In Harlem, Crucial Test for Private Enterprise*, BOSTON GLOBE, June 25, 1998, at A1 (describing attempts by director of Harlem's EZ to attract large, national retailers and to instill more competitiveness among local businesses). Similarly, Ellen Aprill suggests that the limitation of benefits to zone residents may exert pressure on employers to release zone (i.e., qualified) employees who later decide to move their domiciles outside the zone. See Aprill, *supra* note 264, at 1349.

²⁸⁰ See Jeffrey M. Euston, *Clinton's Empowerment Zones: Hope for the Cities or a Failing Enterprise?*, 3 KAN. J.L. & PUB. POL'Y 140, 148 (1994) (asserting that the calculation of the program's costs reduce the chance of the program's success). Since the law counts every dollar of tax benefits as revenues collected by the Internal Revenue Service and spent by the government, the more businesses and jobs that a zone creates, the more that it costs. This formula omits the tax revenues gained by a successful program or the tax revenues that never occur from the lack of one.

lest the products of planning are consumed by excessive attention to process.²⁸¹

B. Empowerment Zones and Antimarkets

The following analysis posits that the structural flaws in the EZ doctrine lie in its failure to acknowledge fully the history and maintenance of ghettos as antimarkets. I limit my critique to three primary analytic aspects: racial and economic discrimination, "soft" businesses and institutions, and the physical composition of the community.

1. Lack of a Sufficient AntiDiscrimination Nexus

Empowerment zones do not adequately, if at all, address the root discriminatory barriers to economic inclusion that create and sustain antimarkets. They offer no legal framework for the enforcement of antidiscrimination laws beyond what already exists. As we have seen, *de jure* segregation made antimarkets the polar opposite of middle-class markets; overt institutional behavior and subsequent covert permutations entrenched ghettos through processes predicated on racial and economic discrimination. Yet, the empowerment zone design does not acknowledge credit discrimination, nor does it provide for mandatory correction of unfair practices. There are no direct economic protections for exploited, marginalized consumers, such as usury penalties or even state attorney general monitoring of price discrimination among uninsured, unregulated businesses. Further, there is no renewed institutionalization of legal protections against housing displacement within the affected zones. Finally, improved public services are not required even in the absence of a finding of discrimination.

Instead, the whole business facilitation thrust of the EZ statutory design seems informed by selective historical memory. Neither the businesses that have disinvested from ghettos nor those that operate there have actively done so because governments failed to accord them the environmental safeguards available in preferred markets. Yet, the message that deregulation and tax incentives send presents an olive branch to besieged combatants of a trade war that never happened: peace, we want you (to come back) and will do anything that we can to satisfy you. It is marketing by seduction, rather than a commitment to markets regulated by context-specific notions of fairness. Marketing investment in antimarkets first requires a frank acknowledgment of antimarkets themselves and a clear public policy of reinstitutionalized fairness. This may appear to sour the offer's sweetness, but firms considering expansion in, or relocation to, areas characterized by persistent antimarket dynamics (e.g., un-

²⁸¹ See Hetzel, *supra* note 264, at 75.

available credit, costly and unreliable insurance, irregular city services, etc.) already know about it or should know the antimarket elements. Offering a zone of commitment to legal controls and evenly applied business regulation provides consumer protection and benefits businesses that are realistic about growing in these areas.²⁸²

2. *Incomplete Vision of Growth Facilitation*

Empowerment zones do not facilitate the growth of soft businesses and institutions that may be specific to many antimarket areas. By *soft*, I refer to the array of nonprofit organizations and social service operations that many persistently poor families need, but which do not generally earn profits or exist in order to maximize profit.²⁸³ This observation directs the type of indigenous commercial landscape that should be encouraged when considering the realities of families and individuals long occupying antinorm status.

Again, we should take recourse in middle-class metamarkets, where the public and private goods and services available in reasonable proximity correspond to the exigencies and preferences of middle-class life. The applicable principle, however, is not merely to recreate those public, private, and nonprofit institutions that dot the landscape of middle-class consumer lifestyles, but rather to provide those goods and services that respond to the needs and demands of consumers in the antimarket context. Families diminished by violence and drug addiction or destabilized by chronic unemployment and marginal educational access comprise a substantial, if not critical, segment of the consumer market in antimarket neighborhoods. Shunted into ghettos, these families have no other locational choices. Their specific needs also constitute the basis for a rebuilding of local economy. The danger lies in conflating their thirst with a desire for cappuccino.

²⁸² Put another way, if I were considering locating my photocopying and graphics design company in Camden, N.J., all of my employees (zone residents and nonresidents alike) and I would be confident in believing that the EZ regime would facilitate my access to credit, bank services, and affordable insurance, as well as mandated public agency accountability for street lighting, snow removal, and bus service. I would gain more by this confidence than I would by the prospect of employees lost to evictions (in the event that the zone succeeds and property values rise), the whims of bank shareholders disenchanted with Whiteacre Bank's new branch there, the possible loss of investor interest in the tax-exempt facility bond market, or cutbacks in state aid to new utilities construction after gubernatorial administrations change parties in two or three years. I would want efficiency and stability in the rules of doing business, just as in my suburban offices, where I expect that I am subject to liability for unfair trade practices to the same extent that I am protected against my competitors.

²⁸³ These organizations and the work that they do are often characterized pejoratively by government officials in the highest offices. For instance, New York governor George Pataki was quoted as saying of the Harlem EZ, "We're trying to build businesses and create jobs, not expand social service bureaucracies and erect monuments to government." Gosselin, *supra* note 279.

Given that the EZ legislation provides specifically for grants to social services and envisions (at least at the point of the strategic plan) substantial involvement of CDCs and other repositories of the community interest, is this criticism a matter of emphasis rather than design? Perhaps, but matters of emphasis, like those of degree, are too easily extinguished by competing notions of good business climate and the good life.

3. *Failure to Include Resident Participation*

EZs fail to emphasize the ground, the air, and a community's desire to determine the physical ingredients that "make the area a sanctuary for people."²⁸⁴ I have argued that comparing ghetto antimarkets to middle-class markets serves two major functions. First, it illustrates the processes by which stable communities have been made and sustained in the United States. Second, it demonstrates the extent of deprivations exacted on antimarket neighborhoods in order to sustain those middle-class neighborhoods. In contrast to middle-class market development, antimarkets are generally unplanned communities that suffer from a patchwork of ad hoc zoning regulations and a civic alienation from public decision making relative to other parts of the city. EZs, because they are formed with the power and resources of all levels of government, could reorder fundamentally the premises underlying antimarkets in order to create truly integrated metamarkets, beginning with the ground and working upward.

However, EZs fail to do so. Nothing in the statute or strategic planning requirements encourages formal civic participation in land use planning, despite the irrefutable fact of patchworked zoning plans, the paucity of useable public space and recreation areas, hostility over the deployment of public services (e.g., police and informal economic controls, such as street vendors), and the toxic presence of environmental hazards amid a preponderance of families.²⁸⁵ By design, EZs reconfigure the inner-city landscape by emphasizing business-friendly concerns; the necessary corollary, however, is the proximate consumer base (with hopeful spokes extending over time to the metropolitan economy). As consumers, residents of these neighborhoods should be able to determine the character of their communities, whatever that ultimately may be. They too consume public, as well as private, goods and services. By omitting these critical determinants of community through deregulation, EZs implicitly propose for the poor what middle-class consumers would not likely tolerate for themselves: a legally silenced voice. Community voice, even in protest, is a mainstay of democratic participation and an ideal central to middle-class civic experience.²⁸⁶ Because land uses frequently involve

²⁸⁴ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

²⁸⁵ See *supra* notes 149–155 and accompanying text.

²⁸⁶ See *supra* notes 93–99 and accompanying text.

competition between neighborhoods,²⁸⁷ the absence of this ideal in the EZ design presents a paradigm for economic development of antimarket areas that offers subordinate membership in the spatial relations among metropolitan areas. Again, the rules differ among areas. Rather than being gradually replaced by a locally determined adaptation of market rules, antimarkets merely will be reconstructed and reinforced.

VI. Community Building Instruments and Antimarkets

Although the metamarket/antimarket framework yields certain suggestions, prescriptions for such a trying and intractable subject matter require caution. In this final Part, I identify instruments and workplaces, rather than specific strategies and blueprints, as guides to the role of law in the multidisciplinary realm of inner-city economic development. I focus first on the approaches that hold the most promise for comprehensive neighborhood planning and advocacy, dividing them into two broad arenas of legal modeling: adversariality and facilitation. The adversarial prong recognizes that the reconstruction of antimarket communities is impossible without eradicating the discriminatory barriers to economic stability. Adversariality often becomes synonymous with litigation, which remains largely true here. Yet, adversariality addresses conflicts between the interests of a community client and the myriad structural forces delimiting them; sometimes such advocacy takes place outside of the bounds of traditional litigation. The three examples discussed here are redlining, municipal context equalization, and the blight of environmental hazards. The second prong, facilitation, refers to the unique tools lawyers bring to community building (such as counseling nonprofits), which is more often performed in the service of multidisciplinary empowerment or community economic development ("CED") activity.

A. Adversariality: Eradicating Discriminatory Barriers to Community Economic Stability

1. Insurance and Bank Redlining

I start with an illustrative case. What if one of the poorest, most segregated cities in the country joined with residents and an established civil rights organization to challenge automobile insurance redlining, which prevented residents from reaching jobs available outside the municipality, increased burdens on local businesses, and spurred the exodus of prime tax-base contributors, such as employers and more economically mobile households? Furthermore, what if they fashioned a litigation strategy de-

²⁸⁷ See Brietzke, *supra* note 8, at 766 (discussing shifting negative externalities among neighborhoods).

signed to avoid perceived hostility among federal courts hearing civil rights claims and instead brought more sympathetic claims in state courts under state constitutional and statutory law?²⁸⁸ Could a single impact litigation strategy effectively address a core vulnerability of antimarket conditions, with the reasonable hope that legal advocacy had removed significant impediments to other CED efforts?

The city of Compton in California tried. In the mid-1980s, Compton was (and still is) a sad, angry, black and Latino ghetto of extraordinary proportions. Sandwiched between Watts and Long Beach, Compton is statistically symbolic of the impoverished, postindustrial wasteland that many associate with all of South Central Los Angeles and the more vertically developed ghetto neighborhoods of Rust Belt cities. The City's decision to bring suit on its own behalf and as a representative of its residents along with the Southern Christian Leadership Conference ("SCLC") and individual taxpayers seemed a masterstroke of advocacy that went beyond discrete redlining or economic development litigation to address the central aspects of its antimarket status through the adversarial process. This was an anti-economic-discrimination lawsuit. A single paragraph in the complaint summarized the theory of the case:

[P]laintiffs aver that redlining practices burden Compton with the cost of repairing damage to city property caused by uninsured motorists, forces residents out of poor and minority areas thereby reducing property values and property tax revenues, encourages businesses in these areas to relocate thereby resulting in a loss of employment opportunities, discourages business in redlined areas thereby resulting in a loss of sales tax revenues.²⁸⁹

Given the perspective of a plaintiff community with many of the historical and socioeconomic scars described by Wilson²⁹⁰ and Massey and Denton,²⁹¹ the case might have said much more about the effects of auto insurance redlining on the community's antimarket status. The spatial mismatch between residents and jobs, along with the Southern California topography, made owning a car a necessity for gainful employment. The spillover of high insurance rates and high numbers of uninsured motorists compounded Compton's inability to attract the most ba-

²⁸⁸ On this general shift in litigation strategy, see Ronald K. L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, reprinted in 13 HASTINGS CONST. L.Q. 599 (1986); Daniel R. Gordon, *Progressive Retreat: Falling Back from the Federal Constitution to State Constitutions*, 23 ARIZ. ST. L.J. 801 (1991).

²⁸⁹ *City of Compton v. Bunner*, 243 Cal. Rptr. 100, 106 (Cal. Ct. App. 1988) (ordered not published). Cf. *County of Los Angeles v. Farmers Ins. Exch.*, 132 Cal. App. 3d 77 (Cal. Ct. App. 1982) (dismissing redlining complaint for failure to exhaust remedies).

²⁹⁰ See WILSON, *supra* note 139; WILSON, *supra* note 184.

²⁹¹ See MASSEY & DENTON, *supra* note 46.

sic investments in goods and services, crippling its consumer infrastructure by increasing the costs and risks of doing business there. Like other poor, predominantly black and Latino incorporated areas,²⁹² the city's tax base was wholly insufficient to provide the level of public goods and services required for such a concentration of low-income households. Redlining was specifically sanctioned by a state nominally antidiscriminatory law,²⁹³ which favored middle- and upper-income areas through statewide formulas for risk allocation. Perhaps most importantly, Compton's claim of direct injury at best suggested an economic development strategy that could integrate its local economy with the benefits of the regional economy around it.

Unfortunately, the plaintiffs lost their appeal and lost badly. Alleging that auto insurance rates in Compton were 150% higher than in more affluent areas,²⁹⁴ the plaintiffs had sued for declaratory and injunctive relief under the California civil rights law²⁹⁵ and the equal protection and privileges and immunities clauses²⁹⁶ of the state constitution. The court splintered and defeated the plaintiffs' novel claims in exemplary fashion.²⁹⁷ Holding the exhaustion of administrative remedies doctrine appli-

²⁹² Compton's experience is not unlike that of East Palo Alto, a predominately black and Latino city nestled but neglected among Silicon Valley's prosperous towns. See Gerald Lopez, *Economic Development in the Murder Capital of the Nation*, 60 TENN. L. REV. 685 (1993).

²⁹³ Redlining, or territorial rating, is expressly authorized by the California insurance nondiscrimination law, which states:

(a) No admitted insurer . . . shall fail or refuse to accept an application for such insurance . . . under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, language, color, religion, national origin, ancestry, or the same geographic area; nor shall race, language, color, religion, national origin, ancestry, or location within a geographic area of itself constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for such insurance.

CAL. INS. CODE § 11628 (West 1988 & Supp. 2000).

Further, the statute states that "[d]ifferentiation in rates *between* geographical areas shall *not* constitute unfair discrimination." *Id.* The state instead prohibits the use of one of the aforementioned protected categories "or location within a geographic area" as a "condition or risk for which a higher . . . premium . . . may be required." *Id.*

²⁹⁴ *City of Compton*, 243 Cal. Rptr. 100, 106 (Cal. Ct. App. 1988) (ordered not published).

²⁹⁵ The Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982 & 2000 Supp.), states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

²⁹⁶ See U.S. CONST. art. I, § 7 (b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.").

The plaintiffs in *City of Compton* alleged state action against Farmers as "a heavily regulated company" doing business under state certification. *City of Compton*, 243 Cal. Rptr. at 106-07.

²⁹⁷ For example, the court could have granted the plaintiffs leave to amend their com-

cable to all claims against the insurer except for the City's,²⁹⁸ the court then denied the City standing for failure to belong to the class of persons allegedly discriminated against because it could not "attempt" to represent the claims of its residents.²⁹⁹ Nevertheless, the court allowed consideration of the constitutional merits when it found that SCLC could sue on behalf of its members.³⁰⁰

In the end, the plaintiffs failed to force a strict scrutiny standard of review.³⁰¹ The more meaningful loss, however, was the court's denial of the plaintiffs' state equal protection claim.³⁰² That denial was premised on a very businesslike rationale analogous to creditworthiness. Insurers under the California statute, like banks under banking laws, are free to charge higher premiums in certain areas as long as there is a business reason, such as actuarial proof of higher aggregate risks (*loss experience*) or a probability of default on a loan.³⁰³ That the effect may mean virtual uninsurability for substantial numbers of resident low-income people of color is not constitutionally relevant, as long as the basis is not predicated on the driver's race, national origin, or other protected status.³⁰⁴

plaint to allege damages in addition to equitable relief, thus fitting them into the judicial remedy exception to the exhaustion of remedies doctrine. It did not. *See City of Compton*, 243 Cal. Rptr. at 114.

²⁹⁸ *See id.* at 109. Exhaustion of remedies was denied to the representative claims because the court said that class relief was implicitly available to plaintiffs seeking an administrative hearing. *See id.* at 112. The City, however, was not an "aggrieved person" under the Act, and therefore no administrative relief was contemplated. *See id.*

Plaintiffs accidentally omitted argument on the futility exception from their reply brief; therefore, the court declined to hear them at all. *See id.* at 115. The court made this ruling despite evidence that the Commissioner's ruling would have been adverse if made consistent with public statements that he had already given in his official capacity and evidence of the Commissioner's failure to complete a preliminary investigation into unfair discrimination. *See id.* at 116. The court called it a close question, but found in favor of the defendants.

²⁹⁹ *See id.* at 118-19.

³⁰⁰ *See id.* at 120. Specifically, the SCLC alleged immediate harm or imminent injury to local, uninsured members of an association dedicated to ending invidious discrimination. Therefore, it satisfied the test for associational standing set forth in *Warth v. Seldin*, 422 U.S. 490, 511 (1975), which was more explicitly reiterated in *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333 (1977).

³⁰¹ The California Supreme Court had declined to apply strict scrutiny in *King v. Meese*, 43 Cal.3d 1217 (1987) (upholding the constitutionality of a mandatory insurance law that required proof of financial responsibility, where the court held a driver's license to be a property right but one that was insufficient to trigger strict scrutiny). Given the authority of the *King* holding, the court in *City of Compton* expressly barred the more favorable standard and noted that procedural due process was adequately afforded by provisions of a state-assigned risk plan. *See City of Compton*, 243 Cal. Rptr. at 121-24.

³⁰² Noting that the antidiscrimination provisions of the current insurance law, CAL. INS. CODE § 11628 (West 1988 & Supp. 2000), originated in 1967 as an apparent response to allegations by civil rights groups that the existing law charged blacks living in the riot-torn Watts area higher rates, the court affirmed the constitutionality of the contested language added in a 1978 amendment, 1978 Cal. Stat. 875, which noted that differentiation in rates between geographical areas would not constitute unfair discrimination. *See id.* at 126.

³⁰³ 243 Cal. Rptr. at 127.

³⁰⁴ *See id.* at 128.

City of Compton demonstrates both the virtues and vices of test case impact litigation. In a broad sense, its primary legal importance lies in its bold attempt to free plaintiffs of the notorious constraints against bringing practically any suit for economic discrimination against the poor. Plaintiffs' counsel were frustrated by obstacles common to impact litigation, such as exhaustion of remedies, standing, narrow judicial construction, and, interestingly, the structural impediments inherent in civil-rights-style equality legislation that predicates antidiscrimination on the spatial hopes of racial integration that never occurs.³⁰⁵ From the perspective of antimarkets, a victory for the plaintiffs would have removed critical discriminatory barriers to Compton's economic growth as a community on behalf of individual households struggling to make ends meet.³⁰⁶ Overall, *City of Compton* demonstrates anti-redlining litigation premised on an underlying access theory of economic development. In that sense, it attempts (here unsuccessfully) to integrate both of the first principles of empowerment advocacy: by demanding access to affordable insurance rates in the city, it attacks discriminatory barriers to economic growth as a critical step toward facilitating such growth.

A similar access theory underlies the Community Reinvestment Act ("CRA"),³⁰⁷ which was designed to encourage banks and savings and loans to make mortgage lending more available to the low-income communities that they have traditionally abandoned.³⁰⁸ The logic is consistent with the model of adversarial advocacy. Regulated lending institutions routinely discriminate against ghetto-area consumers, reducing opportunities for stakeholderism and asset formation while increasing community social and economic marginality. Though the CRA provides no private right of action, communities and their representatives can challenge a banking institution's request for expansion³⁰⁹ on the basis of its poor

³⁰⁵ Presumably, the 1967 language amending the California insurance code in response to pressure from civil rights groups justified the differentiation between discrete areas on the grounds that blacks would come to live in white areas where rates were lower and that, until then, individual black households should be charged rates on the individual merits of the drivers applying for coverage.

³⁰⁶ What is far from clear, however, is how a more or less open-faced anti-economic-discrimination decree would have been incorporated into complementary efforts of a comprehensive community development plan. After all, lower auto insurance rates do not alone create viable metamarkets in ghetto communities.

³⁰⁷ See 12 U.S.C. §§ 2901-2906 (1994).

³⁰⁸ See *supra* notes 46-55 and accompanying text. Regarding the purpose of the CRA, section 2901 (b) states:

It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.

³⁰⁹ See § 2902 (3) (A)-(F).

record of serving its "entire community."³¹⁰ The challenge is aided by public data required pursuant to the Home Mortgage Disclosure Act³¹¹ and, to a lesser extent, by mandatory ratings by Federal Reserve regulators.³¹² As a matter of adversarial advocacy, a successful challenge yields important concessions from the applicant institution to the underserved community.³¹³

I do not intend here to provide another sweeping account of the CRA's merits in reversing decades of disinvestment,³¹⁴ except to point out that it is one of the only adversarial tools available to community clients. This is unfortunate, since the redlining problems that the CRA meekly addresses go to the very core of the economic dimensions of antismarkets.³¹⁵ In a sense, everything that the adversarial prong of CED confronts is redlining.³¹⁶ Virtually irrelevant to the metropolitan political economy of which it is a nominal part, the ghetto experiences isolation from everything that is economically important. This isolation is often traceable to systematic redlining, overlapping lines drawn repetitively and corrosively by a variety of institutional decision making that collectively functions to disempower one or another critical element of a spatially segregated community. From the vantage point of community character, cumulative redlining defines exogenously a ghetto's borders as much as more familiar internal factors, such as crime (or, for that matter, particular aesthetic zoning restrictions on homes). Thus, the CRA, for all of its structural flaws and limitations,³¹⁷ is nonetheless a critical tool for adversarial advocacy. It has come to stand for the proposition that marginal-

³¹⁰ § 2906 (a) (1).

³¹¹ See § 2904; see also 12 U.S.C. § 2803 (1994).

³¹² See § 2906 (b) (1)-(2).

³¹³ There is evidence that such challenges work not only to force banks into negotiating settlements, but that they also motivate unilateral action. See Taibi, *supra* note 228, at 1488.

³¹⁴ See generally Jean Pogue & David Flax-Hatch, *The Invisible Lenders: The Role of Residential Credit in Community Economies*, in CHALLENGING UNEVEN DEVELOPMENT, *supra* note 111, at 85-92; Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291 (1993); Taibi, *supra* note 228, at 1471-84.

³¹⁵ Many would go further in criticizing the effectiveness of the CRA's goals: "[T]he incentive structure of the CRA is perverse; in recognition for having engaged in a minimally acceptable level of community investment, a firm is rewarded by being allowed to contribute to undermining the long-term basis of community investment by further concentrating the market." Taibi, *supra* note 228, at 1512.

³¹⁶ Compare this definition of redlining: "[A]ny set of practices that 'systematically den[ies]' credit to applicants from low- and moderate-income, and minority neighborhoods." *Id.* at 1486 (internal citations omitted).

³¹⁷ Taibi argues that the central flaw of the CRA, even as legislation enacted within an affirmative action paradigm, is that it simply does not go far enough to challenge the banking industry rules and practices that systematically reproduce redlining in the first place. See Taibi, *supra* note 228, at 1511-14. He also notes, as have others, the anticompetitive effects of making banks subject to CRA compliance by entities other than their nonbank competitors, such as investment houses and insurance companies. See *id.* at 1494-96.

ized neighborhoods represent important markets that must not be overlooked in the march toward globalized banking. By assuming even token relevance for marginalized neighborhoods at a merger stage, advocates may creatively seek agreements that further incorporate antimarkets into metropolitan commerce.

Yet, the paramount antimarket question remains: Even if home loans, commercial lending, and affordable insurance could produce more stakeholders, would those improvements magically transform the ghetto? Probably not, unless the magic lay in comprehensive community planning efforts, not unlike those that originally produced stable middle-class areas. This contention underscores an additional benefit of advocacy combined with consumer infrastructure research; consumer infrastructures illustrate the comprehensive nature of interconnected neighborhood deficits, and the same should be true of sustainable solutions.

2. Municipal Services

The integration thesis has been so statutorily dominant that few laws even exist that relate directly to remedying municipal service disparities within poor neighborhoods relative to middle-class areas. Regular, quality services are central to sustaining market viability.³¹⁸ Irregular sanitation results in lower property values, just as poorly paved roads hinder business development. Several commentators have suggested the use of the Fair Housing Act³¹⁹ to remedy the discriminatory denial of growth-enhancing municipal services.³²⁰ From the perspective of in-place devel-

³¹⁸ See Frug, *supra* note 180, at 45 ("Public services can become the vehicle for building the infrastructure that whether we like it or not shapes the kinds of human relationships that characterize the places in which we live.").

Disparities over city services are sometimes characterized in terms of the traditional hostility between central cities and the surrounding suburbs. As suburban residential arrangements settle into dominance, however, some commentators are beginning to note common interests regarding services. See, e.g., Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL'Y & L. 471 (1998) (arguing that the sources of opposition to metropolitan government may be diminishing, and the benefits of metropolitanism may be growing); Florence Wagman Roisman, *Sustainable Developments in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87 (1998) (arguing that distinctions between suburbs and cities are increasingly hollow and that sustainable development in each is linked to the other).

³¹⁹ 42 U.S.C. §§ 3601-31 (1995).

³²⁰ See Calmore, *supra* note 11, at 1487 (proposing "spatial equality" over strict adherence to integration-based approaches to ghetto poverty); John O. Calmore, *Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7, 8 (1980) (arguing for urban non-white and poor to live under improved circumstances in their own neighborhoods); see also, Adams, *supra* note 143; Dubin, *supra* note 164, at 782-83; Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 URB. LAW. 369 (1990); Henry W. McGee, Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB.

opment efforts, the issue is whether provisions of the Fair Housing Act can be applied to address municipal service inequities and gentrification, rather than to the traditional host of integration-based remedies for patterns and practices of exclusionary zoning³²¹ and housing discrimination.³²²

Jon Dubin, in his powerful article *From Junkyards to Gentrification*, articulates a theory of "protective zoning" that is premised in part on Fair Housing Act litigation.³²³ He too begins with the structure of American planning and land use law to unearth the norms of residential development found specifically in *Euclid* and argues that the opinion implicitly established rights to protective zoning: "[T]he Court in *Euclid* found that it is manifestly within the general welfare to protect residential communities from the dangers and degradations of blighting or disruptive uses."³²⁴ Within the penumbra of protections is the right to equitable city services, particularly where they are regularly afforded to predominantly white areas of the same municipality. Enforcing the right in antimarkets may require federal law, since the discriminatory provision of public services falls within the coverage of the Fair Housing Act's sections 3604 (a) and (b).³²⁵ After a plaintiff has made a prima facie case under the Act, the burden then shifts to the defendant to show a legitimate and bona fide purpose or justification served by both the conduct and the absence of less discriminatory alternatives.³²⁶ Since the first prong is no bar to municipal regulation promulgated under the police power, Dubin argues that

LAW. 25 (1991).

³²¹ See *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668 (1976); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (holding that the city's zoning decisions were designed to perpetuate racial segregation); *Arlington Housing Development Corp. v. Village of Arlington Heights* (Arlington Heights II), 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (holding that zoning restrictions against development of low-income housing violated the Fair Housing Act).

³²² See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972) (holding that discrimination by landlord violated the Fair Housing Act); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (holding that city's refusal of housing lower income residents violated the Fair Housing Act); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (holding that city's failure to issue permit for construction of low-income housing project violated the Fair Housing Act); *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (holding that racial discrimination in housing practices violated the Fair Housing Act); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985) (holding that city practices in subsidizing housing were discriminatory and violated the Fair Housing Act).

³²³ See Dubin, *supra* note 164.

³²⁴ *Id.* at 798-99.

³²⁵ Section 3604 (b) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b) (1995). HUD regulations interpret this provision broadly enough to encompass "failing or delaying maintenance or repairs," if not more. 24 C.F.R. § 100.65 (2000).

³²⁶ See *NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (employing the pure effects test).

it is the latter prong which provides a basis for exposing land use discrimination.³²⁷

Michelle Adams suggests that the same provision of the Act may be used to equalize services and facilities within public housing projects.³²⁸ The circuits are currently split as to whether an entity other than the property owner may be sued under the Act. In *Clifton Terrace Association v. United Technologies Corp.*,³²⁹ the D.C. Circuit read the "services or facilities" language narrowly to reach only habitability issues, but three other courts, while ruling against plaintiffs, noted in dicta that § 3604 (b) may encompass "services generally provided by governmental units such as police and fire protection or garbage collection."³³⁰

Overall, the approach suggests two possibilities. On one hand, the Fair Housing Act may be an effective legal means to hold property owners (particularly the U.S. Department of Housing and Urban Development ("HUD") and local public housing authorities) liable for failures to maintain public housing projects occupied by blacks and Latinos at the level comparable to projects occupied by whites.³³¹ As discussed earlier, several studies have detailed substantial disparities in the quality of design, services, amenities, and locations of public housing occupied primarily by low-income white households over those housing black and Latino households.³³² Use of the Fair Housing Act in this way establishes a benchmark for an otherwise elusive measure of equality.

On the other hand, the Fair Housing Act's language could be read broadly to prohibit any practice tending to further exacerbate antimarket conditions. The antimarket concept, then, might have utility well beyond metaphorical meaning. It may instead capture—empirically, historically, and objectively—the variety of institutional processes that have systematically disadvantaged low-income black and Latino urban neighborhoods. Combined with consumer infrastructure studies that chronicle discrimination and deficiencies in the availability of basic public goods and services relative to middle-class areas of the same cities, litigators

³²⁷ See Dubin, *supra* note 164, at 786; see also John M. Payne, *Fair Housing for the 1990s: The Fair Housing Amendments Act and the Ward's Cove Case*, 18 REAL EST. L.J. 307, 340 (1990).

³²⁸ See Adams, *supra* note 143, at 479–84.

³²⁹ 929 F.2d 714 (1991).

³³⁰ See Adams, *supra* note 143, at 482 (quoting *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)); see also *Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1224 n.21 (4th Cir. 1989) (addressing migrant workers' claims of substandard housing facilities); *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 424 (4th Cir. 1984) (involving insurance agent's claim of redlining).

³³¹ See *Concerned Tenants Ass'n v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980) (holding that significant preclusion in housing development's services and facilities following changeover from white to nonwhite constituted a stated cause of action); cf. *Walker v. HUD*, 734 F. Supp. 1239 (N.D. Tex. 1989); *Young v. Pierce*, 685 F. Supp. 986 (E.D. Tex. 1988).

³³² See *supra* note 175 and accompanying text.

could provide courts with quantifiable parameters for equalized environments.³³³

Assuming that the Fair Housing Act is the primary federal statute available to attack discriminatory provision of municipal services,³³⁴ an antimarket perspective raises two additional planning issues. First, what does protective zoning mean for relatively unprotected communities? Despite the great similarities among ghetto neighborhoods, there are significant differences as well. Protective zoning for areas threatened with gentrification may place an emphasis on avoiding displacement that is different than that placed on an area far from such redevelopment. Protective zoning in practice could also imply efforts to utilize the same kinds of character-marking land use devices common to suburban areas, including exclusionary ones, or it may emphasize measures to protect a community's particular family-oriented needs, such as safe recreational facilities and drug-free parks. As always, the conceptual challenge for advocates hopeful about the use of the Fair Housing Act to remedy service disparities is to fit the Act to the need, rather than the reverse.

Second, what is the measure of equality when advocates seek service equalization? The goal of practical equality raises serious epistemological questions, particularly in relation to groups whose history of intentional and negligent deprivations, as Part III illustrates, knows no modern American parallel. It is easy to imagine equality paradigms in which equalization of services in ghetto neighborhoods is measured by services in poor white areas.³³⁵ Yet, why equalize only up to the level of condi-

³³³ The Act may have utility, for example, in suits against a municipality where the city has passed an ordinance that would frustrate affordable housing being built as part of a redevelopment plan. See, e.g., *Hispanics United of DuPage County v. Village of Addison*, 958 F. Supp. 1320 (N.D. Ill. 1997) (establishing that owners facing an imminent decline in property values and loss of social and professional benefits as a result of redevelopment planning have a claim under the Fair Housing Act); cf. *Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Borough of Essex Falls*, 876 F. Supp. 641 (D.N.J. 1995) (holding that an ordinance authorizing condemnation proceedings against a planned treatment facility for disabled adults was not discriminatory under the Fair Housing Act).

³³⁴ I have elected not to discuss the Equal Protection Clause of the U.S. Constitution, though I acknowledge that others have more faith in its current use. Dubin, for example, is more optimistic than many about overcoming the discriminatory intent standard announced in *Washington v. Davis*, 426 U.S. 229 (1976). See Dubin, *supra* note 164, at 791. He points to several cases showing some willingness of courts to find intent by piercing the veil of neutrality on the often used regulatory justifications of an economic nature; see also *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1117-18 (D.D.C. 1987) (enjoining evictions despite economic reasons for apartment house renovations); *United States v. Birmingham*, 538 F. Supp. 819, 830 (E.D. Mich. 1982) (preserving property values). The most inspiring case is *Ammons v. Dade City*, 594 F. Supp. 1274, 1301 (M.D. Fla. 1984), in which black residents of a small Florida town won an equal protection suit against the city for failure to pave roads, run sewer lines, and hire black policemen over several decades. *Ammons*, however, may have been too special a test case for wider applicability. The egregious nature of the clearly race-based deprivations occurring well beyond the formal end of the Jim Crow South differ greatly from the complexity of interests and racially neutral tenor of larger city decision making around the country.

³³⁵ For example, Michelle Adams adopts such a standard in the public housing context.

tions afforded poor whites? Where equality is the goal, the metamarket/antimarket dichotomy instead is historically and philosophically premised on the psychic and material benefits associated with middle-class ideal structures, not white poverty.

3. *Environmental Blighting*

Even with drug-free parks, safer streets, and immaculate sanitation services, ghetto antimarkets would remain severely disfavored because of the discriminatory siting of landfills, solid waste facilities, and decaying hulks of defunct chemical factories. These facilities pose not only economic threats to community stability, but also considerable community health problems and disorders (or noneconomic effects) in the form of cancer, brain damage, asthma, birth defects,³³⁶ and psychological harm.³³⁷ Siting controversies, "the classic environmental dispute,"³³⁸ represent the unique vulnerability of antimarkets and profound evidence of their political powerlessness.³³⁹

Like automobile insurance redlining, federal laws, including the National Environmental Policy Act ("NEPA")³⁴⁰ and the Equal Protection Clause, have been largely ineffective tools compared to their state counterparts.³⁴¹ Among the few significant siting cases heard by federal courts, only one produced a victory for the plaintiffs, but this was on the grounds of inadequate notice to an overwhelmingly Latino community presented only with English-language documentation throughout the permitting process.³⁴² Alternatively, state environmental policy acts

"Appropriate relief for these harms would 'equalize' the housing and facilities where blacks live with those enjoyed by whites receiving the same or similar forms of federal housing assistance." Adams, *supra* note 143, at 420.

³³⁶ See Reich, *supra* note 152, at 273 n.5.

³³⁷ See *id.* at 278-79 (describing disorientation and apprehension of future effects).

³³⁸ Luke Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 687 (1995).

³³⁹ See *id.* at 698; see also Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 451 (1994) (noting that political and economic powerlessness are more central concerns than illegal discrimination and arguing that "many disparities that result from environmental decisions and policies can only be addressed through political means.").

³⁴⁰ 42 U.S.C. §§ 4321-70 (1995).

³⁴¹ See Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 427 (1999); see also Reich, *supra* note 152, at 297-99.

³⁴² Cf. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (11th Cir. 1992) (holding that the requisite showing of intent for an equal protection challenge was not evident in a board's decision to construct a regional landfill in a predominantly black community); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986) (establishing that, despite the fact that the siting was "unfortunate and insensitive," the approval of a solid waste facility lacked the discriminatory intent needed for an equal protection challenge).

(SEPA)s address at least two of what Peter Reich identifies as the central principles of environmental justice advocacy: creating access to environmental planning processes and community preservation.³⁴³ Under most SEPAs, citizen participation is encouraged through the preapplication hearing, scoping meeting, and public comment hearings on environmental impact statements ("EIS") issued by applicants.³⁴⁴ Community preservation is more likely enhanced by provisions in many SEPAs that recognize the socioeconomic impact of a proposed project, and even changes in community character, as threshold effects that may trigger the requirement of an EIS.³⁴⁵

Nevertheless, adversariality in the environmental context may encompass strategies other than litigation. Though the abundance LULUs,³⁴⁶ temporarily obsolete abandoned derelict site ("TOADS"),³⁴⁷ and the disproportionate siting of hazardous facilities may readily appear to blight the economic and noneconomic landscape of the antimarket, providing concrete and steel manifestations of discriminatory barriers to community growth, the zoning process is largely political,³⁴⁸ and the law provides little recourse.³⁴⁹ Moreover, land uses incompatible with family environments strike directly at the soul of a community's character. The role of the lawyer, therefore, must be predicated upon community awareness, consent, and participation, if these communities are to achieve anything like the stability of middle-class markets. Whatever strategies are employed against environmental blight, they require the cooperation inherent in communal planning and decision making.

³⁴³ See Reich, *supra* note 152, at 287-90.

³⁴⁴ See Cole, *supra* note 338, at 693-97.

³⁴⁵ See Reich, *supra* note 152, at 311; *see, e.g.*, MD. CODE ANN., NAT. RES. § 1-301 (b) (West 1989); N.Y. ENVTL. CONSERV. LAW § 8-0105 (6) (McKinney 1984); S.D. CODIFIED LAWS § 34A-9-1 (4) (Michie 1986). The laws have been used successfully against community deterioration. *See, e.g.*, Chinese Staff and Workers Ass'n v. City of New York, 502 N.E.2d 176 (N.Y. 1986) (displacement of low-income residents and character of Asian neighborhood threatened by proposed condominiums); Barrie v. Kitsap County, 613 P.2d 1148 (Wash. 1980) (city's business district might decline as a result of proposed suburban shopping center); Citizens for Quality Growth v. City of Mount Shasta, 243 Cal. Rptr. 727 (Cal. App. 1988) (rezoning for manufacturing might blight downtown area). *But see* Katherine B. Russo, Note, *Neighborhood Character and SEQRA: Courts Struggle with Homeless Shelters, Prisons, and the Environment*, 14 COLUM. J. ENVTL. L. 231 (1989).

³⁴⁶ See *supra* note 149 and accompanying text.

³⁴⁷ See *supra* note 150 and accompanying text.

³⁴⁸ See Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 646 (1992); Torres, *supra* note 339, at 451.

³⁴⁹ "[T]he decisions to place unwanted facilities in low-income neighborhoods are made not in spite of our system of laws, but because of our system of laws." *Id.* at 646.

B. Facilitation of Community Economic Growth

When lawyers engage in facilitation strategies, which I associate with efforts commonly described as empowerment, community building,³⁵⁰ CED, they dismount their proverbial horses.³⁵¹ Facilitative work is service work. It acknowledges that, while most things in the antimarket involve social and economic justice, not everything is discrimination. That is not to say that this realm of antimarket advocacy does not safeguard against a poor neighborhood's structural vulnerabilities. Gentrification is the prime example of facilitation's urgency in the face of exogenous threats, as well as the natural connection between adversarial and facilitative roles. Where adversarial efforts seek to clear the poisoned ground for growth, facilitation invites the more difficult work of planning and tilling for sustainable community harvests. Here, the conflict in the lawyer's imagination of herself is somewhere between the potential community organizer and the professional, market-driven assistant. In the next section, I briefly discuss the various discrete roles that lawyers unselfconsciously may and should play in these endeavors. Then, I examine the underlying assumptions of such building efforts, a fundamental quandary of the metamarket/antimarket lens.

1. Gentrification

The chief threat to ghetto economic development is success.³⁵² Once an antimarket begins to acquire the amenities, public services, property values, improved housing stock, and political organization of even infant metamarkets, gentrification and its resulting displacement of low-income residents may follow. Although gentrification may occur through tradi-

³⁵⁰ I distinguish the present-day usage of this term from its early twentieth century usage. Today, community building is designated by community activists and national organizations, such as the Rockefeller Foundation, to mean coordinated efforts by community-based organizations working in poor neighborhoods to promote better life outcomes for children and families in the areas of public health, jobs, and housing. See Joan Walsh, The Rockefeller Foundation, *Stories of Renewal: Community Building and the Future of Urban America* (last modified Dec. 13, 1999) <<http://www.rockfound.org/reports/community/extract.html>>. In contrast, large developers of the nation's first subdivided common interest developments ("CIDs") employed the use of restrictive covenants to maintain their affluent (and all-white) status and were called community builders. See MCKENZIE, *supra* note 57, at 36-43. For another contemporary use of the term, see Frug, *supra* note 180, at 35-45 (substituting community building for fragmentation as the basis for delivery of municipal services).

³⁵¹ For a critique of high-horsed lawyering attitudes and the damage that they can effect on the representation of clients, see generally GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

³⁵² For a detailed theoretical and analytic account of gentrification across industrialized cities, see NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* (1996).

tional land use processes such as zoning,³⁵³ any efforts that result in improvements in property values risk attracting speculator and/or investor interests, which gradually price out many current residents if they go unchecked. Since so much facilitation work involves new and rehabilitated housing development,³⁵⁴ financing strategies for small businesses,³⁵⁵ and counseling nonprofit CDCs chartered to transform devastated neighborhoods into economically vital ones,³⁵⁶ the risks of success are profound. The antimarket means an environment where households with little income, no wealth, and limited political experience exist in tension alongside those within the community who have a little more of all three resources, who were acculturated to the same unattainable middle-class ideals, and who may conceive of economic justice as finally getting theirs, even at the expense of poorer black neighbors similarly subordinated by institutional racism.³⁵⁷ One author, writing in the context of community organizing, phrases the problem differently:

Most residents in a neighborhood, especially homeowners, would not argue against the benefits of revitalization and increased property values. They are caught between wanting to see their neighborhoods "improved" and fearing that this "improvement" will lead to their displacement, especially because of rising taxes. Even if they manage to hold on, they are faced with the destruction of their community as they know it while they see their neighbors depart.³⁵⁸

This is why the metaphor of antimarkets is more than an historical-economic description of blighted areas. It comprehends a cultural and psychological dynamic of the living poor in America's ghettos, where even the apparent race-neutral market forces of revitalization may conjure the harsh feeling of being dispossessed from the norm by racism. Nobody wants to be poor forever or to plan a community for sustainable poverty. Thus, when we talk of community building and empowerment in

³⁵³ See Dubin, *supra* note 164, at 768 ("Zoning that significantly increases the costs of retaining housing can be as disruptive to the residents of low-income communities of color as the zoning that degrades their environment.")

³⁵⁴ See *infra* notes 368–371 and accompanying text.

³⁵⁵ See *infra* notes 368–371 and accompanying text.

³⁵⁶ See *infra* notes 368–371 and accompanying text.

³⁵⁷ Professor Calmore notes, for example, that the black inner-city poor "experience poverty not simply as individuals, but as members of a poor community[.]" Calmore, *supra* note 6, at 1943. Their condition is spatially connected with the condition of those around them whether they like it or not. See *id.*

³⁵⁸ Teresa Cordova, *Community Intervention Efforts to Oppose Gentrification*, in CHALLENGING UNEVEN DEVELOPMENT, *supra* note 111, at 36. Cordova also notes that gentrifying neighborhoods often means gentrifying the internal composition of community organizations. "The organization may then work on behalf of current residents, but the characteristics of those residents has changed." *Id.*

the image of people who have endured generations of living outside the mainstream, we as advocates, and the law as an instrument of power, must reckon with just how the vision of community growth might appear. Gentrification represents the harm on the other side of otherness.

2. *Legal Tools of Community Building*

The centerpiece of public,³⁵⁹ private,³⁶⁰ and public-private³⁶¹ community-building ventures has been housing first and homeownership second. In recent years, CDCs have become increasingly sophisticated in both personnel and expertise. These assets are often used in economic development projects, such as financing local small businesses,³⁶² developing strip malls,³⁶³ and creating business incubators, if not running job-producing businesses themselves.³⁶⁴ In addition, both CDCs and community development financial institutions ("CDFIs") have carved a substantial niche in the dormant market for mortgage lending, banking services, and business start-up.³⁶⁵ Stakeholdership, akin to wealth formation, remains the key word overall, but homeownership initiatives are the lynchpin to these community-building efforts to achieve stability.

In servicing such work, the roles of lawyers range from community organizing to professionalized assistance, depending on whether an advocate sees herself as promoting grassroots empowerment through community self-determination or the more arm's-length development of institutional programming. The distinction is not always clear (and roles

³⁵⁹ See, e.g., David F. Beatty et al., REDEVELOPMENT IN CALIFORNIA 25-64 (1995) (describing adoption and implementation of redevelopment plans under the California Redevelopment Law). But see National Econ. Dev. Law Ctr., *Facing the Local Redevelopment Agency*, 24 CLEARINGHOUSE REV. 1051 (1991) (analyzing the potentially disruptive consequences of local redevelopment agencies' activities on communities of color).

³⁶⁰ See, e.g., Asian Neighborhood Design, Long-Term Self-Sufficiency: A Practice-Based Anti-Poverty Analysis (Jan. 1996) (policy brief on file with author) (setting forth programmatic stages for encouraging and building personal and economic self-sufficiency among families at risk).

³⁶¹ See, e.g., Ellen W. Lazar & Michael S. Levine, *Community-Based Housing Development: The Emergence of Nonprofits, Enterprise, and LISC*, 2 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 6 (1993) (highlighting litigation as a tool to save black communities); New York City Housing Partnership, *Building in Partnership: A Blueprint for Urban Housing Programs* (1994) (providing a cost/benefit analysis of New York City's housing development program, which was based on public-private partnerships involving nonprofit community organizations and local government).

³⁶² See Lazar & Levine, *supra* note 361, at 6.

³⁶³ For example, New Community Corp. started in 1971 and has grown to become a multimillion dollar "neighborhood" in Newark, New Jersey's central ward, including affordable housing, a Pathmark-anchored strip mall, job training, day care, and housing for the elderly. See Barbara Stewart, *Bill Linder and His City of Hope*, N.Y. TIMES, Feb. 18, 1996, at 13NJ (profiling New Community Corp.'s founder and projects).

³⁶⁴ See *infra* notes 368-373 and accompanying text.

³⁶⁵ See generally Lento, *supra* note 258 (describing community development banks, credit unions, and loan funds and arguing for the reinvigoration of markets suffering from disinvestment); see also Taibi, *supra* note 228, at 1520-28.

may change midstream), but the difference often comes down to decision-making control. For instance, attorneys in a legal services model or in a community law project may view decision-making control as resting primarily with the variety of community groups with whom they regularly work and whom they regard as a more authentic representative of the community's voice.³⁶⁶ In contrast, private-sector attorneys working *pro bono* or students from a law school clinic may assist a well-established nonprofit organization in a specific project requiring contract drafting or researching banking regulation.³⁶⁷

Where antipoverty legal work was once concentrated in well-defined areas of the law, such as landlord/tenant and public benefits retention, CED work often carries into tax, real estate, banking, credit, and other more mainstream areas of private law practice.³⁶⁸ Thus, facilitation may require incorporating CBOs or businesses, handling land acquisition deals, rezoning industrial parcels for housing development, serving as corporate counsel to CDFIs, managing real estate closings, and negotiating with local public agencies over tax assessments or the provision of street lighting.³⁶⁹ Since so much effort is devoted to *greenlining* or procuring reinvestment in redlined neighborhoods, there is substantial finance-related activity for which lawyers are uniquely qualified.³⁷⁰ The point here is not to survey the many particular roles for the law in facilitation, but merely to illustrate their range and to suggest that they are usually marketlike in function.³⁷¹

³⁶⁶ For example, the National Economic Development Law Center, based in Oakland, Cal., trains lawyers and law students in a variety of matters relevant to client community-based organizations and enterprises.

³⁶⁷ For example, the Rutgers University School of Law (Newark) operates a community law clinic, in which students serve as counsel to nonprofit organizations involved in a variety of economic development activities. This model contrasts with more traditional poverty law clinics, in which law students represent indigent families or individuals in a range of legal matters.

³⁶⁸ One distinct benefit of this change is the creation of opportunities for involvement among lawyers whose jobs or training appeared (at least to them) to preclude work on behalf of poor communities.

³⁶⁹ See National Econ. Dev. and Law Ctr., *Counseling Organizations in Community Economic Development* (1995) (a voluminous manual updated regularly for practitioners facing a variety of community economic development issues, including corporate structuring, real estate, tax, and other related legal matters); see also Lazar & Levine, *supra* note 361, at 9 (specifically describing the role of attorneys in nonprofit housing development); see generally David D. Troutt, *Mt. Laurel and Urban Possibility: What Social Narratives Might Tell the Narratives of Futility*, 27 SETON HALL L. REV. 1471, 1487-93 (1997) (describing public housing development in Mt. Laurel).

³⁷⁰ See Peter R. Pitegoff, *Urban Revitalization and Community Finance: An Introduction*, 27 U. MICH. J.L. REFORM 613, 617-25 (1994) (describing policies that combine social goals with credit and housing finance methods); see also RICHARD P. TAUB, *COMMUNITY CAPITALISM: BANKING STRATEGIES AND ECONOMIC DEVELOPMENT* (1988) (chronicling the rise of Chicago's South Shore Bank).

³⁷¹ See, e.g., Lento, *supra* note 258, at 773 ("The revitalization of our urban communities requires a realization that disinvestment is itself a market phenomenon which drives the decline, and that the decline will be reversed only by substantially reinvigorating com-

3. *What Does the Market Grow?*

If much facilitation work aims at creating marketlike processes in ghettos, then are the various organizational activities just discussed merely replicating the kinds of civic associations found in middle-class areas, or must they represent something else? They must, and the burdens of such representation fall squarely within the bounds of traditional social justice advocacy. Antimarkets, I have argued, are not simply undernourished markets. They are a functional part of a cultural economic scheme occupying the opposite pole from, and supporting, the continued existence of middle-class metamarkets. Ghettos are politically dispossessed communities, the marginalization of which is manifest among residents and entrenched in the social, economic, and psychological landscape of the institution. Left out of the above discussion is a social services apparatus as old as mutual aid societies in Jim Crow cities.³⁷² The continuing grassroots apparatus of CBOs is not comparable to homeowners associations and coop boards in middle-class urbana, but its significance here underscores the myriad noneconomic variables inherent in ghetto life and the social justice underpinnings of community development. Therefore, facilitation work cannot cast lawyers and the law as mere silent partners in multidisciplinary initiatives. Parts II and III explore the law's consistent collusion in producing both metamarkets and antimarkets. How, then, should the market grow?

For now, it is sufficient to say that legal facilitation of community growth, by whatever name it is known, should be informed by the bipolar mechanics of the metamarket/antimarket dichotomy. There are a great many attributes of middle-class ideal structures that should also be obtained in ghetto community building efforts. Among them are the principles of family-protective zoning and land use, enhanced citizen participation, access to wealth accumulation, and, perhaps most of all, comprehensive planning for consumer need, all of which have important roots in the law. Applied to antimarkets, these are principles born in the chaos of chronic neighborhood vulnerability and cannot simply be superimposed from middle-class neighborhoods to the other side of the tracks. The essence of empowerment, if we can agree on that term, is self-invention.

Conclusion

This Article has attempted to bring together two distinct worlds within American cities on behalf of the one less favored, the ghetto antimarket and its increasingly outcast residents who occupy antinorm status in society. My approach has been to look historically at the role that law

munity markets.").

³⁷² See *supra* note 144 and accompanying text.

has played, along with political and economic institutions, in creating this duality. However, the metaphor that I employ throughout of metamarkets and antimarkets encompasses the cultural underpinnings of institutional behavior in an effort to demonstrate in a functional and constructive way the extent of metropolitan marginalization that has occurred in areas now poised for multidisciplinary efforts in economic development. Linking the two worlds shows not only their interrelated origins, but, I hope, a framework for critically needed legal involvement in community building. Many of the same norms that created thriving metamarkets for the middle class, such as comprehensive land use planning for family-oriented environments, civic participation in local decision making, segregation of uses incompatible with residential areas, and consumer infrastructures responsive to local needs for basic goods and services, are lacking in ghetto antimarkets. The constraints against their adoption are now as formidable as ever, which speaks directly to the unique role that the law plays more than any other discipline. The resilience of discrimination at the intersection of race and class places further calls for the instruments of legal redress.

This is an ongoing project, and many brighter minds before me have been lodged deep in these struggles. For those engaged in future consideration of these issues, I conclude with more questions. If there is value to a consumer orientation for the inner-city poor, can such an orientation be expressed through legal rights? How much will immigration trends shift the demographic realities of neighborhoods still described in terms of black ghettoes? What should be done about obstacles from within low-income neighborhoods? Are the interests of very low-income residents aligned with more moderate-income households? What happens when the very poor are no longer as poor? What if current global economic transformations increase the requirements of labor, accelerating the time in which to equip underskilled, undereducated workers with the resources to compete? Could a deep recession radically undermine analyses like these? Who is the community? What if lawyers do not lead?

An analysis so grand necessarily omits a great many relevant considerations or oversimplifies their importance by giving them short shrift. Critical factors such as the mechanics of political decision making, public/private distinctions in the law, and variations between suburban and urban, or big city and small city, economies may have received too little emphasis for some readers. Others may criticize the metamarket/antimarket dichotomy as needlessly binary. I recognize that they are not the only realities nor the desired alternatives, and that many Americans are not comfortable with the available choices. However, such criticisms should not limit the descriptive power of the dichotomy, nor its implications for policy and advocacy.

