

# Exclusionary Taxation

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*Property tax assessments appear to be technocratic calculations. But they may be calculated to discriminate, even unintentionally. California’s constitutional limitations on property taxes, as first enacted by Proposition 13 in 1978, remain the poster child for the so-called “property tax revolt” of the late twentieth century. Such laws privilege preexisting homeowners by capping assessments at historic levels far below contemporary value. As property prices rise, beneficiary homeowners may even bequeath this taxpayer windfall to their descendants and immortalize these underassessments. Newer, increasingly diverse residents end up paying higher taxes because the law treats them with less regard than their more pedigreed neighbors. These tax policies are rationalized as providing “stability” to the existing residents. The aggrieved have found cold comfort in the Constitution, with the Supreme Court upholding the core of California’s system in the canonical Nordlinger v. Hahn.*

*In this Article, we argue that even if such exclusionary tax policies do not violate the Constitution, they likely violate another facet of federal law: the Fair Housing Act’s disparate impact liability. Our contributions are threefold. First, as a procedural matter, we identify recent caselaw that offers a means for such legal challenges to enter the courthouse door. Although state and federal courts in the twentieth century erected barriers to judicial review of property tax policies, we argue that the landscape has changed.*

*Second, using California as a case study, we illuminate the contours of a Fair Housing Act challenge to discriminatory, acquisition-value assessments. We do so with reference to prior and ongoing tax litigation in diverse municipalities, namely Long Island and metropolitan Detroit. We thus explore the federal prohibition of what we call “exclusionary taxation.”*

*Third and most significantly, we train our sights on the justifications for exclusionary taxes. We map, and begin to reconcile, the tensions between, on one hand, recognized local government interests in “stability,” and, on the other, property-based inclusion of a demographically-evolving America. We argue that, while property tax assessments can be used to protect existing homeowners, they must be employed through narrowly tailored methods, such as circuit breakers or deferred payment, rather than overly broad acquisition-value assessment systems. While the latter might pass constitutional muster, they fail to comply with the Fair Housing Act’s vision of property-based pluralism.*

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## INTRODUCTION

Property taxes fuel communities. They play a significant fiscal role for state and local governments,<sup>1</sup> and taxpayers are acutely aware of their property tax liability, thanks in part to large annual or semi-annual tax payments.<sup>2</sup> Nonetheless, property value assessment, an underpinning of property taxes,

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<sup>1</sup> Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 296 (2016) (referring to “the most important local tax, the property tax”); see also Darien Shanske, *Revitalizing Local Political Economy Through Modernizing the Property Tax*, 68 TAX L. REV. 143, 144-45 (2014) (explaining how the local property tax may be more efficient given that it operates at closer proximity to voters, as compared to state or federal taxes, and may thus better influence, and respond to, voter preferences).

<sup>2</sup> David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 39 (2011) (describing how “[p]roperty taxes are also far more salient than smaller taxes on personal property and consumption”).

receives only sporadic scholarly attention.<sup>3</sup> Assessment may seem at first blush to be a purely technical or ministerial matter. Under this perception, a taxing jurisdiction mechanically assesses the property value, and then applies a mandated rate to determine the property tax.

However, property taxes, through their underlying assessments, may fuel exclusion.<sup>4</sup> At their worst, property tax assessments have been used as an explicit tool of racial subordination.<sup>5</sup> In response to African-American activists' boycotting of white-owned businesses during the 1960s civil rights movement, one Mississippi county's tax assessor raised the assessed value, and therefore property taxes, for those activists.<sup>6</sup> Historian Andrew Kahrl has chronicled how, in post-Civil Rights Act Mississippi, "[d]iscriminatory assessment practices quietly but undeniably facilitated white wealth accumulation through land[ownership] and homeownership while helping ensure those same opportunities remained unavailable to black Americans."<sup>7</sup>

Even when discernable animus is absent, assessments reflect both overarching policy choices and discretionary administrative decisions that can have significant impacts on property owners' taxes.<sup>8</sup> Moreover, patterns of relatively higher or lower assessment values, as related to market value, can work to the disadvantage of particular racial or ethnic groups. This phenom-

<sup>3</sup> Property tax litigation, and related press, is in fact often focused on the mechanics of assessment practices. See, e.g., Allan Dodds Frank, *Trump Organization seeks hefty tax break for Westchester golf club*, ABC News, (June 21, 2017), <http://abcnews.go.com/Politics/trump-organization-seeks-hefty-tax-break-westchester-golf/story?id=48179222> [<https://permacc/JW94-7ZYY>]; Eric Schmitt, *L.I. Rebels Over Property Tax Rises*, N.Y. TIMES, (Feb. 26, 1989), <http://www.nytimes.com/1989/02/26/nyregion/li-rebels-over-property-tax-rises.html> [<https://permacc/FM8M-K9FC>] (documenting rancor in Long Island over property tax assessments disputes and remedies).

<sup>4</sup> Our description of tax assessments parallels Sarah Schindler's unearthing of architecture's mischaracterization as "functional, innocuous, and prepolitical." Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L. J. 1934, 1934 (2013).

<sup>5</sup> *Williams v. City of Dothan, Ala.*, 745 F.2d 1406, 1408, 1414–15 (11th Cir. 1984) (reversing a grant of summary judgment against minority residents challenging "tax assessments imposed by the city of Dothan, Alabama to pay for a street paving and sewer improvement project in their neighborhood . . . [and] contend[ing] that the city has violated their equal protection rights by contributing a lower percentage of municipal funds to this project than it has contributed to comparable projects in the past which were located in predominantly white areas"); see also *Bland v. McHann*, 463 F.2d 21, 23 (5th Cir. 1972) (holding that TIA and the availability of plain, speedy, and efficient remedy precluded availability of § 1983 relief to "Negro property owners (taxpayers) in Edwards charging that the 1966 increases in property tax assessments of Negroes were solely the result of racial discrimination and were in retaliation for the prior demonstrations").

<sup>6</sup> Andrew Kahrl, *The Power to Destroy: Discriminatory Property Assessments and the Struggle for Tax Justice in Mississippi*, 82 J. OF SO. HIST. 579, 599–602 (2016); see also *Bland*, 463 F.2d at 23.

<sup>7</sup> Kahrl, *supra* note 6, at 615.

<sup>8</sup> We use the terms "property value assessment" and "property assessments" interchangeably. Although the statutory terminology varies by state, in this article, we refer to the determination of value of a property as its "assessment," which is multiplied by the tax "rate" to obtain the property tax amount.

enon has led to litigation from Chicago<sup>9</sup> to Long Island<sup>10</sup> to Berks County, Pennsylvania,<sup>11</sup> to metropolitan Detroit.<sup>12</sup> Communities disadvantaged by tax assessment practices may lack the political power to address policy choices, and the available remedies for unfair assessment may be inaccessible or inadequate to address systemic inequities. As a result, these inequities may be magnified and insulated by the very systems meant to ensure fairness.<sup>13</sup>

In many states, the tax revolts of the 1970s and 80s<sup>14</sup> led to the adoption of explicit caps on property assessment increases, most notably the acquisition-value system created by California's Proposition 13. The Proposition became Article XIII A of the state constitution.<sup>15</sup> Thanks to such caps, a

<sup>9</sup> *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503 (1981) (invoking the TIA and deciding that Illinois's statutory remedy precluded federal jurisdiction over plaintiff's claim for taxpayer relief under 42 U.S.C. § 1983).

<sup>10</sup> *Coleman v. Seldin*, 181 Misc. 2d 219 (N.Y. Sup. Ct. 1999).

<sup>11</sup> *Garrett v. Bamford*, 582 F.2d 810, 812 (3d Cir. 1978).

<sup>12</sup> *MorningSide Cmty. Org. v. Wayne Cty. Treasurer*, No. 336430, 2017 WL 4182985 (Mich. Ct. App. Sept. 21, 2017). Observers have further noted the race-contingent effects of property tax regimes in Oregon, New York City, and New Haven, with empirical strategies of varying rigor. Elliot Njus, *Tax Breaks for Gentrifiers*, THE OREGONIAN (Sept. 11, 2015), [http://www.oregonlive.com/business/index.ssf/2015/09/measure\\_50\\_winners\\_and\\_losers.html](http://www.oregonlive.com/business/index.ssf/2015/09/measure_50_winners_and_losers.html) [<https://permacc/MK3W-J9EN>]; Andrew T. Hayashi, *Property Taxes and Their Limits*, 25 STAN. L. & POL'Y REV. 33, 46 (2014); Lee Harris, 'Assessing Discrimination': *The Influence of Race in Residential Property Tax Assessments*, 20 J. LAND USE & ENVT'L. L. 1, 13–17 (2004).

<sup>13</sup> For example, we discuss below the successful litigation to remedy unfair tax assessments in Nassau County, New York. *See, infra* Section IV.A.1. However, a subsequent county government has adopted a policy to significantly reduce assessments for property owners who appeal their assessments, without corresponding reductions for other properties. This policy has allegedly re-created stark racial disparities among Nassau County homeowners' property tax bills. *See* Matt Clark, *Mangano's overhaul created \$1.7B property tax shift*, NEWSDAY (Feb. 2, 2017), <https://www.newsday.com/long-island/nassau/mangano-s-overhaul-created-1-7b-property-tax-shift-1.13056134> [<https://permacc/4LUM-HAPH>].

<sup>14</sup> ISAAC WILLIAM MARTIN, *THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS* 4–7 (2008). Martin describes the tax revolts of the 1970s as a rebellion against the local property tax; *see also* Marika Cabral & Caroline Hoxby, *The Hated Property Tax: Salience, Tax Rates, and Tax Revolts* 24 (Nat'l Bureau of Econ. Research Working Paper No. 18514, 2012), <https://www.nber.org/papers/w18514> [<https://permacc/ST9H-397J>] (defining property tax revolts as “generat[ing] property tax limits that successfully bind for many years” and noting that between 1970 and 2000, property taxes declined from 3.3% to 2.5% of GDP).

<sup>15</sup> *See* Cal. CONST. art. XIII A, § 2(a). For a discussion of tax revolts, *see generally* Schmitt, *supra* note 3; Darien Shanske, *How Less Can Be More: Using the Federal Income Tax to Stabilize State and Local Finance*, 31 VA. TAX REV. 413, 444–45 (2012) (describing Proposition 13 as the “first shot of the modern property tax revolt”); WILLIAM FISCHEL, *THE HOMEVOTER HYPOTHESIS* 111–19 (2001) (arguing that Proposition 13 was a response to the California courts' decision to equalize school finance); MARTIN, *supra* note 14 (arguing, in contrast to Fischel, that property owners were systematically, if informally, under-assessed prior to Proposition 13, which simply formalized that privilege in response to the looming modernization of the property tax). For further information on state property tax freeze and assessment freeze programs in 14 states, *see* NAT'L CONF. OF STATE LEGISLATURES, *STATE PROPERTY TAX FREEZE AND ASSESSMENT FREEZE PROGRAMS* (2012), <http://www.ncsl.org/research/fiscal-policy/state-property-tax-freezes-and-assessment-freezes.aspx> [<https://permacc/TNT9-D33B>].

house can have a vastly larger tax assessment than the identical house next door.<sup>16</sup>

These property tax systems, including the oft-challenged but so-far impervious California system, likely violate federal civil rights law. The Fair Housing Act places limits on policies, including tax policies, that disproportionately disadvantage and exclude racial minorities and other members of protected classes without proper justification.<sup>17</sup> Thus, borrowing from challenges to “exclusionary zoning” and other “barrier” practices that form the historic core of FHA disparate impact claims,<sup>18</sup> we label such discriminatory tax policies as “exclusionary taxation.”<sup>19</sup> Such taxation can exclude in two main ways. First, it can have the effect of disproportionately taxing or expropriating housing from members of a particular racial or ethnic group. Or it can exclude by entrenching segregated housing patterns (such as by encour-

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<sup>16</sup> In the California context, the disparity is potentially based on when the owners took possession of the property. California’s ceilings apply to most *ad valorem* property taxes. See CAL. CONST. art. XIII A, § 1(b)(2)-(3) (permitting a narrow class of additional *ad valorem* taxes to finance bond indebtedness for particular municipal improvements). But, they have permitted, and arguably encouraged, the introduction of parcel taxes. In 1982, California passed the Mello-Roos Community Facilities Act of 1982, CAL. GOV’T CODE §53311-53368.3 (West 2018). See generally CALIFORNIA TAXPAYERS ASSOCIATION, THE OTHER PROPERTY TAX 1 (2013), <http://www.caltax.org/ParcelTaxPolicyBrief.pdf> [https://permacc/3SDT-AKRV] (describing how a parcel tax is different than an *ad valorem* tax in that it is imposed on a per-parcel, rather than value, basis); CALIFORNIA TAXPAYERS ASSOCIATION, PIECING TOGETHER CALIFORNIA’S PROPERTY TAXES 1, 2 (2014) (“Of the parcel taxes identified, 64 percent were imposed under the Mello-Roos Act. Generally, Mello-Roos parcel taxes are approved by land-owners to fund new development, and, once debt payments on development are repaid, the taxes expire. However, approximately 12.7 percent of Mello-Roos parcel taxes are levied indefinitely to fund police services, fire services, public transit, education, or other services, without ever being approved by the general electorate—and almost all include an annual increase to adjust for inflation.”).

In Oregon, which does not even reassess on resale, similarly valued houses are taxed radically differently, based on the value they held years ago. Northwest Economic Research Center, OREGON PROPERTY TAX CAPITALIZATION 3, 5–6 (2014), [http://media.oregonlive.com/portland\\_impact/other/locreport.pdf](http://media.oregonlive.com/portland_impact/other/locreport.pdf) [https://permacc/DVN4-GZLD] (estimating how differences in assessed values and “real market values” are capitalized into sale prices).

<sup>17</sup> See *infra* Sections III.A and III.B.

<sup>18</sup> See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511 (2015) (“Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability.”); Stacy Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 360–63 (2013) (describing how the earliest FHA disparate impact cases challenged “housing barrier” regulation, which may operate in several ways, including “to prevent the construction of housing that will likely be used by minority groups in places that currently lack minority residents; to confine housing that will be used by minority group members to neighborhoods where minority households already predominate; or to otherwise deny minority households freedom of movement in a wider housing marketplace.”).

<sup>19</sup> We also label these practices “exclusionary taxation” to avoid confusion with the concept of “tax discrimination,” which often refers to the relative overtaxation of “foreign” entities in federal or confederal systems. See Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014, 1017–22 (2012). While tax scholars might nonetheless point out the overlapping terminology of inclusion and exclusion in American income tax, we think such shared semantics will lead to negligible confusion.

aging a lack of mobility), which limit the ability of members of that group to move into certain areas.

This Article focuses on one form of exclusionary taxation involving property tax assessment policies. As reflected in the examples discussed below, artificially inflated or deflated property assessments lead to higher (or lower) tax bills, potentially leading to foreclosure and entrenching existing housing patterns. Future research into other forms of exclusionary taxation may be fruitful. For example, there is a long history of FHA litigation challenging zoning regulations that disadvantage multifamily housing, as compared to single-family housing, under the theory that multifamily housing is more commonly occupied by non-white racial groups. A pending FHA lawsuit in New York City challenges, in part, similar preferential treatment for single-family properties in the New York City property tax scheme.<sup>20</sup>

Surprisingly, despite sporadic litigation to challenge tax assessments under constitutional and state-law theories, scholars have been slow to acknowledge potential exclusionary taxation claims.<sup>21</sup> We look beyond the better-known and generally unsuccessful litany of constitutional claims to explore such federal statutory challenges. Though some property tax litigation has raised claims under the FHA, there has yet to be a substantive merits decision illuminating the meaning of “fair housing” in the context of property taxes.<sup>22</sup>

This Article is thus among the first to systematically describe how property tax assessment policies could have an unjustified disparate impact along racial or ethnic lines in violation of federal civil rights law.<sup>23</sup> We examine the trends that procedurally limited remedies for such discriminatory taxation and the recent countertrends facilitating property tax challenges

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<sup>20</sup> Compare *Complaint, Tax Equity Now NY LLC v. City of New York*, No. 153759/2017 (Sup. Ct. N.Y. Cnty. Apr. 25, 2017) [hereinafter *Tax Equity Complaint*] (alleging unequal tax treatment of multifamily rental properties) with *Warth v. Seldin*, 422 U.S. 490, 495–96 (1975) (describing as “exclusionary zoning” a zoning scheme that sharply limits multifamily housing).

<sup>21</sup> See, e.g., Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2201 (2004) (“Consistent with the extremely deferential standard of review of the state’s exercise of its tax power, highly unequal property taxes will be upheld as long as the basis for the unequal treatment is not wholly arbitrary.”). Peñalver neglects the legal scrutiny potentially placed on such tax systems if the inequality relates to categories protected under the Fair Housing Act. Bernadette Atuahene stands as a prominent exception, having begun a detailed analysis of housing discrimination in the context of Detroit’s tax foreclosures, which is discussed in further detail below. See Bernadette Atuahene & Timothy Hodge, *Stategraft*, 91 So. CAL. L. REV. 2 (2018); Bernadette Atuahene, “*Our Taxes Are Too Damn High*”: *Institutional Racism, Property Tax Assessment, and the Fair Housing Act*, 112 NW. L. REV. 1501 (2018).

<sup>22</sup> The pending New York City case may provide the first such decision, though, like the challenges to Nassau County’s system decades ago, the parties might simply settle first. See *Tax Equity Complaint*, *supra* note 20.

<sup>23</sup> We use federal fair housing law as synonymous with the Fair Housing Act because of its disparate impact theory. However, federal fair housing law includes 42 U.S.C. §§ 1981 and 1982, which, like the Equal Protection clause, have been interpreted to require proof of intent.

under the FHA.<sup>24</sup> Litigation under the FHA can resuscitate fair taxation from the constitutional graveyard.<sup>25</sup>

With an eye toward California's acquisition-value approach to property assessment, we use the seemingly narrow issue of property tax assessments to examine the country's changing demographics and attendant challenges facing American communities.<sup>26</sup> We unpack the "stability" rationale that courts have embraced to justify property tax systems, noting its inconsistencies with the evolution envisioned by the FHA.

In Part I, we offer a primer on the facets of the property tax most relevant to our argument, including a summary of California's system. We also examine briefly the need to look beyond "efficiency" considerations that have historically dominated law and economics literature to fully understand the nature of fair property taxation and the origins of the "tax revolt."

In Part II, we scrutinize the doctrinal efforts that both federal and state courts have taken to disengage with challenges to property tax assessments, including those that are allegedly discriminatory. This jurisdictional and procedural disengagement is grounded in the Tax Injunction Act (TIA); the doctrine of comity, a particularly deferential standard of constitutional review; and inconsistent and insufficient procedures and fora at the state level.

In Part III, we argue that a triplet of Supreme Court decisions in recent years has demanded a more meaningful vindication of federal, property taxpayer rights. The Court confirmed the availability of disparate impact claims under the FHA in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>27</sup> empowering homeowners who could not prove that their unfair taxes resulted from explicit animus. Further, *Haywood v. Drown*<sup>28</sup> reasserted federal supremacy in the face of subversive state jurisdiction rules, and *Direct Marketing Association v. Brohl*<sup>29</sup> cabined the reach of jurisdictional challenges to tax litigation.

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<sup>24</sup> *Infra* Section II.A and Part III.

<sup>25</sup> Early litigation challenging Proposition 13 relied on claims under California's state constitution. *See, e.g.,* Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1284 (Cal. 1978) (rejecting constitutional challenges to four distinct elements of Proposition 13). Despite that litigation's failure, state law may continue to play a role, but we focus on the surprisingly robust floor of fair property taxation inscribed in federal law.

<sup>26</sup> Douglas Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 *DEMOGRAPHY* 1024, 1033 ("Although hypersegregation may have become less common in recent years, it hasn't disappeared, but has instead become centered in a subset of metropolitan areas containing some of the nation's largest black communities. . . . [W]e can continue to expect a disproportionate share of the nation's racial conflicts and disturbances to occur within these intensely segregated landscapes."); *see also* Anderson, *infra* note 281 (describing challenges facing cities in twenty-first century America); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 581–90 (2008) (describing ways in which states and localities can integrate, and have integrated, recent immigrants despite the doctrine of federal exclusivity in immigration law).

<sup>27</sup> 135 S. Ct. 2507 (2015).

<sup>28</sup> 556 U.S. 729 (2009).

<sup>29</sup> 135 S. Ct. 1124 (2015).

In Part IV, we use litigation case studies to show how the FHA can address property tax assessment policies that discriminate without adequate justification. After examining lessons from two existing FHA lawsuits against exclusionary taxation, we explore a prospective FHA challenge to California's system. We note particularly strong concerns about the ability of children and grandchildren to receive the tax benefits accorded to their parents and grandparents. We further examine the meaning and legitimacy of "stability" as a substantial interest under the FHA, particularly amidst competing and evolving visions of local communities. Any defensible conception of stability must accommodate the federal mandate to make figurative and literal room for an increasingly diverse America. And while interventions can be targeted to stabilize those who might otherwise be displaced from their communities, they must not stabilize exclusive conceptions of the communities themselves.

## I. A PROPERTY TAX PRIMER

We begin by explaining the role of the property tax and how property value assessments are determined. We then provide a summary of California's Article XIII A, which was unsuccessfully challenged on constitutional grounds. We conclude by explaining why existing efficiency considerations guiding property tax scholarship are legally and theoretically insufficient.

### A. *The Role of the Property Tax & Assessment*

Local tax policy reflects policy makers' divergent visions for their communities. Different jurisdictions adopt different levels of revenue and public services. They make varying decisions about how progressive the tax system should be, what matters should be incentivized by the tax code, and the blend of revenue sources upon which to rely.<sup>30</sup>

Such variation in tax administration has deep historical roots. Originally, local property taxes primarily fell on agricultural land, but in the nineteenth century, they shifted to cover other property classes and to serve as "commitment devices" to fund public projects across localities.<sup>31</sup> During the twentieth century, states increasingly transferred the authority to tax real

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<sup>30</sup> Eric M. Zolt, *Inequality, Collective Action, and Taxing and Spending Patterns of State and Local Governments*, 62 TAX L. REV. 445, 447 (2009); cf. Bridget Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, WIS. L. REV. 491, 496-97 (2017) (discussing varying tax policy choices in adopting the sales tax and exempting certain products from taxation).

<sup>31</sup> John Joseph Wallis, *The Property Tax as a Coordinating Device: Financing Indiana's Mammoth Internal Improvement System, 1835 to 1842*, at 2 (Nat'l Bureau of Econ. Research Working Paper, Historical Paper No. 136, 2001), <http://www.nber.org/papers/h0136.pdf> [<https://permacc/G7E4-VCLD>].

property to local governments.<sup>32</sup> Local property tax revenue now reflects approximately half a trillion dollars of revenue, and has, in recent history, exceeded federal corporate income tax.<sup>33</sup>

Property taxes are generally “ad valorem” taxes—taxes based on some measure of value, as opposed to, for example, number of parcels or acreage.<sup>34</sup> To administer an ad valorem tax, jurisdictions must conduct assessments by identifying taxable properties, their values, and the corresponding taxes due.<sup>35</sup> Property “value” thus serves as the foundation of property tax,<sup>36</sup> but value assessments occur with heterogeneous frequency depending on jurisdiction.<sup>37</sup> In most states, a local government serves as the property value and tax “assessing unit” under the monitoring of a statewide agency that sets standards.<sup>38</sup> Assessing jurisdictions generally use a current market value approach to assess residential real estate.<sup>39</sup>

<sup>32</sup> Zolt, *supra* note 30, at 472. For a much broader and compelling discussion of tax policy changes during this period, see generally AJAY MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929 1–34 (2013) (describing the transition from a more obscure and piecemeal 19th century tax system to a professionalized, progressive one reflecting distinct values).

<sup>33</sup> JOAN YOUNGMAN, A GOOD TAX ix (2016). According to the Lincoln Institute of Land Policy, the average effective owner-occupant tax rate for the 50 largest US cities in about 1.5%, with a range from .44% in Colorado Springs to 3.82% in Detroit. The average of the estimated tax bills for each city’s median home is \$3,343. LINCOLN CENTER FOR LAND POLICY & MINNESOTA CENTER FOR FISCAL EXCELLENCE, 50-STATE PROPERTY TAX COMPARISON STUDY 64 (2016), <http://www.lincolnst.edu/sites/default/files/pubfiles/50-state-property-tax-comparison-for-2016-full.pdf> [https://permacc/44W9-NDWL].

<sup>34</sup> Stewart E. Sterk & Mitchell L. Engler, *Property Tax Reassessment: Who Needs It?*, 81 NOTRE DAME L. REV. 1037, 1041 (2006).

<sup>35</sup> Timothy Schiller, *What’s It Worth? Property Taxes and Assessment Practices*, Q3 PHILA. RES. BANK BUS. REV. 21, 23 (2011) (defining property tax assessment broadly as “the process by which a taxing authority [i] identifies taxable properties, [ii] determines who is responsible for paying taxes on them, [iii] assigns values to them for taxation, and [iv] calculates the tax liability of the property.”).

<sup>36</sup> Property values are assessed in different manners and with different frequencies. Sterk & Engler, *supra* note 34, at 1042-44. The property tax is generally calculated off the assessed value, in conjunction with the property class-specific tax rate, net any exemptions.

<sup>37</sup> This heterogeneity reflects various concerns, only some of which are technical. Reassessments do not typically focus on all property in a given revaluation year. Richard Henry Carlson, *A Brief History of Property Tax*, FAIR & EQUITABLE 3 (Feb. 2005), [http://www.iaao.org/uploads/A\\_Brief\\_History\\_of\\_Property\\_Tax.pdf](http://www.iaao.org/uploads/A_Brief_History_of_Property_Tax.pdf) [https://permacc/KSC9-FQNE]. Some states impose no duty for reassessment but may provide incentives for assessing jurisdictions to do so, while others require frequent reassessment. Sterk & Engler, *supra* note 34, at 1042. Some commentators have proposed an intermediate proposal, whereby “taxes for each ownership year would be recalculated at sale by averaging the homeowner’s purchase and sales prices.” *Id.* at 1040.

<sup>38</sup> Schiller, *supra* note 35, at 23. Generally, a property is assessed by only one jurisdiction. *But see* N.Y. STATE DEP’T OF TAXATION AND FINANCE, ASSESSORS, <https://www.tax.ny.gov/pit/property/learn/assessors.htm> [https://permacc/YTG6-LPDD] (“New York is only state in the nation where property owners can receive two separate assessments for the same property.”).

<sup>39</sup> Laura Bucher Murphy, *Cafo Grief: Using Tax Grieving Procedures to Protest Industrial Animal Factories*, 23 J. ENVTL. L. & LITIG. 357, 364 (2008). Methods commonly used for commercial, industrial, or agricultural property, may value property according to the income-generating capacity (the income method) or the cost to replace the structures on the property (the cost method). To identify market value, jurisdictions often use a sales comparison approach for residential real estate (the actual sale prices of similar properties). Schiller, *supra*

Many tax assessors are elected, and regardless of the method of selection, they may face political pressures concerning the mechanics of property tax administration.<sup>40</sup> These political pressures can lead assessors to privilege more politically powerful groups, including racial and ethnic majorities.<sup>41</sup> Formalized processes notwithstanding, property tax assessments may reflect “gut feeling”<sup>42</sup> or methods poorly understood by the public.<sup>43</sup> When the valuation procedures leave taxpayers aggrieved, either in accordance with the law or in spite of it, those taxpayers may appeal through the particular channels available in their state, which we will detail in Section II.B.

### B. *The Tax Revolt and Proposition 13*

California provides a paradigmatic example of how state law shapes property tax assessment. In 1978, California voters passed Proposition 13, enacting an amendment to the state constitution capping the property tax rate and limiting the growth of property tax assessments.<sup>44</sup> Proposition 13 adopted an acquisition-value assessment system<sup>45</sup> that placed a state consti-

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note 35, at 25. Residential appraisals occur through “mass,” rather than individual, appraisal. Mass appraisals reflect large data sets of other property with adjustments for particular attributes of property under appraisal, of which computer-assisted mass appraisal (CAMA) is a popular subgenre. *Id.* at 24. In mass appraisals, the *actual* sales price of a property is not the direct basis of its valuation for the purposes of tax assessment.

<sup>40</sup> For example, the California Constitution requires that county assessors be elected. CAL. CONST. art. XI, § 4(c). As of 1994, assessment officials in 30 states were elected, rather than appointed. Robert P. Strauss & Sean R. Sullivan, *The Political Economy of The Property Tax: Assessor Authority And Assessment Uniformity*, 91 PROCEEDINGS, ANN. CONF. ON TAXATION AND MINUTES OF THE ANN. MEETING OF THE NAT’L TAX ASS’N 254, 255 (1998). However, some local governments within a state vary in their method of selection for assessors. *See, e.g.*, VA. CODE ANN. § 58.1-3270 (allowing local governments to choose whether assessment is performed by the elected commissioner of revenue or an appointed official).

<sup>41</sup> *See* Justin M. Ross, *Assessor Incentives & Property Assessment*, 77 S. ECON. J. 776, 792 (2011) (finding a correlation between racial homogeneity—which decreases the political power of racial minorities—and overassessment, as well as a trend toward underassessment by elected rather than appointed assessors).

<sup>42</sup> *City of Biddeford v. Adams*, 1999 ME 49, ¶ 3, 727 A.2d 346, 350 (Me. 1999) (“[The assessor] stated that he granted the 12.5% decrease based on his ‘gut feeling.’”). That is not to suggest that statistical methods do not rely on their own sets of potentially problematic and non-transparent assumptions.

<sup>43</sup> *See, e.g.*, FINAL REPORT OF THE SENATE PROPERTY TAX ASSESSMENTS AND APPEALS STUDY COMMITTEE, GEORGIA SENATE PROPERTY TAX ASSESSMENTS AND APPEALS STUDY COMMITTEE 6–7 (2009), <http://www.senate.ga.gov/sro/Documents/StudyCommRpts/09PropertyTaxAssessmentRpt.pdf> [<https://permacc/YU8X-A2QK>] (noting that the public was intentionally excluded from statutorily required trainings for tax office employees, assessors, and boards of equalization).

<sup>44</sup> CAL. CONST. art. XIII A (as adopted 1978). Various scholars have advanced causes for the passage of Proposition 13. William Fischel argued that it was a response to the California Supreme Court’s decision requiring the equalization of school district finances, severing the tie between local taxes and that most prized of local goods, school quality. WILLIAM FISCHEL, *THE HOMEVOTER HYPOTHESIS* 111–18 (2001).

<sup>45</sup> CAL. STATE BOARD OF EQUALIZATION, CALIFORNIA PROPERTY TAX: AN OVERVIEW, at 1 (Pub. 29, July 2015), <http://www.boe.ca.gov/proptaxes/pdf/pub29.pdf> [<https://permacc/4CAC-2NK4>].

tutional ceiling on property tax assessment growth, administered by a detailed statutory scheme.<sup>46</sup>

Acquisition-value assessment systems anchor the assessed value of a property to the value determined at acquisition.<sup>47</sup> Eighteen other states and several localities have also adopted acquisition-value taxation systems or another limitation on the growth of property assessments.<sup>48</sup> These systems often have significant political support. Proposition 13 has been described as an “impregnable institution” in the California political landscape.<sup>49</sup>

California’s scheme, as further amended by later ballot propositions,<sup>50</sup> has five significant components for residential properties. First, the annual property tax rate is assessed on the “full cash value,” which is constitutionally defined as the “valuation on the 1975-76 tax bill or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred.”<sup>51</sup> If the fair market value exceeds the full cash value in any given year, the full cash value can be increased only by the lesser of the rate of inflation<sup>52</sup> or 2% of the adjusted acquisition cost.<sup>53</sup> At the individual level, the property tax benefit is economically significant.

<sup>46</sup> As Joan Youngman has aptly noted, “Proposition 13 in California does not call for unchanging assessments, but it achieves near complete predictability through a fixed 1 percent tax rate and an assessment generally based on the purchase price of the property (or the 1975-1976 value, for property that has not changed hands since that time).” JOAN YOUNGMAN, *A GOOD TAX* 40 (2016).

<sup>47</sup> As Joan Youngman writes, “[a] property’s maximum assessment is rigidly constrained under an acquisition value system, but a drop in market values below that limit will generally cause assessed value to fall as well. The assessment cannot rise above the inflation-adjusted acquisition value, but in most cases it can fall by any amount-and rise by any amount-so long as it remains below that limit.” *Id.* at 196.

<sup>48</sup> See, e.g., Melissa J. Morrow, Comment, *Twenty-Five Years of Debate: Is Acquisition-Value Property Taxation Constitutional? Is It Fair? Is It Good Policy?*, 53 EMORY L.J. 587, 594-95 (2004) (“States that have adopted such limitations include Arizona, California, Iowa, New Mexico, New York, Michigan, and Florida. Varying from two to six percent, these assessment limitations prevent the government from garnering increased revenues due to rising property values.”); SIGNIFICANT FEATURES OF THE PROPERTY TAX, LINCOLN INSTITUTE, [http://datatoolkits.lincolnst.edu/subcenters/significant-features-property-tax/Report\\_Tax\\_Limits.aspx](http://datatoolkits.lincolnst.edu/subcenters/significant-features-property-tax/Report_Tax_Limits.aspx) [https://permacc/ARZ4-9PTM] (last visited Feb. 26, 2017) (relying in part on DANIEL MULLINS & KIMBERLY COX, *TAX AND EXPENDITURES LIMITS ON LOCAL GOVERNMENTS* (1995)).

<sup>49</sup> Kevin O’Leary, *The Legacy of Proposition 13*, TIME (June 27, 2009), <http://content.time.com/time/nation/article/0,8599,1904938,00.html> [https://permacc/5FU8-YT4V].

<sup>50</sup> For example, Proposition 13 did not actually deal with declines in fair market value until six months after its 1978 passage when Proposition 8 specified assessment on the lower of the existing taxable value or the current market value. Note however that “[i]ncreases to a Prop 8 assessment are not subject to the 2% increase limitation as are Prop 13 values. A Prop 8 value may be increased or decreased, depending on market activity in your neighborhood. Once the real estate market begins to recover, assessed values will be increased until they are restored to their Prop 13 factored base year values. At no point can the value be increased above your factored Prop 13 value.” Alameda Cty. Assessor, *Why Assessed Value May Increase More Than 2%*, [https://www.acgov.org/assessor/about\\_property\\_assessment/may-increase.htm](https://www.acgov.org/assessor/about_property_assessment/may-increase.htm) [https://permacc/UNK4-PJYJ] (last visited May 22, 2018).

For the amendments on inheritability, see *infra* notes 56-57.

<sup>51</sup> CAL. CONST. art. XIII A, § 2(a).

<sup>52</sup> The rate of inflation is currently defined by statute.

As our back-of-the-envelope calculations demonstrate, someone who purchases or has recently purchased a small home in coastal Northern California might pay the equivalent of an additional 20% of their (already significant) mortgage payment to cover the additional property taxes they owe as compared to a neighbor who purchased her property in 1980.<sup>54</sup> The large premium is partly a product of the particularly low annual assessment growth ceiling in California (2%). Yet even in the absence of a ceiling, California's formula would still produce significant disparities by tying assessment growth to inflation (which has trailed real estate appreciation).<sup>55</sup>

Second, and of particular demographic import, post-Proposition 13 constitutional amendments assure that children and grandchildren largely do not incur a reassessment when they inherit or purchase property from parents and grandparents.<sup>56</sup> Third, many homeowners over the age of 55 can carry

<sup>53</sup> Today, the market value of a typical California home purchased in 1980 is more than twice its assessed value. LEGISLATIVE ANALYST'S OFFICE, COMMON CLAIMS ABOUT PROPOSITION 13, 4 (2016).

<sup>54</sup> Imagine two identical cottages purchased in Marin County, CA in 1980 for \$100,000 (nominal). They are unrenovated and have 2016 market values of \$1,000,000 (for a helpful graphic displaying Bay Area valuation changes from 1980 based on the Case-Shiller index, see Blanca Torres, *Bay Area Home Values*, S.F. Chron. (June 24, 2014), <https://www.bizjournals.com/sanfrancisco/blog/real-estate/2014/06/bay-area-home-prices-san-francisco-case-shiller.html#i1> [<https://permacc/XR2F-NMZV>]). The first remains owner-occupied and the value assessment increases by an annual inflation factor, capped at 2%. See CAL. STATE BOARD OF EQUALIZATION, FINAL INFLATION FACTORS FOR PRIOR YEARS (2015), <https://www.boe.ca.gov/proptaxes/pdf/ltal15055.pdf> [<https://permacc/TG5H-2EY9>]. Utilizing these year-specific factors beginning in 1980-81 and ending with 2015-16, the value assessment in 2016 is \$188,474. The homeowner pays 1% of that amount for a \$1,885 annual, or \$157 monthly, property tax payment. In contrast, the prospective or recently arrived homeowner for the *neighboring* cottage will pay 1% of \$1,000,000, for a \$10,000 annual, or \$833 monthly, payment.

Thus, the capped tax assessment leads the new neighbor to pay \$676 per month more in property taxes. If the prospective homeowner purchased the \$1,000,000 home with a 20% down payment and 30-year-mortgage remaining for the \$800,000, their monthly mortgage payment, at a 3.5% interest rate, will be approximately \$3,600 per month. The *additional* property taxes, as compared to the neighbor's, comprise an additional 19% monthly payment (\$676 on top of the \$3,600), and of course the premium would not disappear once the mortgage was paid off.

To be technically precise, this exercise abstracts away from a narrow class of additional ad valorem taxes permitted in California to finance bond indebtedness for particular municipal improvements, which exist in Marin County. See CAL. CONST. art. XIII A, § 1(b)(2)-(3).

<sup>55</sup> Continuing the example from note 57, even with no growth ceiling, the value assessment would become \$363,198. (The annual California inflation rate peaked at 17% during the relevant period, though it was usually closer to two percent.) The homeowner pays 1% of that amount for a \$3,632 annual, or about \$303 monthly, property tax payment. Here, the capped tax assessment leads the new neighbor to pay \$530 per month more in property taxes (as compared to the \$833 monthly payment by new owners). The *additional* property taxes, as compared to the neighbor's under Proposition 13, equate to an additional 15% monthly mortgage payment (\$530 on top of the \$3,600).

<sup>56</sup> Proposition 58 (Nov. 1986) created the safe harbor for transactions between parents and children, and Proposition 193 (March 1996) expanded it to cover grandparent-grandchild transactions. These protections are limited to the recipient's primary residence and an additional \$1 million of property transfer. The resulting propositions are codified at CAL. CONST. art. XIII A § 2(h). See also *Exclusions from Re-appraisal (Propositions 58 and 193)*, CAL. STATE BOARD OF EQUALIZATION (2017), <https://www.boe.ca.gov/proptaxes/faqs/propositions58.htm#1> [<https://permacc/JQ7N-BRE8>].

their property assessment to a new home—further extending disparities as homeowners are able to preserve tax privileges.<sup>57</sup> Fourth, the annual property tax rate cannot exceed 1%, with only narrow exceptions.<sup>58</sup> Finally, the property tax rate and assessment limitation apply broadly across all categories of property, both residential and commercial.<sup>59</sup> In particular, the property tax relief accorded residential property occurs regardless of owner-occupancy and number of properties owned.

These tax limitations often have distortionary effects with different consequences for different racial and ethnic communities.<sup>60</sup> Housing patterns and values change over time in ways that sometimes correlate with race and ethnicity. Tax systems that fail to account for value changes or disincentivize moving can reinforce unequal and segregated housing patterns. Shortly after Proposition 13 passed, the California Taxpayers' Association noted a sharp rise in other fees and non-ad valorem taxes, which are administered on a basis other than in proportion to fair market value, such as per parcel.<sup>61</sup> Because the fees are restricted to new developments or service districts, these fees hit newer residents harder. The parcel taxes thus further exacerbate Proposition 13's effect of increasingly unequal tax burdens between old and newer, increasingly diverse residents.<sup>62</sup> Additionally, scholars have

<sup>57</sup> Proposition 60 (Nov. 1986) allowed for the transfer of the property assessment by a person over the age of 55 from one primary residence to another within the same county. Proposition 90 (Nov. 1988) allowed counties to accept intercounty assessment transfers, but did not require counties to do so. As of 2015, eleven counties accept intercounty transfers under Prop 90. See *Exclusions from Re-appraisal (Propositions 60 and 90)*, CAL. STATE BOARD OF EQUALIZATION (2017), [http://www.boe.ca.gov/proptaxes/faqs/propositions60\\_90.htm](http://www.boe.ca.gov/proptaxes/faqs/propositions60_90.htm) [https://permacc/ELZ2-LVCP].

<sup>58</sup> CAL. LEG. ANALYST'S OFFICE, A LOOK AT VOTER-APPROVAL REQUIREMENTS FOR LOCAL TAXES, 2 <http://www.lao.ca.gov/reports/2014/finance/local-taxes/voter-approval-032014.aspx> [https://permacc/F4NY-JMAG] ("The State Constitution limits, with narrow exceptions, the property tax rate to 1 percent. Local governments may raise the property tax rate only for two purposes: (1) to pay debt approved by voters prior to July 1, 1978 and (2) to finance bonds for infrastructure projects.").

<sup>59</sup> At the end of 2017, multiple organizations sought a ballot initiative to secure a "split roll," that would reduce the benefits of Proposition 13 to commercial property. See Kevin Modesti, *Prop. 13 targeted by proposed California ballot initiative*, ORANGE COUNTY REGISTER (Dec. 19, 2017), <https://www.ocregister.com/2017/12/19/prop-13-is-targeted-by-proposed-california-ballot-initiative/> [https://permacc/AN7W-3AMC]. This proposal was previously contained in a proposed constitutional amendment, Senate Constitutional Amendment No. 5 (Cal. 2015-2016), [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160SCA5](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SCA5) [https://permacc/4NGF-ML8E].

<sup>60</sup> See, e.g., *infra* Section IV.A.1 (discussing disparate consequences in the context of Nassau County, New York).

<sup>61</sup> Bill Stall, *Levies, Fees Used to Offset Prop. 13: Finances: Cities, Counties and Special Districts have Added a Variety of Assessments to Compensate for Losses in Property Tax Revenues*, L.A. TIMES (Oct. 11, 1993), [http://articles.latimes.com/1993-10-11/news/mn-44713\\_1\\_property-taxes](http://articles.latimes.com/1993-10-11/news/mn-44713_1_property-taxes) [https://permacc/9U33-ZPCV]. See generally CALIFORNIA TAXPAYERS ASSOCIATION, THE OTHER PROPERTY TAX (March 2013), <http://www.caltax.org/ParcelTaxPolicyBrief.pdf> [https://permacc/F9BN-JFTY].

<sup>62</sup> See Darien Shanske, Note, *Public Tax Dollars for Private Suburban Development: A First Report on a National Phenomenon*, 26 VA. TAX REV. 709, 763 (2007) ("Mello-Roos taxes, along with impact fees, represent a further tax burden generally imposed on newer homeowners or, put more precisely, on homeowners in newer neighborhoods."); see also

bemoaned the resulting “fiscalization of land use law,” by which municipal governments in California might, for example, prioritize retail over residential development because sales tax revenue is potentially more lucrative than the peril of capped property taxes.<sup>63</sup>

### C. *Fairness and the Law and Economics of Property Taxes*

Law and economics scholarship provides thoughtful insights into the efficient administration of the property tax, but efficiency considerations are somewhat orthogonal to, or at least constrained by, the law’s equality- and fairness-oriented mandates. Whatever the economic virtues, shortcomings, or particular form of the property tax, the Fair Housing Act (FHA) requires some equality in its application.<sup>64</sup> We propose below that the FHA includes a precept of equitable taxation of housing that prohibits tax policies producing inadequately justified disparate impacts on housing opportunity for different groups. This concept of equitable taxation is distinct from optimal<sup>65</sup> or efficient taxation. A deeply inefficient property system can create equal burdens, just as a more efficient property system can create unequal burdens. More concretely, a high tax jurisdiction may suffer from relatively low-quality schools and amenities due to poor planning and inefficient expenditures, and yet each frustrated resident pays their fair share. In contrast, a low tax jurisdiction might innovatively make use of its limited funds to provide for high quality schools, but might have arcane and unjustified tax policies that

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Building Industry Ass’n of the Bay Area v. City of San Ramon, 4 Cal. App. 5th 62, 67 (2016) (holding that tax imposed upon developer to cover the cost to the city of providing services to the new development was a qualifying “special” tax under Mello-Roos and therefore did not violate California’s constitutional restriction, via Proposition 13, of such special taxes).

<sup>63</sup> David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2346 (2003) (“Indeed, some have faulted Proposition 13’s restrictions on local property taxation for having induced a destructive interlocal scramble for commercial property, and the resulting sales tax revenue that promotes the kind of sprawling, zero-sum development pattern that many critics of home rule find problematic.”). See generally Scharff, *supra* note 1, at 312; Shanske, *supra* note 62, at 764.

<sup>64</sup> To that end, even prior to reassessment, ratio study audits can address concerns with the assessment process, namely horizontal and vertical equity. See Daniel P. McMillen & Rachel N. Weber, *Thin Markets and Property Tax Inequities: A Multinomial Logit Approach*, 61 NAT’L TAX J. 653, 654 (2008) (“Property tax assessment ratios—a property’s assessed value divided by its market value—determine the effective tax rates paid by owners and . . . [w]hen ratios in the same assessment district vary, the property tax will not be applied uniformly.”). Horizontal and vertical equity refer, respectively, to the claims “that persons with equal lifetime resources should face equal lifetime tax burdens, and that those with higher lifetime resources should face higher lifetime tax burdens than those with lower lifetime resources.” Lawrence Zelenak, *Tax Policy and Personal Identity over Time*, 62 TAX L. REV. 333, 346 (2009).

<sup>65</sup> Optimal taxation theories generally consider consumer behavior and elasticities in maximizing social surplus. The concept of optimal taxation has recently attracted considerable attention in the context of commodity taxes, a literature pioneered by Frank Ramsey. F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47 (1927); see also Raj Chetty, Adam Looney, & Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009) (measuring, and incorporating, salience and behavioral responses to augment the canonical model).

disproportionately burden minorities. The Fair Housing Act's legal mandate empowers those aggrieved by tax *inequity* (if that inequity falls on the axis of a protected classification) while providing little relief to those aggrieved by tax *inefficiency*.<sup>66</sup> Federal law thus limits tax policies discriminating on characteristics of the (prospective) property *owner*, though tax policies regularly and permissibly discriminate on characteristics of the property itself.<sup>67</sup>

While the questions of efficiency might be somewhat orthogonal, they do play a role in the competing narratives surrounding Proposition 13. Some have praised the economic virtues of property taxes as exemplifying the Tiebout hypothesis,<sup>68</sup> whereby local goods are purchased with local taxes and allow for residential segregation based on preferences and willingness-to-pay for amenities. The economist William Fischel has characterized Proposition 13 in Tiebout terms by arguing that it was a reaction to the California Supreme Court's decisions in *Serrano v. Priest*,<sup>69</sup> which struck down the inequities produced by California's earlier school financing system. According to Fischel, these decisions "crippled the Tiebout system by divorcing local property wealth from school spending."<sup>70</sup> Under this theory, Proposition 13, which passed on *Serrano*'s tails, can be construed as taxpayers refus-

<sup>66</sup> Tax efficiency in this context relates to the community benefits acquired through a given amount of tax collection while tax inequity refers to differences in burdens between diverse property owners with nonetheless similar properties. Our distinction between tax efficiency and tax equality should not be confused with the large literature on the role of tax in furthering equality. See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (arguing that "redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient."); see also Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1007–10 (2001) (arguing against Kaplow and Shavell's double-distortion argument and against using efficiency as the sole guiding principle of legal rule design).

<sup>67</sup> We are generally focused on property owners. Nonetheless, economists have pointed out that the progressivity of property taxes depends, in part, on the incidence of the tax between property owners and renters. Thomas Piketty & Emmanuel Saez, *How Progressive is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. OF ECON. PERSPECTIVES 3, 10 (2007) ("Overall, state and local taxes are believed to be somewhat regressive but this depends on the assumed incidence of the property tax."). There may still be analytic room, outside the scope of this Article, to argue that in a renter-dominated society (or municipality or town), if the incidence of the property tax falls upon the renters rather than the property owners, the Fair Housing Act challenge might need to contemplate both the impact on, and demographics of, renters and property owners.

<sup>68</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see also Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 811–12 (2003) (noting that "[i]n the local setting, individuals can shop among multiple jurisdictions, selecting membership in the community that most closely matches their preferences for the appropriate mix of taxes and services."); Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 76 (2013) ("Legal scholars have drawn on this [Tiebout] framework to argue for devolution and decentralization in governmental authority and structure.").

<sup>69</sup> The three *Serrano* cases are *Serrano v. Priest*, 96 Cal. Rptr. 601 (1971) (*Serrano I*); *Serrano v. Priest*, 135 Cal. Rptr. 345 (1976) (*Serrano II*); *Serrano v. Priest*, 141 Cal. Rptr. 315 (1977) (*Serrano III*). Proposition 13 passed in 1978.

<sup>70</sup> William A. Fischel, *Did "Serrano" Cause Proposition 13?*, 42 NAT'L TAX J. 465, 465–66 (1989).

ing to shoulder further local tax increases when those increases could no longer fund locally consumed amenities.<sup>71</sup> In some sense, Fischel's hypothesis ties together efficiency and equity concerns by arguing that Proposition 13's resulting inequities were catalyzed by conservative voters' fears of post-*Serrano* inefficiency.

Other analysts have disputed this account and advanced alternative explanations.<sup>72</sup> For instance, Isaac William Martin suggested that the roots of Proposition 13 may lie in the administrative modernization of the property tax, which undermined previously hidden tax advantages for homeowners.<sup>73</sup> From this perspective, Proposition 13 formalized preexisting benefits for homeowners. Martin also draws on individual voter survey data, as opposed to only aggregated community-level data, to argue that there is little empirical evidence supporting the idea that *Serrano* catalyzed support for Proposition 13.<sup>74</sup>

## II. TWENTIETH CENTURY WITHDRAWAL FROM PROPERTY TAX REVIEW

Notwithstanding recent Supreme Court decisions that subtly yet meaningfully shift the procedural landscape,<sup>75</sup> American courts have been historically reluctant to adjudicate challenges to state and local tax systems. Over the course of the twentieth century, both federal and state actors erected strong barriers to meaningful judicial review of local tax policies.

Although the federal courts generally became more aggressive enforcers of federally protected civil rights during the mid-twentieth century, the Burger and Rehnquist Courts insulated state taxation from this trend through procedural barriers and weakened constitutional standards for tax fairness. As federal remedies were closed off, many states likewise restricted taxpayers' ability to challenge assessment regimes under state law.

The trends discussed below present challenges for homeowners who seek to challenge systemically unfair property tax assessments, including where that unfairness falls along racial lines.

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<sup>71</sup> *Id.* at 465.

<sup>72</sup> Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts*, 50 U.C.L.A. L. REV. 801, 850-53 (2002) (finding no connection between *Serrano* and Proposition 13 and suggesting that it was spurred by high property price inflation in California in the 1970s). But see William A. Fischel, *Did John Serrano Vote for Proposition 13?*, 51 U.C.L.A. L. REV. 887 (2004).

<sup>73</sup> See, e.g., ISAAC WILLIAM MARTIN, *THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS* 4-5 (2008) ("By modernizing and standardizing tax assessment, the reformers did away with traditional and informal tax breaks that dated from the late nineteenth century. Local tax assessors had dispensed these informal tax privileges unevenly and often arbitrarily. But most homeowners received substantial benefit from them. *When they were swept away, homeowners fought to restore them in a new and permanent form.*" (emphasis added)).

<sup>74</sup> Isaac W. Martin, *Does School Finance Litigation Cause Taxpayer Revolt? Serrano and Proposition 13*, 40 L. & SOCIETY REV. 525, 545 (2006).

<sup>75</sup> See discussion *infra* Part III.

### A. Federal Disengagement

At first, federal intervention in allegedly unlawful state taxation was primarily constrained by general restrictions on federal-court injunctions. Early cases from the nineteenth century grounded the hesitance to enjoin taxes in the general limitations on equity jurisdiction—that an injunction will not lie where there is a “plain, adequate, and complete remedy at law” available in federal court.<sup>76</sup> In the 1930s, the Supreme Court and Congress further restricted the power of federal courts to enjoin state taxes, culminating in the Tax Injunction Act.<sup>77</sup>

First, in *Matthews v. Rodgers*, plaintiffs sought a federal injunction against Mississippi’s allegedly unconstitutional taxes on those engaged in buying or selling cotton.<sup>78</sup> The Court denied the injunction after describing state-court refund procedures.<sup>79</sup> The “remedy at law in state court was [ ] sufficient to defeat federal equitable jurisdiction,” effectively reversing prior state tax injunction cases that had held that the remedy must have been available in federal courts.<sup>80</sup> The *Matthews* Court characterized this rule as “a proper reluctance to interfere by injunction with [states’] fiscal operations.”<sup>81</sup>

Lower federal courts nonetheless continued to enjoin state and local taxes.<sup>82</sup> Possibly because of the relatively high amount-in-controversy requirement for both federal question and diversity lawsuits, out-of-state corporations were the predominant plaintiffs in these lawsuits, arousing Congressional sympathy for state and local fiscs.<sup>83</sup>

<sup>76</sup> *Dows v. City of Chicago*, 78 U.S. 108, 109–10, (1870); see also *Allen v. Pullman’s Palace Car Co.*, 139 U.S. 658, 661 (1891); *Shelton v. Platt*, 139 U.S. 591, 598–99 (1891); *Pacific Exp. Co. v. Seibert*, 142 U.S. 339, 348 (1892). The Supreme Court sometimes discussed the importance of taxation to the public fisc, but the holdings did not rely principally on financial federalism concerns. See, e.g., *Dows*, 78 U.S. at 110.

The Court did, however, rely on federalism principles to reject the suggestion to allow any unconstitutional tax to be enjoined, regardless of whether the other general requirements for an injunction are met. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909) (noting a “proper reluctance to interfere by prevention with the fiscal operations of the state governments . . . where the Federal rights of the persons could otherwise be preserved unimpaired.”); see also *Henrietta Mills v. Rutherford Cty.*, 281 U.S. 121, 127 (1930).

<sup>77</sup> 28 U.S.C. § 1341 (2012).

<sup>78</sup> 284 U.S. 521, 523 (1932).

<sup>79</sup> *Id.* at 526.

<sup>80</sup> John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 CONN. L. REV. 73, 109 (1999) (“In 1932, the Supreme Court unanimously held that federal courts could not entertain the equitable challenges to state taxes if an adequate remedy at law was available in state court.”); see also *Matthews v. Rodgers*, 284 U.S. 521, 525–26 (1932).

<sup>81</sup> *Matthews*, 284 U.S. at 525–26 (internal citations omitted).

<sup>82</sup> Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780, 782–83 (1946); see, e.g., *Consolidation Coal Co. v. Martin*, 113 F.2d 813 (6th Cir. 1940).

<sup>83</sup> Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 HARV. L. REV. 1888, 1892–93 (1990).

In 1937, Congress passed the TIA, which provides: “The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”<sup>84</sup> This language resembles the general standard for equity jurisdiction, with two significant expansions. First, mirroring the *Matthews* ruling, the statute prohibits an injunction where a remedy is available in state courts. Second, the TIA expanded on the *Matthews* ruling by precluding a federal-court injunction for any “plain, speedy, and efficient” remedy, whether at law or at equity. Congress described the purpose of the act as addressing “the unfairness of requiring ‘the citizen of the State . . . to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.’”<sup>85</sup> The Act was one of a series of Depression-era laws, coincident with “[t]he sales tax movement . . . associated primarily with the fiscal emergencies of the States.”<sup>86</sup>

The TIA’s new exception—“plain, speedy, and efficient”—became the subject of judicial interpretation, and by the end of the twentieth century, the TIA and related doctrines operated as an effective bar on many federal remedies in taxation, regardless of venue.<sup>87</sup> This doctrinal shift occurred on two axes: (i) the Court interpreted TIA’s principles of comity to preclude federal damages remedies, and even certain injunctions in state court, while (ii) narrowing the main safety valve—the requirement of a “plain, speedy, and efficient” state remedy. We turn to each of these axes in turn and conclude by briefly addressing a third factor—the deferential substantive standards applied by courts in reviewing property tax policies. Each of these changes

<sup>84</sup> 28 U.S.C. § 1341 (2012). The original wording differed, but “[t]he courts have treated the rewording of the Act, which was part of the 1948 recodification of Title 28, as not affecting the Act’s substance.” Peter D. Enrich, *Federal Courts and State Taxes: Some Jurisdictional Issues, with Special Attention to the Tax Injunction Act*, 65 TAX LAW. 731, 741 n.65 (2012) (citing *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335 n.10 (2010)).

<sup>85</sup> Note, *supra* note 87 at 1892 (quoting S. REP. NO. 1035, 75th Cong., 1st Sess. 2 (1937)). Drawing on this legislative history, some courts in the 1970s had suggested that the TIA *only* applied to diversity jurisdiction cases. *Id.* at 1892 (citing *Fulton Mkt. Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1074–75 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979); *Garrett v. Bamford*, 538 F.2d 63, 67 (3d Cir. 1976), *cert. denied*, 429 U.S. 977 (1976)).

<sup>86</sup> CHARLES A. TROST, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAX* § 11:1 (2d ed. 2017); see also ROBERT MURRAY HAIG & CARL SHOUP, *THE SALES TAX IN THE AMERICAN STATES* 3–24 (1934) (chronicling the factors that led to the widespread adoption of state-level sales taxes).

<sup>87</sup> Contemporaneous commentary suggested that the Court’s early cases interpreting the statute were inconsistent with “the strong congressional policy of noninterference with state fiscal operations.” Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780, 781 (1946). However, the Harvard Law Review, more than fifty years later, suggested that the later expansive interpretation of the TIA contravened legislative intent. Leading Cases, *The Supreme Court, 2003 Term*, 118 HARV. L. REV. 486 (2004) (“Gradually over the course of the Act’s almost eighty-year history, its scope has been interpreted more expansively, diverging from the congressional intent behind it, so that [at the turn of the twenty-first century] the TIA had come to stand for the broad principle that federal courts must not interfere with any aspect of state tax systems.”).

continue to inhibit litigation on behalf of homeowners who face unfair tax assessments.

### 1. *Expansion of Comity*

Comity broadly refers to a deference, or at least sensitivity, to state authority and institutions.<sup>88</sup> In the mid-twentieth century, a revitalized Section 1983<sup>89</sup>—the Reconstruction-era statute creating a cause of action for state constitutional violations—opened federal courthouse doors to constitutional claims.<sup>90</sup> Taxpayers, however, were left shortchanged as their efforts to challenge perceived constitutional infirmities in state tax regimes were undermined by the Supreme Court’s expansion of the comity doctrine, apart from the TIA, to bar such lawsuits.<sup>91</sup> Specifically, the Supreme Court expanded comity to deter tax challenges in *Fair Assessment in Real Estate Ass’n, Inc. v. McNary* and *National Private Truck Council, Inc. v. Oklahoma Tax Commissioner*.<sup>92</sup> These decisions recognized tax-specific comity principles that reach beyond the text of the TIA—and beyond historical equity jurisdictional principles—to significantly limit federal constitutional damages claims and constitutional claims in state courts.

In *Fair Assessment*, the Supreme Court erected a comity-based barrier to review of state and local taxes, despite having liberally offered judicial

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<sup>88</sup> The Supreme Court has defined comity as “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” *Younger v. Harris*, 401 U.S. 37, 44 (1971); see also James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1052 (1994) (“I propose to revise abstention doctrine on a view of federal and state courts as functional coequal by focusing on the idea of ‘comity,’ a term unduly freighted with baggage from the discourse of federalism and abstention. Properly unpacked and understood, however, the concept of comity is useful; it nicely captures the reciprocal deference that different parts of government—such as state and federal courts—ought to accord each other.”).

<sup>89</sup> 42 U.S.C. § 1983 (2016) (establishing a civil action for constitutional torts).

<sup>90</sup> See *Monroe v. Pape*, 365 U.S. 167, 193–98 (1961) (holding that individual officers, but not municipalities, could be held liable for allegations that Chicago police officers illegally searched plaintiff’s home and arrested him.). But see *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 663 (1978) (overruling *Monroe* and finding that municipalities can be held liable under § 1983); see also John Valery White, *Vindicating Rights in A Federal System: Rediscovering 42 U.S.C. S 1985(3)’s Equality Right*, 69 TEMP. L. REV. 145, 147–48 (1996) (discussing how “*Monroe* revived the dormant Section 1 of the 1871 Civil Rights Act and initiated the revival of other largely dormant sections of Reconstruction Era statutes.”).

<sup>91</sup> Note, however, that the Supreme Court had earlier expanded the scope of the TIA to preclude federal jurisdiction of a lawsuit seeking a declaratory judgment that a state law is unconstitutional where an adequate state remedy exists in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300–02 (1943). Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2455 (2014) (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) to note that “[t]he Supreme Court has held in public law cases that ‘there is little practical difference between injunctive and declaratory relief.’”).

<sup>92</sup> *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 116 (1981); *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’r*, 515 U.S. 582, 586–88 (1995).

relief for constitutional grievances in other domains. A group of St. Louis property owners had brought a § 1983 damages action in federal court, alleging that their county violated the federal constitution by unfairly assessing newer homes at a higher rate and retaliating against property owners that appealed their assessments. A narrow majority of the Supreme Court held that comity required federal courts to deny damages relief under § 1983 for challenges to state tax regimes, except where state remedies were not “plain, adequate, and complete.”<sup>93</sup> One of the reasons that the Court found Missouri’s remedies to be sufficiently plain, adequate, and complete was the availability of a § 1983 remedy in state court.<sup>94</sup> The majority, led by then-Justice Rehnquist, recognized that this ruling conflicted with the general thrust of § 1983 jurisprudence, which broadly allowed for active federal court intervention to protect against state violations of federal constitutional rights.<sup>95</sup> Nonetheless, the Court worried that damages liability would sufficiently intimidate state tax officials, apocalyptically predicting that a damages lawsuit would “in every practical sense operate to suspend collection of the state taxes.”<sup>96</sup> Beyond the principle of comity, the majority opinion did not clearly articulate the nature of the barrier to §1983 damages actions in federal court.

Noting this omission, Justice Brennan’s concurrence in the judgment described the majority’s holding as jurisdictional—analogueous to the TIA—despite earlier case law that placed comity within the equity court’s discretion whether to grant relief.<sup>97</sup> Rather than relying on jurisdictional limitations defined by comity or the TIA, the four concurring justices in *Fair Assessment* identified a historical rule of judicial administration that required state exhaustion before pursuing a damages action in federal court.<sup>98</sup> An exhaustion requirement would not have salvaged the St. Louis homeowners’ law-

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<sup>93</sup> *Fair Assessment*, 454 U.S. at 116.

<sup>94</sup> *Id.* at 116–17.

<sup>95</sup> *Id.* at 105 (1981) (recognizing that, generally, “comity does not apply where § 1983 is involved, and that a litigant challenging the constitutionality of any state action may proceed directly to federal court”); *see also id.* at 103–04.

<sup>96</sup> *Id.* at 115 (quoting *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)). To support its reasoning by practical equivalence, the Court looked to precedent that immediately followed the passage of the TIA. In *Great Lakes Dredge and Dock Co.*, the Supreme Court had been confronted with the recently-created remedy of the declaratory judgment. 319 U.S. at 299–300. Declaratory judgments in federal court had been first created by the Federal Declaratory Judgments Act in 1934. 48 Stat. 955. The *Great Lakes* Court analogized the declaratory judgment to equity procedures, implicitly contrasting declaratory judgment to damages and other remedies at law, and grounded its extension of comity principles in this analogy between declaratory judgment and equity practice. 319 U.S. at 300. Rather than engaging with the analogy that formed the reasoning of *Great Lakes* on this point, the later *Fair Assessment* opinion relied on a dictum that emphasized the practical effect of declaratory judgment. Shortly after the *Fair Assessment* decision, the Supreme Court held that the TIA itself deprived federal courts of jurisdiction to grant declaratory judgment in state tax cases. *California v. Grace Brethren Church*, 457 U.S. 393, 409–11 (1982).

<sup>97</sup> *Fair Assessment*, 454 U.S. at 119.

<sup>98</sup> *Id.* at 133–35 (discussing *First Nat’l Bank of Greeley v. Board of Comm’rs of Weld Cty.*, 264 U.S. 450 (1924)). Because the rule was implicitly and favorably discussed in the

suit, but it would have allowed plaintiffs to bring a federal lawsuit if they could not obtain relief through state processes. Under Justice Brennan's proposed regime, federal courts would have played a limited supervisory role over state taxes, but would not have abdicated responsibility completely. Thus, over the objections of a vigorous concurrence in the judgment, the *Fair Assessment* court decided that comity prevented taxpayers from asserting § 1983 challenges to state tax systems in federal courts.

In *National Private Truck Council*,<sup>99</sup> the Supreme Court invoked this comity-based exclusion of § 1983 tax actions from federal courts to hold unanimously that § 1983 claims were additionally impermissible in state fora, if an adequate remedy was available under state law.<sup>100</sup> Oklahoma law required a taxpayer to pay taxes under protest, and, if successful in the challenge, obtain a declaration of unconstitutionality, preclude future collection of the tax, and receive a refund.<sup>101</sup> The Oklahoma Tax Commission asserted that this state procedure was an adequate and exclusive state-court remedy for tax disputes.<sup>102</sup> Disregarding *Fair Assessment's* explicit discussion of a state-court § 1983 remedy, the *National Private Truck Council* Court located the comity principle in § 1983 itself. By the Court's reasoning, "the background presumption that federal law generally will not interfere with administration of state taxes" should be read into Congressional intent and the operation of the statute.<sup>103</sup> Injunctive and declaratory relief could not therefore be available under § 1983 if state law provided an adequate remedy (i.e. a refund).<sup>104</sup> Although the *National Private Truck Council* opinion addressed only injunctive and declaratory relief, state courts have found its reasoning to be equally applicable to damages actions against cities or state officials.<sup>105</sup> In sum, despite the availability of federal remedies for constitutional torts at that time, *National Private Truck Council* limited its growth into state taxation.<sup>106</sup>

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TIA's legislative history, Justice Brennan argued that it overrode the general presumption against an exhaustion requirement for § 1983 actions. *Id.* at 136–37.

<sup>99</sup> 515 U.S. 582 (1995).

<sup>100</sup> The *National Private Truck Council* petitioners had filed a class action in the Oklahoma trial court challenging the constitutionality of state taxes imposed upon vehicles registered in certain other states. *Id.* at 584. While the Oklahoma Supreme Court reversed the trial court's disposition in favor of the state and awarded a refund of the taxes under state law, it declined to award prospective injunctive relief under § 1983 or the corresponding attorney's fees under § 1988. *Id.* at 585.

<sup>101</sup> Kendall Houghton, *U.S. Supreme Court Rejects State Taxpayers' Right to Attorney's Fees*, 5 J. MULTISTATE TAX'N 196, 200 (1995) (discussing remedy in *National Private Truck Council*).

<sup>102</sup> Br. of Respondents, *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 1995 WL 130557 at \*12-\*16 (Mar. 24, 1995).

<sup>103</sup> *Nat'l Private Truck Council*, 515 U.S. at 588.

<sup>104</sup> *Id.* at 591. The court did note that a state's refund remedy may be considered inadequate—and that the § 1983 injunctive remedy may be available—if state officials continue to collect a tax after it has been declared unconstitutional in a refund action. *Id.* at 591 n.6.

<sup>105</sup> See, e.g., *General Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 460 (Cal. 1999); see also Coverdale, *supra* note 80, at 125 n.336 (collecting cases).

<sup>106</sup> Houghton, *supra* note 101, at 196.

*Fair Assessment* and *National Private Truck Council* broadened the effective application of the TIA to preclude any constitutional challenge to state or local taxes outside of procedures provided by the state.<sup>107</sup> This expansion could have still left meaningful access to federal remedies if courts vigorously policed alternative state remedies to determine whether they were “plain, speedy, and efficient.” However, as described below, the Supreme Court watered down this standard at the same time as it expanded comity.

## 2. “Plain, Speedy and Efficient Remedy”

The TIA limits federal judicial interference “of any tax under State law where a *plain, speedy and efficient remedy* may be had in the courts of such State.”<sup>108</sup> Although the “plain, speedy, and efficient remedy” standard initially played a robust role, it has increasingly lost its meaning and potential as a safeguard against wholesale federal abdication in tax policy. Some lower courts nonetheless remained faithful to that initial robust role by continuing to scrutinize state remedies and to articulate the importance of a meaningful “plain, speedy, and efficient” analysis, but intervening Supreme Court precedent has made it difficult.<sup>109</sup>

*Garrett v. Bamford* illustrates the potential of a strong “plain, speedy, and efficient remedy” standard to ensure that wronged taxpayers have access to meaningful judicial review, particularly in the context of racial discrimination. In *Garrett*, the Third Circuit adjudicated a complaint by homeowners in predominantly non-white areas of Berks County, Pennsylvania, arguing that property tax assessment methods constituted intentional discrimination.<sup>110</sup> Concerned with the unavailability of a class action mechanism for the predominantly low-income, minority taxpayers, the Court held that the TIA did not bar federal district court jurisdiction.<sup>111</sup> In doing so, the *Garrett* Court argued that its decision was required by, rather than con-

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<sup>107</sup> We should note briefly that the Supreme Court appeared to allow greater federal intervention in the Establishment Clause case of *Hibbs v. Winn*, 542 U.S. 88 (2004), which seemed to hold that the TIA and comity doctrines did not block injunctive relief if the injunction would lead to increased state tax revenues. *Id.* at 107 n.9. The Court soon limited the *Hibbs* rule, although its precise contours remain unclear. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430 (2010).

<sup>108</sup> 28 U.S.C. § 1341 (2012) (emphasis added).

<sup>109</sup> *See, e.g.*, *Northwest Airlines, Inc. v. Tennessee State Bd. of Equalization*, 11 F.3d 70 (6th Cir. 1993) (holding that a state remedy was inadequate because it deprived state courts of authority to review factual findings of the administrative agency that considered an initial appeal); *Louisville and N. R. Co. v. Public Service Commission*, 631 F.2d 426 (6th Cir. 1980) (holding that state remedy was inadequate because of a state procedural rule that prohibited claims on unequal assessment by overpaying taxpayers); *Garrett v. Bamford*, 538 F.2d 63, 65 (3d Cir. 1976); *U.S. Steel Corp v. Multistate Tax Comm’n*, 367 F. Supp. 107, 115–17 (S.D.N.Y. 1973) (finding state remedies to be inadequate, in part because they would require a multiplicity of suits).

<sup>110</sup> *Garrett v. Bamford*, 538 F.2d 63, 65 (3d Cir. 1976). The plaintiffs raised claims under the constitution and the Civil Rights Act of 1866, but not the FHA.

<sup>111</sup> *Id.* at 71.

trary to, the spirit of the TIA: “A denial of a federal forum . . . would allow a state to depend upon burdensome piecemeal review procedures as an effective defense to an allegedly unconstitutional tax structure[, turning] the legislative intent of [the TIA] on its head.”<sup>112</sup> After Pennsylvania amended its procedure for reviewing tax assessments to allow class litigation, the Third Circuit held the state procedures to be theoretically sufficient for the TIA to apply, while leaving the door open to a future claim that the procedures were inadequate in practice.<sup>113</sup>

Yet the promise of *Garrett* soon faded when the Supreme Court hollowed out the “plain, speedy, and efficient” requirement in *Rosewell v. LaSalle Nat’l Bank*. The plaintiff in that case had brought an equal protection claim, alleging that Cook County’s assessment scheme produced “disparities in assessments [that] were ‘far greater in number and size in older, inner city and county areas, owned, inhabited or used to a larger extent by minorities and poorer people.’”<sup>114</sup> Without reaching the merits of this discrimination claim, the Court considered whether the Illinois refund remedy was “plain, speedy, and efficient” such that the TIA should apply. The Illinois remedy was available only to property owners who had paid their taxes under protest.<sup>115</sup> Although the process generally took two years, the taxpayer did not receive interest on any refunded tax payments.<sup>116</sup> The Court held that Illinois’s remedy was “plain, speedy, and efficient” because (i) the remedy was not alleged to be uncertain or unclear, and therefore was “plain”; (ii) the two-year wait was “regrettably . . . not unusual” and therefore did not fall “outside the boundary of a ‘speedy’ remedy”; and (iii) “the Illinois remedy imposes no unusual hardship on respondent requiring ineffectual activity or an unnecessary expenditure of time or energy, [and therefore one] cannot say that it is not ‘efficient.’”<sup>117</sup> Rather, the Court emphasized that this standard only required “certain minimal procedural criteria.”<sup>118</sup>

*Rosewell’s* definitions of “plain,” “speedy,” and “efficient” were lax and have been cited approvingly by subsequent Supreme Court decisions.<sup>119</sup>

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<sup>112</sup> *Id.* at 72.

<sup>113</sup> *Garrett v. Bamford*, 582 F.2d 810, 812 (3d Cir. 1978). Although it affirmed the district court, the Third Circuit caveated its affirmance by maintaining that “the federal forum should remain available to the appellants in the event that, contrary to our prophesy, the Pennsylvania courts do not interpret the amended remedy in a way which satisfies the requirements of the Tax Injunction Act.” *Id.* at 819. Specifically, taxpayers had “contend[ed] that although the 1977 amendments create a class action procedure in the administrative context, the amendments do not extend that procedure to judicial review of the agency action.” While the Third Circuit felt that this extension was a natural and likely corollary, it encouraged the retention of jurisdiction should the scheme operate contrary to belief. *Id.* at 814.

<sup>114</sup> *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 508 (1981).

<sup>115</sup> *Id.* at 508.

<sup>116</sup> *Id.* at 512.

<sup>117</sup> *Id.* at 516–20.

<sup>118</sup> *Id.* at 512 (emphasis in original).

<sup>119</sup> See e.g., *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (quoting *Rosewell’s* mention of minimal procedural criteria to satisfy the “plain, speedy, and efficient” requirement of the TIA). Nonetheless, that approving reference by the majority occurred over

The definition of a “plain” remedy as neither “uncertain” nor “unclear” appears reasonable. Yet in rendering the remedy “speedy” insofar as it was not “unusual[ly]” long vis-à-vis the norm of judicial delays, and “efficient” insofar as it required no “unusual hardship,” the Court dug into its standard of “minimal” procedural criteria.<sup>120</sup> On the heels of *Rosewell*, the Supreme Court emphasized that it “must construe narrowly the ‘plain, speedy and efficient’ exception to the Tax Injunction Act” and apply the TIA broadly.<sup>121</sup> Since *Rosewell*, some have argued that the judicial interpretation of “plain, speedy, and efficient” is so minimal as to be “toothless.”<sup>122</sup>

Nonetheless, courts have occasionally found state remedies to be insufficient for the TIA’s application, even after *Rosewell*. The First Circuit found that a Puerto Rican tax refund regime was not “plain, speedy, and efficient” because it imposed a cap on payments of judgments, as well as discretionary reductions from even the capped amounts.<sup>123</sup> These limitations “largely insure that the judgment is worthless for all practical purposes.”<sup>124</sup> In a property-tax challenge, the Ninth Circuit suggested in dicta that the *Garrett* skepticism and scrutiny of state remedies may remain good law for claims that involve protected classes, notwithstanding *Rosewell*.<sup>125</sup> How precisely these particular lower court cases comport with the law enunciated in *Rosewell*, while an important question, remains outside the scope of this paper. Nonetheless, we read these cases as rare but important incidents of courts deploying the meaningful scrutiny originally envisioned under the TIA’s “plain, speedy, and efficient” requirement.

The Supreme Court’s reluctance to intervene in state tax systems forty years ago has tempered but not eliminated the scrutiny of federal courts. It is vital that courts recognize the remaining availability of federal judicial review where state remedies are plainly lacking, to ensure that taxpayers are able to meaningfully assert their federal antidiscrimination rights in some venue.

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a dissent that specified how “[w]hen one compares the layers of review that must be exhausted in the California system with the direct appeal to this Court provided by 28 U.S.C. § 1252, one surely cannot conclude that the state system provides the “plain, speedy and efficient” remedy that Congress intended for the resolution of the federal questions these cases present.” *Id.* at 422 (Stevens, J., dissenting).

<sup>120</sup> It should be noted that the specific calculus of “hardship,” based on “ineffectual activity” and “unnecessary expenditure of time or energy,” remained vague.

<sup>121</sup> *Grace Brethren Church*, 457 U.S. at 413.

<sup>122</sup> John B. Oakley, *Prospectus for the American Law Institute’s Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 903-04 (1998). Oakley has suggested that the judicially imposed meaning is so distant from a plain meaning of the text as to require statutory revision. *Id.*

<sup>123</sup> *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, 834 F.3d 110, 121 (1st Cir. 2016).

<sup>124</sup> *Id.*

<sup>125</sup> *Lowe v. Washoe Cty.*, 627 F.3d 1151, 1156 (9th Cir. 2010). The Ninth Circuit cited the earlier case of *Waldron v. Collins*, 788 F.2d 736, 739 (11th Cir.1986), which interpreted *Garrett* as applying only to cases where “state tax codes utilize classifications which are constitutionally suspect” and held that the State of Georgia’s procedures were not inadequate despite the unavailability of a class action. *Id.*

3. *Deferential Constitutional Review – Article XIII A, Allegheny, and Nordlinger*

Alongside the procedural barriers to federal review of state tax policies, “longstanding judicial deference towards tax measures” particularly in the context of constitutional challenges, undermines plaintiffs ability to seek relief for unfair taxes on race-neutral grounds.<sup>126</sup> When “no specific federal right, apart from equal protection, is imperiled,” the Supreme Court has granted “States . . . large leeway in making classifications . . . [to] produce reasonable systems of taxation.”<sup>127</sup> For a brief period, the Supreme Court seemed willing to abandon such a deferential posture, as it did in *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster Cty., W. Va.*<sup>128</sup> But deference was resuscitated in *Nordlinger v. Hahn*, a challenge to Article XIII A as enacted by Proposition 13.<sup>129</sup>

In *Allegheny*, the Supreme Court indicated a willingness to undertake substantive constitutional review of state tax systems. The Webster County, West Virginia, assessor had effectively adopted an acquisition-value assessment system, making “only minor modifications in the assessments of land which had not been recently sold.”<sup>130</sup> Upon a challenge by Allegheny Pittsburgh Coal Company to its alleged overassessment as compared to neighbors, the Court unanimously held that the assessment practice violated the Equal Protection Clause.<sup>131</sup> The holding was predicated, however, on the inconsistency between the assessor’s practices and state law, which required that “taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value.”<sup>132</sup> And while the Court struck down the West Virginia county’s assessment scheme, it explicitly reserved consideration of California’s then recently-passed Proposition 13 or any generally-applied state law.<sup>133</sup>

Shortly after *Allegheny*, some Californians attempted to use the holding as authority that Article XIII A was unconstitutional insofar as it produced

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<sup>126</sup> Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2189 (2004).

<sup>127</sup> *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

<sup>128</sup> 488 U.S. 336, 338 (1989).

<sup>129</sup> 505 U.S. 1, 2 (1990).

<sup>130</sup> *Allegheny*, 488 U.S. at 338.

<sup>131</sup> *Id.* The Court made note of the striking disparities. *See id.* at 344 (“But the present action is not an example of transitional delay in adjustment of assessed value resulting in inequalities in assessments of comparable property. Petitioners’ property has been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies have continued for more than 10 years with little change. The county’s adjustments to the assessments of property not recently sold are too small to seasonably dissipate the remaining disparity between these assessments and the assessments based on a recent purchase price.”).

<sup>132</sup> *Id.* at 338 (quoting W. VA. CONST. art. X, § 1). Although the Supreme Court had previously allowed states to divide property into differentially-taxed classes, the *Allegheny* Court painted the contested county practice as an “aberrational enforcement policy,” *id.* at 344 n.4, divorced from not only statutory authority but also “even-handed,” implicit policy, *id.* at 345.

<sup>133</sup> *Id.* at 344.

disparate property tax assessments between newer and older owners.<sup>134</sup> But the *Nordlinger* Court declined to extend *Allegheny*'s holding to California's system.<sup>135</sup> Under rational basis scrutiny, the *Nordlinger* majority identified two rationales "that justify denying petitioner the benefits of her neighbors' lower assessments:"<sup>136</sup> first, "local neighborhood preservation, continuity, and stability," and second, "legitimate expectation and reliance interests."<sup>137</sup>

Justice Stevens alone dissented. He believed that the feudalistic system could not be sustained under even rational basis scrutiny because of the particularly tenuous relationship between the tax structure and the legitimate purported goal of community stability.<sup>138</sup> He emphasized that "deference is not abdication and 'rational-basis scrutiny' is still scrutiny" and had earlier led the court to "invalidate[ ] tax schemes under such a standard of review."<sup>139</sup> While he agreed that "neighborhood preservation" was a legitimate state interest, he could not "agree that a tax windfall for all persons who purchased property before 1978 rationally furthers that interest [as] Proposition 13 [was] too blunt a tool to accomplish such a specialized goal.

<sup>134</sup> The California Supreme Court had previously rejected a state and federal constitutional challenge to Proposition 13. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1284 (1978) (rejecting constitutional challenges to four distinct elements of Proposition 13: (1) 1% annual property tax ceiling; (2) restricting increases in assessed value of property to 2%; (3) making it more difficult to pass non-ad valorem state taxes; and (4) making it more difficult to pass non-ad valorem local taxes limits the method of changes in State taxes). But *Allegheny* appeared to offer intervening contrary authority. See *Nordlinger v. Lynch*, 275 Cal. Rptr. 684, 688 (Cal. Ct. App. 1990), *aff'd sub nom*, 505 U.S. 1 (1992). The California Supreme Court rejected the revived constitutional arguments, and the Supreme Court granted certiorari to consider the constitutionality of acquisition-value assessment. 502 U.S. 807 (1991) (granting certiorari).

<sup>135</sup> To distinguish from *Allegheny*, the Court wrote: "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, Article XIII A was enacted precisely to achieve the benefits of an acquisition-value system. *Allegheny Pittsburgh* is not controlling here." *Nordlinger*, 505 U.S. at 15. Justice Thomas, writing separately, acknowledged the inconsistency between *Allegheny* and the *Nordlinger* decision, but would have resolved the discrepancy by overruling *Allegheny*. *Id.* at 27–28 (Thomas, J., concurring in the judgment).

<sup>136</sup> *Nordlinger*, 505 U.S. at 12.

<sup>137</sup> *Id.* at 12–13; see also Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1404 (1994) (describing the Supreme Court's invocation of the "assumption that neighborhood stability is a positive good that fosters useful relationships among individuals . . . to uphold property tax schemes that discriminate in favor of longstanding residents.").

<sup>138</sup> Scholars, and even jurists, have generally noted that Proposition 13 violates the tax principle of horizontal equity, which requires that similarly situated taxpayers should be taxed the same. See Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness*, 36 SETON HALL L. REV. 421, 455–56 (2006); John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFSTRA L. REV. 79, 82 (1993) ("I will argue that Proposition 13's disregard for horizontal equity is so pervasive and so deep that it should not be considered to have a rational basis."); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 249, 583 P.2d 1281, 1303 (1978) (C.J. Bird, dissenting) ("The right to equality of taxation is as basic to our democracy as is the right to representation in matters of taxation.").

<sup>139</sup> *Nordlinger*, 505 U.S. at 30–31 (Stevens, J., dissenting).

The severe inequalities created by Proposition 13 cannot be justified by such an interest.”<sup>140</sup> Rather, he critiqued the exemption, which could

be invoked repeatedly and indefinitely, allowing the Proposition 13 windfall to be passed from generation to generation . . . [T]he rationale for such disparity is not merely “negligible,” it is nonexistent. Such a law establishes a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage.<sup>141</sup>

Since *Nordlinger*, taxpayers have had little success bringing federal constitutional challenges to acquisition-value assessment systems.<sup>142</sup> But as we discuss below, the Fair Housing Act, and particularly its disparate impact standard, offers a more hospitable analytic framework for Justice Stevens’s analysis than the “discriminatory purpose” standard required by the Equal Protection Clause.<sup>143</sup> Despite a lack of constitutional purchase, Justice Steven’s criticism of Proposition 13 as an overly-broad mechanism by which to advance neighborhood stability could nonetheless be relevant to the FHA’s disparate impact framework—his criticism could undermine a state or local government’s ability to justify an adverse impact on statutorily protected classes.

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<sup>140</sup> *Id.* at 37–38 (1992) (Stevens, J., dissenting). Justice Stevens also criticized the majority’s reasoning concerning the reliance interest and argued that “[i]t cannot be said . . . that the earlier purchasers of property somehow have a reliance interest in limited tax increases.” *Id.* at 38.

<sup>141</sup> *Nordlinger*, 505 U.S. at 29–30 (Stevens, J., dissenting).

<sup>142</sup> Some of these cases explicitly acknowledge the disproportionate impact on racial minorities. *See, e.g.*, *Columbus-Muscogee Cty. Consol. Gov’t v. CM Tax Equalization, Inc.*, 579 E.2d 200, 201-05 (Ga. 2003) (invoking *Nordlinger* to reverse lower court, which had found that racial minorities were “probable victims” of the County’s taxation scheme and had found the county’s acquisition-value based system to violate Equal Protection); *see also* Melissa J. Morrow, *Twenty-Five Years of Debate: Is Acquisition-Value Property Taxation Constitutional? Is It Fair? Is It Good Policy?*, 53 EMORY L.J. 587, 610–15 (2004) (describing state court decisions regarding acquisition-value taxation). Additionally, in *Amador*, the California Supreme Court rejected the argument that Proposition 13 unconstitutionally infringed on nonresidents’ right to travel. 583 P.2d at 1295 (noting that “by reducing inflationary increases in assessments, by limiting tax rates, and by permitting the taxpayer to make more careful and accurate predictions of future tax liability,” Proposition 13 might have encouraged migration if “prospective purchasers of real property might have been deterred from purchasing . . . by reason of the unpredictable nature of future property tax liability resulting from unlimited inflationary pressures.”).

<sup>143</sup> *Washington v. Davis*, 426 U.S. 229, 240 (1976) (articulating “the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”). A meaningful equal protection remedy may have been of use to the African-American residents of Edwards, Mississippi, who brought *Bland v. McHann*, 463 F.2 21 (5th Cir. 1972), but it is not clear how common such practices are today.

### B. State Restrictions on Review

Alongside the federal limitations on judicial interference with state tax systems, states have established analogous barriers. Heterogeneity in state tax procedure yields inconsistent access to individual, and particularly collective, taxpayer redress. Through statutory prohibitions on relief, a lack of adjudicatory independence, and absent aggregate procedures, state restrictions may impair the enforcement of federal civil rights.

California,<sup>144</sup> New York,<sup>145</sup> and Michigan<sup>146</sup> each have statutes generally prohibiting declaratory or injunctive relief against property taxes. Some states' courts have identified exceptions to allow certain tax-related injunctions, but these exceptions are often limited in ways that restrict challenges to assessment inequities.<sup>147</sup> These mini-TIAs channel taxpayers into specialized procedures for resolving tax disputes.<sup>148</sup>

There are three main ways in which a property tax levy can be examined by an adjudicatory body. The first form is an immediate appeal of an assessed property value. In states where properties are reassessed annually, these appeals must generally be brought very quickly to be timely.<sup>149</sup> Second, a taxpayer may pay a disputed tax and seek a refund for the tax.<sup>150</sup>

<sup>144</sup> CAL. REV. & T. CODE § 4807. Note, also, that California similarly prohibits injunctions against state collection of any tax. See CAL. CONST. art. XIII, § 32.

<sup>145</sup> See N.Y. REAL PROP. TAX § 700; *Niagara Mohawk Power Corp. v. City Sch. Dist. of Troy*, 451 N.E.2d 207, 268 (N.Y. 1983) (“Article 7 of the Real Property Tax Law applies to taxes collected because of erroneous assessments. It is the exclusive procedure for review of property assessments ‘unless otherwise provided by law.’”).

<sup>146</sup> MICH. COMP. LAWS 205.731; 205.741.

<sup>147</sup> See Charlotte Crane, *Maintaining Class Actions in Tax Cases: Why Have Federal Litigants Been So Much Less Successful?*, 11 PITT. TAX REV. 179, 184–85 (2014) (noting many courts' efforts to create remedies for tax challenges outside administrative processes); *Niagara Mohawk*, 451 N.E.2d at 210 (allowing general-jurisdiction courts to consider challenges to a system of assessment, but not a particular valuation); *Wikman v. City of Novi*, 322 N.W.2d 103, 114 (Mich. 1982) (noting that the Michigan Tax Tribunal lacks jurisdiction to hold a statute unconstitutional, but holding that constitutionally framed challenges to tax assessments fall within the Tribunal's exclusive jurisdiction).

<sup>148</sup> State procedures vary on several dimensions, including whether a taxpayer can challenge a tax levy before paying it or must sue for a refund, the nature of the first-level decision-maker, whether aggregate procedures, such as a class action, are available, and the applicable statute of limitations. See generally COUNCIL ON STATE TAXATION, *THE BEST AND WORST OF STATE TAX ADMINISTRATION* (Dec. 2016), <http://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/final-scorecard-in-templateupdatedbookmarked.pdf> [<https://permacc/8N2R-Y58M>] (describing the variation in tax tribunals on many of these axes).

<sup>149</sup> See, e.g., N.Y. REAL PROP. TAX §§ 525(2)(a); 706(2). For more description of these processes, see Laura Bucher Murphy, *Cafo Grief: Using Tax Grieving Procedures to Protest Industrial Animal Factories*, 23 J. ENVTL. L. & LITIG. 357, 367 (2008).

<sup>150</sup> Consider, for example, the Illinois property tax refund process in *Rosewell*: “Respondent first exhausted her administrative remedy by appealing unsuccessfully for a correction of her 1977 assessment before the Cook County Board of Appeals [and] [h]er only remaining state remedy was to pay the contested tax under protest, and then to file an objection to the Cook County Collector's Application for Judgment before the Circuit Court of Cook County.” *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 508 (1981).

Finally, for those who are unable to afford property taxes and end up in arrears, the property may be subject to a tax lien for the back taxes. If the taxes remain unpaid, some states require the taxing jurisdiction to obtain a foreclosure from a court before selling or taking ownership of the property.<sup>151</sup>

State fora for tax-related adjudication vary significantly in their position within the state government and therefore vary in independence.<sup>152</sup> The structure and independence of a state forum should inform whether the remedy is “plain, speedy, and efficient,” as required for the TIA to preclude federal intervention. (Of course, the *Rosewell* standard makes it difficult to characterize a state tax procedure as legally insufficient.)

The availability of state aggregate procedures is also relevant to the federal TIA analysis. As both the *Garrett* and *Lowe* courts recognized, such procedures may partly determine whether the tax procedure constitutes a “plain, efficient, and speedy” remedy. Through the aggregation of smaller recoveries, class actions can offer more persuasive incentives for individuals, including attorneys.<sup>153</sup> Some states do not allow for class actions at all, having never adopted state level parallels of Rule 23 of the Federal Rules of Civil Procedure.<sup>154</sup> In many states, despite an apparent class action procedure, state courts enforce a strict requirement for taxpayers to individually pay the taxes and seek refunds before challenging them, effectively eliminating the prospect for a broad, class-action challenge.<sup>155</sup> On the other hand,

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<sup>151</sup> In some states, rather than a foreclosure, the second stage is a “tax sale,” where a partial or full interest in the property is sold. JOHN RAO, NAT’L CONSUMER LAW CTR., THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES 12 (2012), [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/tax\\_issues/tax-lien-sales-report.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf) [<https://permacc/Q4FE-6QMR>]. The purchaser acquires an interest in the property subject to, in most states, redemption by the former owner, so full rights do not pass at the sale alone. *Id.* at 17. Not every state allows for (quasi-)judicial review, and certain proceedings may be limited in the issues that parties can address.

<sup>152</sup> There are “Judicial Branch Courts,” or tax tribunals in the judicial branch of state government; “Independent Tax Appeal Agencies,” which are tax-specialized and located in the executive branch; “Generalist Appeal Agencies,” which utilize general administrative law judges and are located in the executive branch; and “Revenue Agencies,” which operate within the state revenue collecting agency. Elizabeth Buroker Coffin, *The Case for A State Tax Court*, 8 ST. & LOC. TAX LAW. 63, 78–79 (2003). Depending on the assignment of burdens of proof, appeals to these agencies may also be extremely costly, requiring extensive expert testimony on the valuation of a property. The identity of the first-line decision-maker in tax appeals is consequential to the decision-maker’s independence and familiarity with relevant legal principles. *Id.* at 93 (describing bills in Alabama and West Virginia to, in part, assure the competence of tax dispute adjudicators).

<sup>153</sup> See, e.g., Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 845 (2016); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

<sup>154</sup> See, e.g., Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 534 n.126 (2013) (discussing how Mississippi does not allow class actions, while Virginia lacks a class action rule but nonetheless permits class relief in some situations).

<sup>155</sup> See, e.g., *Ziegler v. Indiana Dep’t of State Revenue*, 797 N.E.2d 881, 885–86 (Ind. T.C. 2003); Coverdale, *supra* note 80, at 123.

states like Louisiana and North Carolina have made efforts to expand taxpayer access to class relief.<sup>156</sup>

Tax scholar Charlotte Crane has identified a surprising willingness among at least some state courts to employ aggregate procedures to evaluate challenges to legally dubious local government taxes. Under pressure to judicially resolve political uncertainty around new taxes, state courts might have “encouraged some cases by signaling that innovative procedures, including class actions, may be available.”<sup>157</sup> In recent years, a number of states, including Alabama, Florida, and Louisiana, have changed the architecture of their appeals system in favor of taxpayers.<sup>158</sup> These changes have included decreased evidentiary burdens for plaintiffs; the elimination of fees or tax prepayment as a condition of accessing redress; and extended filing periods.<sup>159</sup>

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<sup>156</sup> Louisiana recently held that the Louisiana Board of Tax Appeals has jurisdiction to certify and hear a class action. *St. Martin v. State*, 25 So. 3d 736, 737 (La. 2009). The class action specifically sought “the payment of statutorily mandated interest due as a result of tax refunds or credits.” *Id.* North Carolina’s highest court essentially nullified the prerequisite that all class members seek a refund, with the goal of expanding access to class relief. Coverdale, *supra* note 80, at 124–25 (“Under these circumstances, the [North Carolina Supreme Court] held a class action could be brought on behalf of all taxpayers who had paid the unconstitutional tax even though many of them had not filed a timely administrative claim for refund. Although the [court]’s decision is open to criticism as an example of judicial nullification of a statute, it underlines the shortcomings of the present system which allows states to escape in practice their obligation to refund unconstitutional taxes.”).

<sup>157</sup> Crane, *supra* note 147, at 186.

<sup>158</sup> Florida recently established that “the taxpayer’s burden is now governed by a preponderance of the evidence standard,” abrogating a less taxpayer-friendly regime that had, in certain circumstances, required a clear and convincing standard. Recent Development, *Finance & Taxation*, 43 *STETSON L. REV.* 447, 447 (2014). In 2014, the then-governor of Alabama signed into law the “Alabama Taxpayer Fairness Act” that eliminated a tax appeal tribunal located within the state Department of Revenue and replaced it with an independent state agency based on the American Bar Association’s Model State Administrative Tax Tribunal Act. Ferdinand Hogroian, *More Movement Toward Fairness in State Tax Administration and Appeals*, 25-JUL *J. MULTISTATE TAX’N* 28, 28-29 (2015). Additionally, “[t]here is also no ‘pay to play’ required for appeals to the Tax Tribunal, although there continues to be a tax prepayment (or bond) requirement for subsequent appeals to circuit court. (The bond requirement has been loosened somewhat: taxpayers with a net worth of \$250,000 or less need not post a bond or pay the tax before filing suit.)” *Id.* at 28. Louisiana and New Mexico also made recent changes to their tax appeal systems to allow for more time to file the complaint, increased transparency by public posting of tax tribunal opinions, and increased fora for redress. *Id.* at 28–32 (describing Louisiana’s Act 198, providing taxpayers 180 days from the date of final determination of a federal adjustment for the filing of an amended state tax return; Louisiana’s Act 640, whereby taxpayers may appeal assessments of local sales and use taxes to the Board of Tax Appeals without prepayment; New Mexico’s Senate Bill 356, which creates a new ‘administrative hearings office’ under the Department of Finance and Administration, and separate from the Taxation and Revenue Department, involving hearing officers with tax law knowledge; and Arkansas’s Senate Bill 490, which provides 180 days for taxpayers to seek judicial relief from a final assessment or determination). “In sum, 2014 and 2015 have been very successful years for proponents of increasing fairness in state tax administration and appeals.” *Id.* at 32.

<sup>159</sup> *Supra* note 158. Relatedly, using data from New York, Andrew Hayashi finds that certain property taxpayers—racial minorities, immigrants, and working families—have lower legal salience by virtue of using mortgage escrow to (bundle and) pay their taxes, and such mortgage escrow usage predicts a much lower use of tax appeals, even controlling for overas-

Such procedural liberalization aside, studies of taxpayer appeals suggest that appeals may disproportionately benefit residents of wealthier neighborhoods, despite greater density of extremely high assessment ratios in poor neighborhoods.<sup>160</sup> One facet of this problem may be the fact that lawyers and non-lawyers often agree to represent petitioners in real property tax assessment challenges on a contingency basis.<sup>161</sup> Empirical studies from Miami-Dade County, Florida and Texas suggest that tax representatives, who assist homeowners in appealing tax assessments, disproportionately target higher value homes and neighborhoods, for which formal appeals are more likely to be filed.<sup>162</sup> Yet, as reflected in an analysis of data from Chicago, extremely high assessment ratios are often concentrated at low sales prices.<sup>163</sup> Because they work on contingency, profit-maximizing tax representatives may prioritize higher value properties over lower-value areas with nonetheless proportionally greater overassessments.

The federal and state trends discussed above present significant procedural barriers to property owners who face unjustifiably unequal, and potentially illegally unfair, property tax assessments.<sup>164</sup> However, more recent

assessment and other covariates. Andrew Hayashi, *The Legal Salience of Taxation*, 81 U. CHI. L. REV. 1443, 1484–86 (2014).

<sup>160</sup> *Infra* notes 162 and 163, and accompanying text.

<sup>161</sup> See Charles T. Beeching, Jr., *The Billable Hour Is Dead. Long Live . . . What?*, 30 N.Y. ST. B.J. 12, 12 (1995) (“Lawyers have been charging contingent fees for personal injury cases, condemnation proceedings, real property tax assessment challenges, and a number of other types of legal proceedings for decades if not centuries.”); see also Michele Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. SOC. JUST. 179, 204 (2012) (“The difference between the courts, where nonlawyers are generally not permitted to appear on behalf of parties, and administrative hearings, where nonlawyer representation sometimes occurs, may be understood as reflecting differences between judicial and legislative functions.”).

<sup>162</sup> See William Doerner & Keith Ihlanfeldt, *The Role of Representative Agents in the Property Tax Appeals Process*, 68 NAT’L TAX JOURNAL 59, 60 (2015) (finding that data on single-family homes located in Miami-Dade County, Florida are consistent with a theory that tax representatives target higher-value neighborhoods based off of greater expected payoffs). A study examining Texas property tax appeals in the first decade of the twenty-first century similarly found that “higher market values increase the probability of appeal and the likelihood of filing a formal rather than an informal appeal.” *Id.* at 62 (summarizing Rodney Hisson & Robert F. Hawley, *Analyzing the Residential Property Appraisal and Outcomes to Determine if a Property Tax Revolt is Imminent*, 93 SOC. SCI. Q. 191(2012)). “An informal appeal is a meeting between the petitioner and a member of the tax assessor’s office. In a formal appeal both the petitioner and the assessor’s representative present their case in front of a value adjustment board.” *Id.* at 61-62.

<sup>163</sup> Doerner & Ihlanfeldt, *supra* note 162, at 62 (summarizing Rachel Weber & Daniel P. McMillen, *Ask and Ye Shall Receive? Predicting the Successful Appeal of Property Tax Assessments*, 38 PUB. FIN. REV. 74 (2010)). Doerner and Ihlanfeldt argue that unlike Weber and McMillen, whose “primary interest was on how the probability of appeal and the probability of obtaining an assessment reduction are affected by thin markets (i.e., few comparable sales),” their “interest is in the role played by tax representatives in the appeals process, who according to our data from Miami-Dade County, Florida, are used by an overwhelming majority of property owners.” *Id.* at 60.

<sup>164</sup> The *MorningSide* litigation in Detroit, to which we will turn shortly, provides an example of this. Although the county acknowledged that property tax assessments were incorrect, the admission came *after* the appeals period passed. Homeowners are therefore unable to use this admission in the state tax procedures.

developments, to which we now turn, present a new opening to address property tax assessment inequities—at least where they have a disparate impact on a protected class.

### III. REVIVING MEANINGFUL STATE-COURT REVIEW

We argue that the FHA's disparate impact theory may swing the pendulum away from deference to state tax regimes and toward a meaningful review of property tax policies that disproportionately affect protected classes. The opportunity to address exclusionary taxation is reinforced by recent cases in which the Court exhibited a stronger concern for preservation of federal rights in state courts, including rights related to state and local taxation. These jurisprudential trends do not overcome the TIA's explicit statutory limitation on federal injunctions, but they suggest an expansion of meaningful state-court review.

#### A. *Inclusive Communities*: Reaffirmed Disparate Impact

The primary vehicle for challenges to exclusionary taxation lies in the FHA, particularly after the Supreme Court's confirmation that FHA plaintiffs may prove discrimination through disparate impact theories.<sup>165</sup> The FHA offers both procedural guarantees that are unavailable to constitutional plaintiffs and a substantive standard that allows for review of tax policies with unintentionally discriminatory effects.

The FHA resulted from decades of activism by mid-twentieth century fair housing advocates who viewed limitations on the ability to inherit, lease, sell, hold, and convey real and personal property “as a denial of full citizenship.”<sup>166</sup> Those advocates argued not only “that America would be a truly democratic society when all races lived in one community”<sup>167</sup> but also that “all citizens had a responsibility to participate in the housing market in a nondiscriminatory manner.”<sup>168</sup>

Under the FHA, it is illegal both “to otherwise make unavailable or deny[ ] a dwelling to any person because of race, color, religion, sex, and family origin” and “[t]o 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,” among other prohibitions.<sup>169</sup> Courts

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<sup>165</sup> *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

<sup>166</sup> Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 *URB. LAW.* 399, 403 (2003).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 406. Pritchett also identifies the importance of the FHA to securing opportunity for middle-class African Americans, while acknowledging its limitations in ensuring opportunity for lower-income communities. *Id.* at 407.

<sup>169</sup> 42 U.S.C. § 3604(a)-(b).

have recognized that these provisions encompass challenges to discriminatory property taxes.<sup>170</sup>

Several features of the FHA should give courts pause if defendants try to import comity arguments from the § 1983 cases or to interpose insufficient state remedies. The FHA contains an explicit preemption provision that overrides state laws that would conflict with the operation of the statute.<sup>171</sup> Moreover, the FHA's private right of action provision explicitly allows for an "aggrieved person [to] commence a civil action in an appropriate . . . State court."<sup>172</sup> A wide range of plaintiffs are entitled to bring FHA claims, including members of a racial majority who are wronged by the deprivation of a racially diverse community.<sup>173</sup>

If the FHA reached only intentional (disparate treatment) discrimination claims, these procedural features would be relevant in a small number of cases. They would effectively replace the unavailable § 1983 claim for a violation of the Equal Protection Clause, but offer little additional relief.<sup>174</sup>

However, in *Inclusive Communities*, the Supreme Court recently reaffirmed the viability of an FHA disparate impact theory, which proscribes seemingly neutral rules that are discriminatory in operation.<sup>175</sup> Disparate im-

<sup>170</sup> See *Coleman v. Seldin*, 687 N.Y.S.2d 240, 250 (Sup. Ct. 1999) (recognizing cause of action for discriminatory property-tax foreclosures under the Fair Housing Act); *MorningSide v. Sabree*, Case No. 16-008807-CH (Mich. Ct. App. Sept. 21, 2017) (same). The property tax-related foreclosures, instead of the property taxes themselves, address the immediate issue of preventing the foreclosures of the clients' homes, undergirded by the broader property tax system. See *United States v. Cty. of Nassau*, 79 F. Supp. 2d 190, 191 (E.D.N.Y. 2000) (denying jurisdiction for Fair Housing Claims under the TIA).

<sup>171</sup> 42 U.S.C. § 3615 (2012); see David Franklin, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits Under the Fair Housing Act*, 63 U. CHI. L. REV. 1607, 1610–13 (1996) (discussing FHA's interaction with local rules, including striking down facially neutral zoning ordinances with disparate impacts). The preemptive effect of the FHA is highlighted by the fact that, at least in the context of race cases, the FHA was enacted pursuant to section 2 of the Thirteenth Amendment, U.S. CONST. amend. XIII, which granted Congress the power to pass statutes to "eliminate the badges and incidents of slavery." *Mitchell v. Cellone*, 389 F.3d 86, 87–88 (3d Cir. 2004) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968)). This power, established after the Civil War, was explicitly granted to Congress to overwhelm intransigent state actions to deprive people of civil rights.

<sup>172</sup> 42 U.S.C. § 3613(a)(1)(A) (2012).

<sup>173</sup> See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–12 (1972); see also *Bank of America v. City of Miami*, 137 S. Ct. 1296, 1298 (2017) (reaffirming the holding of *Trafficante*).

<sup>174</sup> *Washington v. Davis*, 426 U.S. 229, 244–47 (1976) (articulating "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). Such a remedy may have been of use to the African-American residents of Edwards, Mississippi, who brought *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), but it is not clear how common such practices are today.

<sup>175</sup> *Inclusive Cmty.*, 135 S. Ct. at 2525; J. William Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act*, 46 U. MEM. L. REV. 1039, 1041–42 (2016); Michael G. Allen, Jamie L. Crook, & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 156 (2014). Although the Supreme Court did not explicitly address the viability of a disparate impact to enforce § 3604(b), its reasoning regarding § 3605(a) would apply equally; both provisions use the word "discriminate," which the Court held to include disparate impact theories in this context. See *Inclusive Cmty.*, 135 S. Ct. at 2518–19.

fact theories emerged in administrative agencies almost immediately after the passage of the Civil Rights Act of 1964<sup>176</sup> and were solidified by the Supreme Court's 1971 decision in *Griggs v. Duke Power*.<sup>177</sup> Soon after, the Eighth Circuit was the first to recognize disparate impact under the FHA.<sup>178</sup>

All of the other circuits, other than the D.C. Circuit, followed suit, recognizing two effects-based claims under the FHA:<sup>179</sup> (i) when the challenged practice has a greater adverse impact on members of a protected class (a "disproportionate effect") and (ii) when the practice tends to "create, reinforce, or perpetuate patterns of segregation" (a "segregative effect").<sup>180</sup> Courts have invoked the FHA's disparate impact analysis across a multitude of housing-related practices, from exclusionary zoning ordinances and lending practices to landlord and housing provider reference policies and occupancy restrictions.<sup>181</sup>

The purposes of disparate impact liability are contested, including in the FHA context, but the Supreme Court's decision in *Inclusive Communities* rules against narrower theories linking disparate impact to intent.<sup>182</sup> At one extreme, earlier commentators had treated disparate impact theories as merely an alternative means of proving discriminatory intent, potentially including unconscious or implicit biases.<sup>183</sup> A more moderate version of this

<sup>176</sup> See Olatunde Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 133–34 (2014).

<sup>177</sup> See 401 U.S. 424, 432 (1971) (holding that educational and testing requirements that "that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" are impermissible employment discrimination under Title VII, regardless of intent). *Id.* at 432.

<sup>178</sup> See *U.S. v. City of Black Jack, Mo.*, 508 F.2d 1179, 1181 (8th Cir. 1974) (ruling that a St. Louis suburb's prohibition on multifamily housing would not only perpetuate segregation in the metropolitan area but also have a disproportionate impact on African Americans).

<sup>179</sup> See *Inclusive Cmty.*, 135 S. Ct. at 2519 (collecting cases).

<sup>180</sup> We borrow these labels from Allen, et al., *supra* note 175, at 160; see also Langlois v. Abington Hous. Auth., 207 F.3d 43, 54 (1st Cir. 2000) ("Because 'subconscious discrimination' in housing tends to manifest itself in practices that, although not overtly racial, have the effect of freezing segregation, I . . . [ask] whether defendants' use of local preferences within the jurisdictions they represent may have the effect of 'perpetuat[ing] segregation and thereby prevent[ing] interracial association.'") (quoting *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)).

<sup>181</sup> See Allen, et al., *supra* note 175, at 156–57.

<sup>182</sup> *Inclusive Cmty.*, 135 S. Ct. at 2521–22 (acknowledging the evidentiary role of disparate impact as one of multiple purposes). As Bagenstos has recognized, this statement also makes the novel step of characterizing unconscious prejudice as a form of discriminatory intent. See Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law after Inclusive Communities*, 101 CORNELL L. REV. 1115, 1134–35 (2016).

<sup>183</sup> See George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1311 (1987) (proffering a theory of disparate impact as a hedge against pretext and hidden intent); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 489–90 (2006) (discussing the role of unconscious bias theory in disparate impact claims around subjective employment practices, such as *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)). But see Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, 42 WAKE FOREST L. REV. 1141 (2007) (critiquing this approach).

theory suggests that disparate impact liability polices “racially selective indifference”—described by Paul Brest as “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”<sup>184</sup> Because disparate impact analysis requires justification for, and recognition of, harms, it can force a decision-maker to consider the policy’s effects on a protected class (both in anticipation of potential liability and through the process of litigation).<sup>185</sup>

*Inclusive Communities* can be read as partially endorsing the bottleneck theory of disparate impact that ascribes a role for antidiscrimination law in eliminating “bottlenecks to opportunity,”<sup>186</sup> practices that unjustifiably inhibit economic opportunity. The bottleneck framework calls attention to the extent to which an opportunity-limiting practice operates arbitrarily or in furtherance of a meaningful goal.<sup>187</sup> The Court likewise articulated that “disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.”<sup>188</sup> To address the competing goals, the Court largely embraced a three-part burden-shifting test promulgated by the Department of Housing and Urban Development (“HUD”).<sup>189</sup> This test, described below, provides a framework for courts to make these distinctions.<sup>190</sup>

In addition to the bottleneck theory, other disparate impact theories exhibit less concern with policymakers’ mental states. One such theory presents disparate impact liability as a means to address policies that perpetuate structural and historical discrimination.<sup>191</sup> *Griggs* itself endorsed this theory, noting: “Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>192</sup>

<sup>184</sup> Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976); see also Olatunde Johnson, *Disparity Rules* 107 COLUM. L. REV. 374, 394–95 (2007) (describing a classic Title VI disparate-impact case as reflecting racially selective indifference).

<sup>185</sup> The political connotations of various theories of intent in antidiscrimination law, particularly Equal Protection law, have changed over time. See generally Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016).

<sup>186</sup> Samuel Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 TEX. L. REV. 415, 423–24 (2014) (reviewing Joseph Fishkin, *BOTTLENECKS* (2014)).

<sup>187</sup> See Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1477–78 (2014) (arguing that both disparate treatment and disparate impact laws do, and should, function to preclude bottlenecks in the opportunity structure).

<sup>188</sup> *Inclusive Cmty.*, 135 S. Ct. at 2522 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>189</sup> *Inclusive Cmty.*, 135 S. Ct. at 2514–15 (2015).

<sup>190</sup> *Infra* Section III.B.

<sup>191</sup> See, e.g., Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 524–25 (2003). In the employment context, a related form of disparate impact litigation addresses biological differences between ethnicities or genders—for example, height requirements. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977). It is difficult to think of an analogue to these cases in the FHA context.

<sup>192</sup> *Griggs*, 401 U.S. at 430.

Richard Thompson Ford recognized the FHA's "potential to attack the structure of racially identified residential spaces," particularly through the application of a disparate impact standard.<sup>193</sup> In the words of *Griggs*, the discrimination inquiry should be focused not only on intent but whether a barrier is "artificial, arbitrary and unnecessary."<sup>194</sup>

Although the Court did not explicitly decide among these competing theories in *Inclusive Communities*, the opinion reflects a sensitivity to disparate impact's role in unseating structural discrimination on a particularly relevant tax policy front: the privileging of individual residents based on preexisting ties.<sup>195</sup> The opinion identifies so-called "barrier" cases, including those where potential residents are excluded based on their relationship to existing residents in a place, as "resid[ing] at the heartland of disparate impact liability."<sup>196</sup>

The Court cabined this focus on historical and structural discrimination by articulating a "robust causality requirement" and evincing concern that defendants not be "held liable for racial disparities they did not create."<sup>197</sup> Yet, as Stacy Seicshnaydre has written, this "robust causality requirement" simply extends precedent that has traditionally policed segregative *practices* rather than statistical disparities alone.<sup>198</sup> The FHA has always required a meaningful nexus between the challenged policy and the alleged disparity.<sup>199</sup> Of course, courts should not ignore a policy's disparate impact because the effect was caused by its interaction with existing social and historical realities.<sup>200</sup> As courts continue to confront and clarify the meaning of causality in

<sup>193</sup> Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1894 (1994).

<sup>194</sup> *Griggs*, 401 U.S. at 431.

<sup>195</sup> See *Inclusive Cmty.*, 135 S. Ct. at 2515–16.

<sup>196</sup> *Id.* at 2522.

<sup>197</sup> *Id.* at 2523. Opponents of the disparate impact theory immediately found solace in these statements, noting that nearly every facially neutral policy—including in *Griggs*—causes a discriminatory effect by virtue of its interaction with existing social realities. See Roger Clegg, *Silver Linings Playbook: Disparate Impact and the Fair Housing Act*, 2015 CATO SUP. CT. REV. 165, 170–71 (2015). On remand to the district court, this causality requirement was the first of several grounds on which the court rejected Inclusive Communities Project's claims. See *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, at \*8–\*9 (N.D. Tex. Aug. 26, 2016).

<sup>198</sup> Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 GEO. MASON. L. REV. 663, 676–77 (2017).

<sup>199</sup> *Id.* at 678–79 (collecting cases that recognized the need for a causal relationship before *Inclusive Communities*). Those who have seized upon the "robust causality requirement" to assert that the requirement tightened the disparate impact standard thus ignore the historical development of the standard. See, e.g., Paul Hancock, *Symposium: The Supreme Court recognizes but limits disparate impact in its Fair Housing Act decision*, SCOTUSBLOG 3 (Jun. 26, 2015, 8:58 AM), <http://www.scotusblog.com/2015/06/paul-hancock-fha/> [<https://permacc/2A3K-ESJ9>] ("While supporters of the disparate-impact theory may perceive the Court's decision as a 'win,' the decision imposes significant limitations on the application of the theory, which provide an important benefit to defendants in FHA cases.").

<sup>200</sup> Noah Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1379 (2017).

particular fact patterns,<sup>201</sup> FHA plaintiffs must, as always, articulate the connections between allegedly discriminatory policies and disparate impacts.

Because Congress has established disparate impact liability only in certain domains, our argument would be unlikely to reach to other aspects of state tax systems, such as sales, income, or even non-residential property taxes.<sup>202</sup> Although changes to such tax regimes may indirectly affect residential patterns and access to housing, the effects are unlikely to satisfy the “robust causality requirement” that the Court articulated in *Inclusive Communities*.<sup>203</sup> For example, some have made the argument that the mortgage-interest deduction incentivizes segregation.<sup>204</sup> Even if armed with quantitative evidence pertaining to a particular state’s mortgage-interest deduction (as a federal analogue), such a deduction, as a second-order tax benefit, is unlikely to fall under the specific FHA statutory language—whether “terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” or as a basis “to otherwise make [housing] unavailable.”<sup>205</sup> In contrast, property taxes have been explicitly recognized as regulated by the FHA in the *Coleman* case, described below.<sup>206</sup>

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<sup>201</sup> Courts after *Inclusive Communities* are confronting and defining the contours of causality. See *In De Reyes v. Waples Mobile Home Park Ltd. P’ship*, 205 F. Supp. 3d 782, 793–94 (E.D. Va. 2016) (holding that the robust causality requirement was not met by showing that a policy against undocumented immigrants disproportionately affected Latinos but doing so on the arguably erroneous ground that undocumented immigrants are not protected by the Fair Housing Act). Note also that this causality requirement is distinct from the requirement that a plaintiff show that damages were proximately caused by a wrongful action in order to collect damages under the FHA. *Bank of America v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (reversing and remanding for further consideration that foreseeability alone was not a sufficient showing of causality for municipalities to be awarded damages under the FHA).

<sup>202</sup> Disparate impact liability is also available in the context of employment and credit discrimination, under Title VII and ECOA, respectively. However, neither statute provides a cause of action for government regulatory or taxing activity. See 42 U.S.C. § 2000e–2; 15 U.S.C. § 1691e(a).

<sup>203</sup> *Inclusive Cmty.*, 135 S. Ct. at 2523.

<sup>204</sup> Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. (forthcoming 2018). Layser focuses on optimal policy, noting that “it is not necessary to prove legal liability to establish that the LIHTC program in these and many other cities has rewarded segregation and limited housing choice.” See also Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 257–59 (2010) (describing the history of the MID and longstanding acknowledgment of the inequities embedded in it).

<sup>205</sup> 42 U.S.C. § 3604(a), (b).

<sup>206</sup> See *infra* Section IV.A.1. Interestingly, Lee Anne Fennell has made the point that § 3608(d) of the FHA, which requires federal agencies to cooperate with HUD in affirmatively furthering fair housing, could be construed as a basis (though not requirement) to reduce tax subsidies for homeownership, including the mortgage-interest deduction. Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 417 (2017); see also 42 U.S.C. § 3608 (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”).

### B. HUD's Disparate Impact Framework

Adverse impact alone does not, and should not, render a policy illegal under the FHA if the policy or practice causing the disparity is warranted by a sufficient justification. While Inclusive Community Project's appeal was pending before the Fifth Circuit, HUD promulgated an evidentiary framework for evaluating a disparate impact claim under the FHA that recognizes the need to evaluate both impact and justification.<sup>207</sup>

The HUD rule articulates a three-part burden-shifting test for determining when a practice with a discriminatory effect violates the Fair Housing Act. First, the plaintiff bears the burden of proving a prima facie case that a policy or practice (i) actually or predictably results in a discriminatory effect (a "disproportionate effect") or (ii) "creates, increases, reinforces or perpetuates segregated housing patterns" (a "segregative effect") on the basis of a protected characteristic.<sup>208</sup> As the Supreme Court has articulated, "[a] disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."<sup>209</sup>

If the plaintiff proves a prima facie case, the burden of proof shifts to the defendant to prove that the challenged practice is "necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests."<sup>210</sup> Commenters had requested that HUD's final rule state that profit maximization, cost minimization, and increasing market share all qualify as such interests. HUD expressly declined to do so, reasoning that "a determination of what qualifies as a substantial, legitimate, nondiscriminatory interest for a given entity is fact-specific and must be determined on a case-by-case basis [and a]ccordingly, the final rule does not provide examples of interests that would always qualify as substantial, legitimate, nondiscriminatory interests for every respondent or defendant in any context."<sup>211</sup>

If the defendant satisfies this burden, the plaintiff may still establish liability by proving that the "substantial, legitimate, nondiscriminatory interest" could be advanced by a practice that has a less discriminatory effect.<sup>212</sup>

<sup>207</sup> See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013).

<sup>208</sup> 24 C.F.R. § 100.500(c) (2012); see also Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460–01, 11470 (Feb. 15, 2013) ("The word 'legitimate,' used in its ordinary meaning, is intended to ensure that a justification is genuine and not false, while the word 'nondiscriminatory' is intended to ensure that the justification for a challenged practice does not itself discriminate based on a protected characteristic.").

<sup>209</sup> *Inclusive Cmty.*, 135 S. Ct. at 2512; see also *id.* at 2509 ("A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.").

<sup>210</sup> 24 C.F.R. § 100.500(c).

<sup>211</sup> Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

<sup>212</sup> *Id.* at 11460. For a list of cases in which defendants have succeeded, as well as cases in which they have failed, to persuade courts that the challenged policy is needed to advance a legitimate interest, see Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 696, nn.47-48 (2016).

This less discriminatory alternative “must be supported by evidence” that the proposed alternative would serve the interests supporting the challenged practice.<sup>213</sup> In a recent lawsuit, plaintiffs alleged that a city’s decision to rezone a parcel of land as residential-townhouse (“R-T”), facilitating only a small number of single-family residential homes, as opposed to multifamily-residential (“R-M”), permitting a larger number of residential units, violated the Fair Housing Act.<sup>214</sup> On remand from the Second Circuit, the district court found that the “R-M” zoning was less discriminatory towards racial minorities than the R-T proposal while still serving the city’s interests in minimizing school overcrowding and controlling traffic.<sup>215</sup>

HUD’s test is holistic and analogous to other disparate impact tests from antidiscrimination law. In the preamble to the final rule, the agency clarified that the “‘substantial, legitimate, nondiscriminatory interest’ standard . . . is equivalent to the ‘business necessity’ standard” that agencies have applied in both the fair lending context and the job-relatedness standard of Title VII.<sup>216</sup> Further, the Fair Housing Act’s “broad, remedial goal” requires both that “practices with discriminatory effects cannot be justified based on interests of an insubstantial nature” and that “[t]he determination of whether goals, objectives, and activities are of substantial interest to a respondent or defendant such that they can justify actions with a discriminatory effect requires a *case-specific, fact-based* inquiry.”<sup>217</sup>

### C. Diminished Deference

In addition to the procedural and substantive opportunities carved out by the FHA, two twenty-first century Supreme Court cases offer support for rigorous state-court protection of federal claims, including claims regarding state taxes. We focus on *Haywood v. Drown*,<sup>218</sup> which reasserts federal supremacy and scrutinizes state procedural sufficiency, and *Direct Marketing Association v. Brohl*,<sup>219</sup> which cabins efforts to strip federal courts of jurisdiction over tax challenges.

The Supreme Court’s decision in *Haywood* rejected New York’s attempted use of a specialized state adjudicatory forum to undermine enforcement of federal rights.<sup>220</sup> In other words, state jurisdictional bait-and-switches cannot be used to deprive actors of a meaningful mechanism to

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<sup>213</sup> Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11472–73, 11482 (Feb. 15, 2013).

<sup>214</sup> *MHANY Mgmt., Inc. v. Cty. of Nassau*, No. 05–CV–2301(ADS)(ARL), 2017 WL 4174787, at \*1–\*2 (E.D.N.Y. Sept. 19, 2017).

<sup>215</sup> *See id.* at \*5, \*9–\*12.

<sup>216</sup> Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460–01, 11470 (Feb. 15, 2013).

<sup>217</sup> *Id.* (emphasis added).

<sup>218</sup> 556 U.S. 729 (2009).

<sup>219</sup> 135 S. Ct. 1124 (2015).

<sup>220</sup> *Haywood*, 556 U.S. at 733.

vindicate federal protections. Although the case arose outside the context of taxation, it undermines prospective arguments that FHA challenges to taxes must be shunted to non-judicial or other specialized tax adjudicators, particularly where the adjudicator would lack full authority to analyze the FHA claim or provide a full remedy.<sup>221</sup>

The *Haywood* Court struck down the New York statute, which stripped state courts of general jurisdiction over state prisoners' § 1983 claims and relocated those claims in an alternative tribunal without jurisdiction to hear personal-capacity claims, as unconstitutional.<sup>222</sup> The presumption of concurrency (between state and federal courts) is defeated only in "two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction; and second, '[w]hen a state court refuses jurisdiction because of a . . . state rule'" that applies neutrally to federal and non-federal claims.<sup>223</sup> In analyzing whether the challenged jurisdictional rule qualified as a neutral rule, the Court reaffirmed that "our cases have established that a State cannot employ a jurisdictional rule 'to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'" <sup>224</sup> This mandate persists even though the Supremacy Clause does not compel states to establish local courts ideally positioned to effectuate federal law.<sup>225</sup> The Court rejected the neutrality argument and found that N.Y. Correction Law § 24 contravened Congress's intent to provide § 1983 relief and therefore contravened the Supremacy Clause.<sup>226</sup>

*Haywood* was, in some regard, a case of first impression, where the Court disapproved of the jurisdictional subversion of federal mandates.<sup>227</sup> The Court had yet to confront a state statute "that registers its dissent by

<sup>221</sup> See discussion *supra* Part II.B. This issue arose in the *MorningSide* case, discussed below. See *infra* notes 286–88, and accompanying text.

<sup>222</sup> *Haywood*, 556 U.S. at 734. In precluding state courts of general jurisdiction from hearing claims against Department of Corrections employees, N.Y. Correction Law § 24 left the aggrieved party to "pursue a claim for damages against an entirely different party (the State) in the Court of Claims—a court of limited jurisdiction." N.Y. Correct. Law § 24.

<sup>223</sup> *Haywood*, 556 U.S. at 735 (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)). The express ousting was not implicated in *Haywood*.

<sup>224</sup> *Id.* at 736 (quoting *Howlett*, 496 U.S. at 371).

<sup>225</sup> See *Howlett*, 496 U.S. at 372 ("The States thus have great latitude to establish the structure and jurisdiction of their own courts.") (internal quotation marks and citations omitted). Federal rights only need be enforced in state courts with jurisdiction "adequate to the occasion." *Id.* at 373 (quoting *Second Employers' Liab. Cases*, 223 U.S. 1, 59 (1912)).

<sup>226</sup> The Court specifically rejected New York's rationale that the suits against corrections officers are "too numerous or too frivolous (or both)." *Haywood*, 556 U.S. at 736. In doing so, the Court explained that such a rationale "is contrary to Congress's judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages." *Id.* at 730.

<sup>227</sup> The Supreme Court explained that, while Congress passed § 1983 "to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." *Id.* at 735 (internal citations omitted).

divesting its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim.”<sup>228</sup> In establishing the procedural insufficiency of the alternative tribunal, the Court noted that “plaintiffs in the Court of Claims must comply with a 90-day notice requirement; are not entitled to a jury trial; have no right to attorney’s fees; and may not seek punitive damages or injunctive relief.”<sup>229</sup> Nondiscrimination, here manifested in New York’s equal disapproval of state and federal claims against corrections officers, was not sufficient to insulate it from a Supremacy Clause challenge. A jurisdictional rule that limits the relief available in a federal cause of action, for example by channeling a federal claim to a forum that is unable to provide the full range of legal and injunctive relief, should not be considered “neutral.”

Another case, more squarely within the state-tax context, indicates the Supreme Court’s willingness to limit expansive readings of the TIA, potentially indicating openness to claims against state taxes more generally. In *Direct Marketing Association*, the Court used the history of the TIA and comity to explain that the TIA’s restriction on reviewing “the assessment, levy or collection of any tax under State law” could not be stretched to strip jurisdiction over challenges to *any* tax-related process.<sup>230</sup>

Colorado, to improve tax collections from online purchases, required retailers that did not collect Colorado sales or use tax to notify Colorado customers of their use-tax liability and to report tax-related information to customers and the Colorado Department of Revenue.<sup>231</sup> Direct Marketing Association sued under § 1983, claiming that the use tax discriminated against out-of-state retailers in violation of the dormant commerce clause.<sup>232</sup>

Rejecting Colorado’s invocation of the TIA, the Supreme Court emphasized the explicit text of the Act, which limits district court’s power to “enjoin, suspend or restrain *the assessment, levy or collection*” of a state tax.<sup>233</sup> The Court held that Colorado’s “notice and reporting requirements” fell outside these three categories because they “precede the steps of ‘assessment’ and ‘collection.’”<sup>234</sup> The Court likewise rejected a broad interpretation of “suspend or restrain” in the Act, noting that “early courts did not refuse to hear every suit that would have a negative impact on States’ revenues.”<sup>235</sup>

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<sup>228</sup> *Haywood*, 556 U.S. at 737–38.

<sup>229</sup> *Id.* at 734 (internal citations omitted).

<sup>230</sup> *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1126, 1131–32 (2015).

<sup>231</sup> As the Court explained, Colorado requires its consumers who purchase goods from a retailer that does not collect use taxes (“noncollecting retailers”) to remit taxes to the Colorado Department of revenue directly. Because of predictably low rates of voluntary compliance, Colorado enacted legislation imposing notice and reporting obligation on noncollecting retailers. *Id.* at 1127–28.

<sup>232</sup> *Id.* at 1128.

<sup>233</sup> 28 U.S.C.S. § 1341 (2012) (emphasis added).

<sup>234</sup> *Brohl*, 135 S. Ct. at 1131. The Court explained that “the TIA is not keyed to all activities that may improve a State’s ability to assess and collect taxes,” thereby limiting the scope of the Act. *Id.* at 1126.

<sup>235</sup> *Id.* at 1133.

While the Court found that the TIA did not bar the suit as a jurisdictional matter, *Direct Marketing* admittedly left open the question of whether comity, as a nonjurisdictional doctrine, might favor dismissal.<sup>236</sup> While *Direct Marketing* does not clearly permit injunctions regarding property tax assessment,<sup>237</sup> the opinion reflects an openness to federal litigation regarding state taxes, at least where a state taxing authority seeks to expand the jurisdiction-stripping effect of the TIA beyond existing doctrine. This may signal a retreat from the earlier expansive interpretations of the TIA and comity doctrines, although it is unclear whether this trend will lead to greater judicial comfort with damages lawsuits in federal courts or changed interpretations of when a state remedy is “plain, speedy, and efficient.”<sup>238</sup>

These procedural trends, when combined with the opportunity of the FHA, offer taxpayer plaintiffs one path around the procedural obstacles of the TIA and comity doctrine. Courts may be less willing to extend the limitations on § 1983 claims from *Fair Assessment* and *National Private Truck Council* to the FHA, in light of the statute’s explicit discussion of a cause of action in state court.<sup>239</sup> Thus, FHA damages claims for discriminatory taxes would be available in federal court, as by its terms, the TIA concerns only injunctive (and related declaratory) relief. To the extent that plaintiffs seek injunctive relief such as reassessments, however, the TIA would still apply—in fact, federal courts have specifically cited the availability of “efficient”<sup>240</sup> FHA remedies in the state courts as a basis to apply the TIA’s jurisdictional bar.<sup>241</sup> FHA claims for injunctive relief may therefore be limited to state courts in states where those courts provide a “plain, speedy, and efficient remedy” for FHA claims.

Those state courts should take heed of *Haywood*’s prohibition on the use of state procedural or jurisdictional rules to limit federal causes of action. That is, a state may not be able to automatically relocate FHA chal-

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<sup>236</sup> *Id.* at 1133–34.

<sup>237</sup> *Id.* at 1130 (“[Assessment] might also be understood more broadly to encompass the process by which [the tax owed] is calculated.”).

<sup>238</sup> See generally *supra* Part II (discussing the evolving application of the TIA and comity in challenges to tax policies).

<sup>239</sup> 42 U.S.C. § 3613(a)(1)(A) (“An aggrieved person may commence a civil action in an appropriate United States district court or State court.”).

<sup>240</sup> *Cnty. Dev., Inc. v. Sarpy Cty. Neb.*, No. 8:16–CV–135, 2016 WL 3748710, at \*3 (D. Neb. May 26, 2016), *report and recommendation adopted*, No. 8:16–CV–135, 2016 WL 3747545, at \*1 (D. Neb. July 11, 2016) (relying on the FHA’s discussion of a cause of action in state court as the plain, speedy and efficient state-court remedy depriving the federal district court of jurisdiction over an FHA claim).

<sup>241</sup> *Reed v. Dorchester Cty.*, C/A No. 2:14–76–RMG, 2014 WL 3799433, at \*3 (D.S.C. July 8, 2014), *report and recommendation adopted as modified*, C/A No. 2:14–CV–76–RMG, 2014 WL 3799502, at \*2 (D.S.C. July 31, 2014) (same); *cf.* *United States v. County of Nassau, N.Y.*, 79 F. Supp. 2d 190, 196–97 (E.D.N.Y. 2000) (relying on the Attorney General’s power to intervene in a state court FHA case as sufficient state-court remedy to invoke the TIA). We note that one court displaced FHA claims based on the incorrect reasoning that there is a plain, speedy, and efficient remedy for constitutional claims in state courts. See *Georgetown Property Owners Ass’n v. Town of Georgetown*, No. 01–881–SLR, 2002 WL 31319469 (D. Del. Sept. 27, 2002).

lenges to state tax tribunals from state courts of general jurisdiction, since a “jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear.”<sup>242</sup> Because of the aforementioned state heterogeneity in tax appeal procedures and institutional arrangements,<sup>243</sup> the proper forum for FHA challenges under *Haywood* must be determined on a state-by-state basis. Meaningful state-court review requires a state forum with the institutional and procedural disposition to adjudicate these federal claims. *Haywood* also suggests that federal courts adopt a more aggressive interpretation of the TIA’s exception for lack of a “plain, speedy, and efficient remedy” in FHA cases. Where a limited-jurisdiction venue undermines the relief available for an FHA claim, for example through lack of capacity to evaluate discrimination claims, by limiting the availability of systemic relief, or by providing no injunctive remedy, the state remedy is not “plain, speedy, and efficient” and should not displace federal equity jurisdiction.<sup>244</sup>

#### IV. *NORDLINGER* REVISITED: ADDRESSING EXCLUSIONARY TAXATION WITH THE FAIR HOUSING ACT

Having identified the potential for fair housing challenges to property tax policies, we consider, in this Part, how courts have and should adjudicate challenges to exclusionary taxation regimes. Although different aspects of a tax regime could have actionable discriminatory effects,<sup>245</sup> we focus here on the use of the FHA to address property tax assessment policies.

We have chosen California’s Proposition 13, and resulting Article XIII A, as our poster child for exclusionary taxation, based in part on the Supreme Court’s holding in *Nordlinger* that the regime passed constitutional muster.<sup>246</sup> Because of California’s increasingly diverse population, the potentially perpetual property tax relief Article XIII A provides to historically early homebuyers, and particularly their inheritors, is ripe for challenge under the Fair Housing Act. We identify several avenues for potential FHA plaintiffs to change all or part of California’s Article XIII A. These include both disproportionate effect claims, based on the higher taxes that recent

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<sup>242</sup> *Haywood*, 556 U.S. at 739.

<sup>243</sup> See *supra* section II.B discussing state review heterogeneity.

<sup>244</sup> The 9th Circuit has recognized, in an equal protection case, that these protections are all the more important in cases alleging racial discrimination. See *Lowe*, 627 F.3d at 1156. Admittedly, the opinion does not mention the FHA, a non-constitutional remedy for discrimination.

<sup>245</sup> For example, many states and localities tax or assess multifamily properties at a different rate from single-family properties. Differential treatment of multifamily property is familiar territory for “exclusionary zoning” litigation, so it would be unsurprising to find similar discriminatory effects from tax disadvantages for multifamily property. See Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780–81 (1969) (defining and initially explaining exclusionary zoning, albeit outside the disparate impact framework that would later develop around the Fair Housing Act).

<sup>246</sup> *Nordlinger*, 505 U.S. at 17–18.

arrivals pay relative to their more established neighbors, and segregative effect claims, based on the racial calcification of housing patterns. In particular, we predict that courts will be skeptical of the privileged treatment of intrafamilial transfers.<sup>247</sup>

To inform our discussion of the claims against California's system, we first examine two important, yet underanalyzed, examples of property tax litigation under the FHA. We then discuss the questions that would be raised at each stage of the FHA analysis. How could a plaintiff prove a disparate impact under various theories? Even given a disparate impact, what might constitute a "substantial, legitimate, nondiscriminatory interest" to justify Article XIII A, and what might comprise a less discriminatory alternative to the current property tax policy?

### A. *Prior Disparate Impact Challenges to Property Tax Assessment*

We now examine the challenges and consequences of disparate impact liability through prior litigation. Both cases detailed below address allegations of racially discriminatory property value assessments based, in part, on a lack of universal and current fair market value assessments. In Long Island, the allegations stemmed from the *underassessment* of property values in non-minority neighborhoods relative to fair market value. This led minority homeowners to bear a greater share of the tax burden. In Wayne County (which houses Detroit), plaintiffs alleged that the *overassessment* of property values in African-American neighborhoods led to such unreasonable tax burdens for African-American homeowners that the county foreclosed on their homes for inability to pay. The cases, particularly the Wayne County litigation, also illustrate how heterogeneous state procedures and remedies (or lack thereof) can stymie collective redress.

#### 1. *Coleman v. Seldin*

At the turn of the twenty-first century, a New York state trial court recognized the FHA's prohibition on exclusionary taxation, amid significant procedural and jurisdictional tumult.<sup>248</sup> The resulting settlement completely overhauled Nassau County's assessment scheme. This case, barely discussed

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<sup>247</sup> These provisions were added to Proposition 13's structure by Propositions 58 (Nov. 1986) and 193 (Mar. 1996). See Cal. Const., Art. XIII A § 2.

<sup>248</sup> While the plaintiffs alleged an additional federal statutory violation under Title VI based on a disparate impact theory, the state court rejected this theory and invoked Second Circuit precedent to support its conclusion. *Coleman v. Seldin*, 687 N.Y.S.2d 240, 242 (Sup. Ct. 1999). In 2005, the U.S. Supreme Court agreed and found that Title VI does not permit a private right of action to enforce its regulatory disparate impact liability. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Thus, for the purposes of contemporary law and this Article, there are no disparate impact challenges to property taxation schemes cognizable under Title VI.

in legal scholarship,<sup>249</sup> represents an invocation of the FHA to challenge an allegedly racially discriminatory system and the procedural challenges that face plaintiffs who seek to change discriminatory systems.

Nassau County's "controversial and archaic" assessment system operated as follows at the end of the twentieth century.<sup>250</sup> Nassau County assessed residences housing one to three families and certain condominiums using a combination of construction cost in 1938 dollars, less depreciation, and value of the underlying land as determined by a county-wide valuation from 1964.<sup>251</sup> The continued use of this system in the late 1990s reflected a variation on the "tax revolt" narrative—efforts by property owners to restrict and lower property taxes.<sup>252</sup> A 1975 New York Court of Appeals decision insisting on equal assessments for all property classes statewide spurred, in the words of the *New York Times*, the "kind of anger that fueled [California's] Proposition 13."<sup>253</sup> In response, New York state legislators, led by representatives from Nassau County, passed a statute that specifically preserved the county's assessment system.<sup>254</sup>

The omission of contemporary market valuation in assessment caused an adverse impact on African-American and Hispanic homeowners in the county.<sup>255</sup> Since the system reflected historical rather than current market values and "[b]ecause property values in non-minority areas ha[d] risen faster than property values in minority neighborhoods," the system compelled Nassau County's minority owners to pay higher property taxes, as a fraction of the *current* market property value, than property owners in non-minority areas.<sup>256</sup> By one estimate, homeowners in largely minority areas

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<sup>249</sup> There are fleeting mentions of *Coleman*, 687 N.Y.S.2d at 242 in only three law review articles uncovered in our research of *Coleman* and the federal companion case, *United States v. Cty. of Nassau*, 79 F. Supp. 2d 190, 191–92 (E.D.N.Y. 2000); see also Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895, 903 (2000) (noting author's involvement in "[a] landmark lawsuit challenging Nassau County's method of valuating residential real estate for tax purposes—a system that has resulted in gross inequities that disfavored minorities for many years."); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 110 n.241 (2001) (referencing *Coleman* as an example of how to challenge discriminatory housing taxes).

<sup>250</sup> *Cty. of Nassau*, 79 F. Supp. 2d at 196–97.

<sup>251</sup> See *id.* at 191–92.

<sup>252</sup> See *supra* note 14–15 (discussing historical meaning of "tax revolt").

<sup>253</sup> Eric Schmitt, *L.I. Rebels Over Property-Tax Rises*, N.Y. TIMES (Feb. 26, 1989), <http://www.nytimes.com/1989/02/26/nyregion/li-rebels-over-property-tax-rises.html> [<https://perma.cc/386R-VPVX>]; see also Darien Shanske, *How Less Can Be More: Using the Federal Income Tax to Stabilize State and Local Finance*, 31 VA. TAX REV. 413, 444–45 (2012) (describing Proposition 13 as the "first shot of the modern property tax revolt").

<sup>254</sup> *O'Shea v. Bd. of Assessors of Nassau Cty.*, 864 N.E.2d 1261, 1262–64 (N.Y. 2007) (describing the course of events leading to the *Coleman* litigation).

<sup>255</sup> *Id.*

<sup>256</sup> *Cty. of Nassau*, 79 F. Supp. 2d at 191. Although these allegations were never put to proof at trial, we accept the analysis as true for the purpose of this discussion.

paid taxes on assessments that were “27% higher relative to current property values than assessments in mostly white areas.”<sup>257</sup>

The litigation against Nassau County’s tax system operated on two parallel tracks: county residents represented by the New York Civil Liberties Union exercised the FHA’s private right of action in state court, while then-U.S. Attorney for the Eastern District of New York Loretta Lynch brought parallel claims in federal court.<sup>258</sup>

The federal district court dismissed the U.S. Attorney’s lawsuit, relying on the availability of the state court FHA claim as a “plain, speedy, and efficient” remedy.<sup>259</sup> Even prior to the dismissal, the federal court seemed particularly concerned about the lawsuit’s interference in state taxation, noting that “diversion of employees’ time and attention from municipal business . . . to otherwise assist in the pursuit of this litigation, would be an unnecessary expense in the event that Nassau County’s motion to dismiss is ultimately granted.”<sup>260</sup> The court thus held that it lacked jurisdiction under the TIA to enter injunctive or declaratory relief and would refrain from awarding damages under principles of comity.<sup>261</sup>

In the state court action, *Coleman v. Seldin*, the court denied the county’s motion to dismiss, holding that the FHA permitted a disparate impact cause of action for the aggrieved taxpayers.<sup>262</sup> The court noted the broad application of the FHA, the strength of the public policy interest in its enforcement, and the validity of the disparate impact standard.<sup>263</sup> The court particularly noted the relationship to insurance redlining cases. Like discriminatory tax assessments, discriminatory insurance practices both discriminate in “the provision of services in connection with a dwelling” and would make housing more expensive (and therefore “unavailable”).<sup>264</sup> *Coleman*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* The federal government complaint alleged that “this assessment methodology constitutes discrimination in the terms, conditions, and privileges of the sale of dwellings and in the provision of services and facilities related to the sale of dwellings, in violation of the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3604(b) and 3605(a)” and “further contends that Nassau County’s methodology constitutes a pattern and practice of resistance to minorities’ enjoyment of rights under the Fair Housing Act, as amended, 42 U.S.C. § 3601 *et seq.*” *Cty. of Nassau*, 79 F. Supp. 2d at 191.

<sup>259</sup> *Cty. of Nassau*, 79 F. Supp. 2d at 197. The United States did not challenge Nassau County’s assertion that a speedy and efficient remedy existed under New York law. Rather, the United States argued that the TIA contained an implicit exception “allowing the Government to sue to effectuate its own statutes and policies.” *Id.*

<sup>260</sup> *United States v. Cty. of Nassau*, 188 F.R.D. 187, 189 (E.D.N.Y. 1999). In granting the county’s request to stay discovery pending a ruling on the county’s ultimately successful motion to dismiss, the court believed that “[t]he interests of fairness, economy and efficiency therefore favor[ed] the issuance of a stay of discovery at th[at] time.”

<sup>261</sup> *Id.*

<sup>262</sup> *Coleman*, 687 N.Y.S.2d at 250. The county does not appear to have argued that the court lacked jurisdiction to hear the FHA claim.

<sup>263</sup> *Id.* at 248-50.

<sup>264</sup> *Id.* at 249 (citing *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992)); see *N.A.A.C.P.*, 978 F.2d at 297-98 (accepting the applicability of these prohibitions in the FHA to insurance redlining); 42 U.S.C. § 3604(a)-(b) (2012).

settled two days prior to going to trial in state court.<sup>265</sup> Consequently, the court did not evaluate Nassau County's justifications for the assessment practice.<sup>266</sup> As a practical matter, the litigation led the county, home to some of the nation's highest property taxes, to engage in mass reassessment.<sup>267</sup> The new assessment scheme raised the property taxes of an estimated one third of affected homeowners,<sup>268</sup> catalyzing an increase in taxpayer appeals. But it also placed the county on more solid fiscal footing, while resolving the legal challenge to the prior discriminatory regime.<sup>269</sup> Perhaps inspired by the success in Nassau County, a coalition of property owners recently filed an FHA case in state court to change New York City's assessment system.<sup>270</sup>

*Coleman* illustrates the potential of the FHA to compel a local government to overhaul its assessment methods where the chronic underassessment of historically early homeowners leads to racially disparate impacts. On a narrow procedural ground, *Coleman* also reinforced the applicability of the TIA in a new context—for litigation brought by the federal government—and reflected a fair application of the “plain, speedy, and efficient remedy” standard where a state court's jurisdiction over the federal claim compelled the dismissal of a related civil rights action in federal court.<sup>271</sup> Because of the settlement, however, the *Coleman* court never reached the merits or considered the justifications for Nassau County's assessment scheme.

## 2. MorningSide v. Sabree

Unlike *Coleman*, where the allegations of racially discriminatory assessments were premised in the *underassessment* of non-minority neighborhoods relative to fair market values, *MorningSide v. Sabree* focused on the *overassessment* of minority neighborhoods relative to fair market values. The lawsuit's FHA claim was dismissed on jurisdictional grounds that raise significant questions about whether Michigan courts provide a “plain,

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<sup>265</sup> Bruce Lambert, *Nassau Property Taxes: Going Up, Going Down, and Getting Fairer*, N.Y. TIMES (Jul. 10, 2002), <http://www.nytimes.com/2002/07/10/nyregion/nassau-property-taxes-going-up-going-down-and-getting-fairer.html> [https://permacc/N8WM-Z4M4].

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Aside from the allegations of racial discrimination, the earlier assessments had left the county in debt. Property owners would successfully go to court to challenge their assessments as excessive and secured more than \$100 million of refunds annually. *Id.* These refunds contributed to the county's fiscal crisis, resulting in a bailout by the state of New York and the appointment of a state board to oversee the county's finances. *Id.* By implementing the *Coleman* settlement, the county increased its property tax revenue by more than \$119 million, helping to close a recurring budget deficit. NASSAU COUNTY INTERIM FINANCE AUTHORITY, 2003 ANNUAL REPORT (2003), [https://www.nifa.state.ny.us/reports\\_financial/annual/2003AnnualReport.pdf](https://www.nifa.state.ny.us/reports_financial/annual/2003AnnualReport.pdf) [https://permacc/4ZZ3-QAYG].

<sup>270</sup> Complaint, Tax Equity Now NY LLC v. City of New York, No. 153759/2017 (Sup. Ct. N.Y. Cnty. Apr. 25, 2017); see Lois Weiss, *NYC's property tax assessment system is unconstitutional: suit*, N.Y. POST (Apr. 25, 2017), <https://nypost.com/2017/04/25/nycs-property-tax-assessment-system-is-unconstitutional-suit/> [https://permacc/YB24-AVWN].

<sup>271</sup> See *Coleman v. Seldin*, 687 N.Y.S.2d 240 (Sup. Ct. 1999).

speedy, and efficient” remedy for racially discriminatory property tax systems.<sup>272</sup> Moreover, the *MorningSide* FHA claim presented several challenging questions regarding proof of impact and legitimate, non-discriminatory justification, which could arise in other litigation against exclusionary taxation.

In 2016, the ACLU of Michigan and NAACP Legal Defense Fund, representing a group of Detroit neighborhood associations and homeowners, filed a class-action lawsuit in state court against the Treasurer of Wayne County, Michigan.<sup>273</sup> The homeowners sought an injunction pursuant to the FHA<sup>274</sup> halting tax foreclosure practices that have a racially disproportionate impact across the county, due in part to unverified and racially discriminatory tax assessments.<sup>275</sup> The complaint alleged that owner-occupied homes in census blocks where the majority of homeowners were African-American were more than ten times more likely to be at risk of foreclosure sale than such homes in majority non-African-American census blocks.<sup>276</sup> Tax assessment in Michigan is initially conducted by municipalities, although counties have a role in reviewing tax assessments and conducting tax foreclosures.<sup>277</sup>

Because assessors in Detroit (and majority-African-American suburbs) failed to update assessments to reflect declines in property values during the Great Recession, Detroit homeowners were assessed taxes as if their homes

<sup>272</sup> *MorningSide Cmty. Org.*, *supra* note 12, (ruling that the trial court lacked jurisdiction), *leave to appeal denied*, 905 N.W.2d 597 (Mich. 2018).

<sup>273</sup> *MorningSide v. Sabree*, No. 16-008807-CH (Mich. 3d Cir. Ct.).

<sup>274</sup> 42 U.S.C. § 3613(a)(1)(A) (2012) (granting private parties a cause of action to seek an injunction enforcing the Fair Housing Act).

<sup>275</sup> Complaint at 46–48, *MorningSide v. Sabree*, No. 16-008807-CH (Mich. 3d Cir. Ct. July 13, 2016) [hereinafter *MorningSide* Complaint]. The lawsuit includes a separate constitutional due process claim, alleging that the City of Detroit’s process for granting tax exemptions for homeowners in poverty is procedurally defective. *Id.* at 47–48. The *MorningSide* plaintiffs allege that the significant racial disparities in tax foreclosures are caused by the County’s practice of foreclosing on owner-occupied homes for unpaid taxes without meaningfully verifying the accuracy of the underlying tax debts. *Id.* at 15–21. Under the Michigan constitution, the taxable value of a property can be no more than one-half its True Cash Value (a defined term corresponding to fair market value). MICH. CONST. Art. IX § 3. See generally Bernadette Atuhene & Timothy R. Hodge, *Statecraft* 91 S. CAL. L. REV. (forthcoming 2018). Wayne County did not contest the underlying questions of assessment accuracy or disparate impact, even in response to a preliminary injunction motion. Instead, the county largely relied on jurisdictional arguments, arguments that the Fair Housing Act does not relate to property tax foreclosure, and arguments about whether the disparities were caused by a County policy. County Defendants’ Motion for Summary Disposition at 8–13, *MorningSide v. Sabree*, No. 16-008807-CH [hereinafter *MorningSide* Motion for Summary Disposition]. As discussed below, the courts have so far resolved the issue on the jurisdictional ground.

<sup>276</sup> *MorningSide* Complaint, *supra* note 275, at 21. Since 2002, more than 150,000 properties, strongly concentrated in African-American communities, have gone through the Wayne County tax foreclosure auction. Loveland Technologies, *2017 Tax Foreclosure Auction*, [LOVELAND](https://makeloveland.com/2016/mi/wayne#b=admin), <https://makeloveland.com/2016/mi/wayne#b=admin> [<https://permacc/W77D-3Z6Q>].

<sup>277</sup> Mich. Comp. Laws § 211.10 (2018) (municipal assessment), § 211.34 (2018) (equalization), § 211.57 (2018) (municipal return of delinquent taxes to county treasurer for collection).

were worth between double and eleven times the actual fair-market value.<sup>278</sup> Assessors in other Wayne County municipalities that have greater proportions of white homeowners assessed homes more frequently and more accurately.<sup>279</sup> Detroit's inflated property values had a particularly stark effect on homeowners because the city's property tax rates are among the highest in the country.<sup>280</sup> State and local officials acknowledged that Detroit properties were overassessed and began reducing property assessments beginning in 2014.<sup>281</sup> But this admission came too late for homeowners whose overassessed taxes were already in default, leading to foreclosure.<sup>282</sup>

The *MorningSide* case crystallizes the procedural issues that sometimes arise when assessment policies are challenged under the FHA in a jurisdiction with a designated tax adjudicator. Michigan law vests exclusive jurisdiction over tax matters with the Michigan Tax Tribunal, an administrative, quasi-judicial body with limited powers and jurisdiction.<sup>283</sup> Wayne County successfully argued that any claim that touches on property tax assessment must be litigated in the Tax Tribunal.<sup>284</sup> The case therefore squarely concerned the effect of the FHA's guarantee of a cause of action in "state court," as well as the significance of *Haywood*'s protection of federal claims against state procedural interference. Because the Tax Tribunal has limited

<sup>278</sup> For a description of the declining value of Detroit properties, see Housing Finance Policy Center, *Detroit Housing Tracker*, URBAN INSTITUTE 5 (Apr. 2016), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000739-Detroit-Housing-Tracker-Q1-2016.pdf> [https://permacc/3QT3-PP3R]; see also Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1142–43 (2014) (discussing the role of falling property values in Detroit and other economically insolvent cities' fiscal troubles, with a particular focus on the effects of reverse redlining). In addition to Detroit, smaller majority African-American cities in Wayne County, such as Inkster and Highland Park also experienced high rates of tax foreclosure. See Anderson, 123 YALE L. J., at 1135–36, 1180 (discussing how economically "distressed suburb[s]" are being pushed to become "new minimal cit[ies]").

<sup>279</sup> See generally Atuahene, *supra* note 21.

<sup>280</sup> At 3.385%, Detroit's effective tax rates on owner-occupied properties have consistently ranked among the very highest in the country. See LINCOLN CENTER FOR LAND POLICY & MINNESOTA CENTER FOR FISCAL EXCELLENCE, *supra* note 36, at 2.

<sup>281</sup> See *Most Detroit Residents to See Property Assessment Reductions This Summer*, CITY OF DETROIT (Jan. 28, 2015), <http://www.detroitmi.gov/News/ArticleID/24/Most-Detroit-Homeowners-to-See-Property-Assessment-Reductions-This-Summer> [https://permacc/X8PN-84N7]; Christine MacDonald, *State Launches Look into Detroit Tax Assessments*, DETROIT NEWS (Apr. 9, 2013), 2013 WLNR 8740534.

<sup>282</sup> Detroit residents must appeal an assessment between February 1 and February 15 of the relevant tax year. Detroit, Michigan, Municipal Code § 18-9-3(b). Property assessments are announced in late January, and taxes are not billed until the summer. Relying on homeowners' failure to appeal their assessments, the county has asserted that the tax assessments must be treated as accurate—particularly once a foreclosure judgment has been entered. *MorningSide* Motion for Summary Disposition, *supra* note 275, at 13.

<sup>283</sup> See *MorningSide* Opinion on County Defendants' Motion for Summary Disposition (on file with authors); Mich. Comp. Laws 205.731. The exclusivity of the Tax Tribunal's jurisdiction has been construed broadly to include any "attack on the validity of . . . property tax assessments," even when that attack is couched in constitutional terms. *Johnson v. State*, 317 N.W.2d 652, 657 (1982).

<sup>284</sup> County Defendants' Motion for Summary Disposition at 13, *MorningSide v. Sabree*, No. 16-008807-CH.

powers and expertise, it lacks the ability to offer relief for the *MorningSide* disparate impact claim; the purportedly neutral state procedural rule granting it exclusive jurisdiction would thus nullify the federal cause of action, reminiscent of how the New York limited-jurisdiction court could not offer relief for § 1983 claims against prison guards.<sup>285</sup>

Beyond the jurisdictional issues, the *MorningSide* case also introduced important questions for the consideration of a taxing jurisdiction's "substantial, legitimate, nondiscriminatory interest" under the Fair Housing Act disparate impact analysis.

A troubled county undoubtedly has a legitimate interest in the collection of revenue. Older, predominantly African-American cities such as East Cleveland and Detroit continue to grapple with existential crises borne of declining economic activity and property tax bases.<sup>286</sup> But foreclosures based on inaccurate assessments are unnecessary for revenue collection, particularly given their ineffectiveness.<sup>287</sup> Moreover, they are hardly the least discriminatory means to advance that interest.<sup>288</sup> Plaintiffs have offered nondiscriminatory alternatives, such as preferential treatment of occupied properties, which could generate greater tax revenue in the longer term by maintaining value in the property at issue and surrounding properties.

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<sup>285</sup> For example, while a claim may require analyzing the relationship between tax assessments and the value of the assessed properties, the assessment issues are not the full extent of the Fair Housing Act prima facie case, and the Tax Tribunal's expertise in technical matters of taxation does not correspond to an expertise in evaluating evidence of disparate racial impact. The Michigan Court of Appeals did not adopt this reasoning. *MorningSide v. Wayne Cty.*, No. 336430, 2017 WL 4182985 at \*3. Moreover, the racial effects of a tax assessment policy may not be observable until after the time frame for agency review of taxes or assessments. In the case of Wayne County, the disparity arose as a result of the county's foreclosure policies—which affected homeowners years after the appeal period for assessments.

<sup>286</sup> Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1122–23 (2008) (describing how cities like Cleveland, Dallas, and Detroit struggle to adapt to declining manufacturing sectors and growing poverty). Some have argued that reviving these localities may require redrawing their fiscal and political borders. See, e.g., Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 427 (1993) (describing various ways to conceptualize the city, and the implications of such definition for redrawing fiscal borders); Emily Bamforth, *What East Cleveland Bankruptcy Could Mean for a Cleveland Merger, Plus Other Aspects to Consider*, CLEVELAND.COM (May 12, 2016), [http://www.cleveland.com/metro/index.ssf/2016/05/what\\_bankruptcy\\_could\\_mean\\_for.html](http://www.cleveland.com/metro/index.ssf/2016/05/what_bankruptcy_could_mean_for.html) [<https://permacc/5SDC-BJX2>] (describing consequences of East Cleveland's bankruptcy for neighboring jurisdictions).

<sup>287</sup> The *MorningSide* plaintiffs presented preliminary evidence that foreclosure auctions fail to recover the unpaid tax revenue because of limited demand. See Margaret Dewar, et al., *Disinvesting in the City: The Role of Tax Foreclosure in Detroit*, 51 URB. AFFAIRS REV. 587, 592 (2015). For occupied properties, the process of foreclosure too often led to disinvestment, undermining neighborhoods and weakening the tax base further. *Id.* at 600–05.

<sup>288</sup> In one regard, the situation in Detroit notably resembles the claim in *Allegheny Pittsburgh*, *supra* note 128, at 435. In both cases, inaccurate property assessments were the result of municipal assessors' choices and mistakes contrary to the requirements of state law, as opposed to a set of inaccurate assessments that resulted from a particular assessment regime mandated by law. It would therefore be implausible for Wayne County to collect the admittedly inaccurate assessments.

The county may also assert procedural interests, such as the uniform application of state tax procedures, the finality of tax assessments, or an efficient tax foreclosure process. These interests are conceptually distinct from an argument that state law requires a certain set of procedures, which would likely be insufficient in light of the FHA's preemption provision. For example, the general preference for intrastate uniformity is sensible.<sup>289</sup> However, using this interest to justify a practice with a disparate impact would ignore an important feature of the disparate impact claim. Disparate impact claims often reflect the interaction of neutral policies with social realities related to protected classes. For example, in the *MorningSide* case, the disparate impact arises because of racial segregation across Wayne County and uneven assessment quality between municipalities.<sup>290</sup> A strong regard for intra-state uniformity would therefore undermine the effectiveness of the disparate impact remedy to address those circumstances in which a neutral policy has discriminatory effects.<sup>291</sup> As for the goals of efficiency and finality, they are generally closely tied with the underlying goal of revenue collection. To the extent that tax foreclosures fail to collect revenue effectively, a more speedy process offers little independent interest for a local government.<sup>292</sup>

So far, the Michigan courts have not accepted plaintiffs' arguments that the general jurisdiction court is the appropriate venue for an FHA lawsuit. The Michigan Court of Appeals recently affirmed the dismissal of Plaintiffs' FHA claims as falling within the exclusive jurisdiction of the Tax Tribunal.<sup>293</sup>

In both Wayne County and Nassau County, assessment practices favored white homeowners over minority homeowners. Litigants' attempts to challenge these systems illustrate the need for meaningful state-court review, or a federal-court backstop, to ensure that their rights under the FHA are protected. Moreover, these cases call into question the justification for assessment policies that fail to reflect current property values.

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<sup>289</sup> Cf. *Wilson v. Garcia*, 471 U.S. 261, 266–68 (1985) (recognizing generally, in the context of statutes of limitations across courts, the value of intra-state uniformity).

<sup>290</sup> See the discussion of the origins and purposes of disparate impact claims at *supra* notes 176–194, and accompanying text.

<sup>291</sup> Moreover, in other contexts, courts nominally look more favorably on narrow, as-applied challenges to state actions, rather than more intrusive facial challenges. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 923 (2011). The result of a successful as-applied challenge is disuniformity in the application of the challenged law or policy.

<sup>292</sup> In the Michigan example, the tax foreclosure system was streamlined to prevent blight that had resulted from murky titles. See Kevin T. Smith, *An Update on Foreclosure of Real Property Tax Liens Under Michigan's New Tax Foreclosure Process*, 36 MICH. REAL PROP. REV. 30 (2009).

<sup>293</sup> *MorningSide v. Wayne Cty.*, No. 336430, 2017 WL 4182985.

## B. *Litigating Challenges to California's Article XIII A*

We now turn to California's Article XIII A to illuminate the theoretical conflicts between rights afforded to increasingly diverse residents under the FHA and the justification that already withstood rational-basis review: local communities' "stability."

### 1. *The Prima Facie FHA Case and Relevant Empirical Evidence*

There are several FHA claims that could be brought against California's system. While we discuss suggestive empirical evidence and illustrative calculations, we leave the requisite detailed empirical assessments to prospective litigants and future researchers.<sup>294</sup>

First, more recently arrived California homeowners<sup>295</sup> could challenge Article XIII A as discriminating in the provision of services or facilities in connection with their dwellings.<sup>296</sup> This "disproportionate effect" claim would therefore mirror the claim in *Coleman* that succeeded in forcing changes to the Long Island underassessment of minority households.

Hispanic or Asian-American homeowners may be able to show that California's system leads to higher property taxes for them as compared to their white neighbors. As discussed above, the additional property tax burden borne by a newer resident could add the equivalent of an additional 20% of the newer resident's monthly mortgage payment.<sup>297</sup> Indeed, Isaac William Martin and Kevin Beck have estimated that rate and assessment limitations such as Article XIII A have a statistically significant effect favoring white homeowners over homeowners of other races.<sup>298</sup> They conclude that property

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<sup>294</sup> *Supra* notes 54–55 and accompanying text.

<sup>295</sup> Although contemporary non-resident investors in California homes may also be more diverse than their predecessors, courts have rejected claims by such commercial investors for Fair Housing Act protection based on the investors' own identities. *See, e.g.,* *Germain v. M&T Bank Corp.*, 111 F. Supp. 3d 506, 521–22 (S.D.N.Y. 2015); *Home Quest Mortg. v. Am. Family Mutual Ins. Co.*, 340 F.Supp.2d 1177, 1185 (D. Kan. 2004).

<sup>296</sup> 42 U.S.C. § 3604(b) (2012). Although it would not be binding on a California state court, the Ninth Circuit relied on this provision of the Fair Housing Act to support a post-acquisition cause of action based on failure to provide municipal services and the distribution of property tax revenues for predominantly Hispanic unincorporated neighborhoods in *The Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 714 (9th Cir. 2009).

<sup>297</sup> *See supra* notes 54–55, and accompanying text.

<sup>298</sup> Isaac William Martin & Kevin Beck, *Property Tax Limitations and Racial Inequality in Effective Tax Rates*, 43 CRITICAL SOC. 221, 229 (2017) ("Although most of the interaction terms taken singly are not statistically significant, a test of joint statistical significance shows that the interaction terms are jointly different from zero ( $\pm 2 = 22.5$ , 9 *df*,  $p < .05$ ), providing evidence that the effects of property tax limitation differ by race and ethnicity. Most of these coefficients are consistent with the interpretation that white homeowners derive the greatest benefit from property tax limitation."). Martin and Beck's methodology relies both on a nationally-representative longitudinal dataset of self-reported tax burdens and the fact that different states have different property tax regimes, which have changed over time. *Id.* at 226. They can thus estimate how property tax burdens differ for respondents based on race and state property tax features, after controlling for other demographic covariates. *Id.* at 228.

tax limitations serve to “entrench, and even to exacerbate, structural features of local property taxation that favor white property owners, most especially the bias in favor of long-term owners of high-value homes.”<sup>299</sup> While their suggestive evidence provides support for the racial effects from a broader landscape, a jurisdiction-specific legal challenge would likely require more granular, rather than national, data for the pleadings.

The Martin and Beck study is consistent with California’s story, in light of the interaction between assessment growth ceilings and significant demographic shifts since 1978. Between 1980 and 2015, the Asian-American and Hispanic shares of California’s population both more than doubled.<sup>300</sup> Newer California homeowners are presumably more likely to have been a member of these ethnic groups, even putting aside the differences in wealth across racial groups for Californians who were present in 1978.<sup>301</sup> Because the newer, ethnically diverse homeowners bought their houses later, the benefit that they receive from Article XIII A’s assessment growth ceiling would be less than their longer-standing, white neighbors. Similarly, newly affluent “ethnoburbs”<sup>302</sup> have seen significant growth in property value since

<sup>299</sup> *Id.* at 233. This Article primarily addresses what Beck and Martin describe as “assessment limitation,” whereas they also study “rate limitations” (1% in California after Proposition 13).

<sup>300</sup> Public Policy Institute of California, *California’s Population*, March 2017, <http://www.ppic.org/publication/californias-population/> [<https://permacc/976F-BBA3>]. At the same time, “homeownership among Californians 45 and younger has fallen by around one-third since 1980.” CAL. LEG. ANALYST’S OFFICE, *COMMON CLAIMS ABOUT PROPOSITION 13*, 42 (2016), <http://www.lao.ca.gov/reports/2016/3497/common-claims-prop13-091916.pdf> [<https://permacc/2629-JQ6S>]; see also Comment by Fernando Vendramel Ferreira on Nada Wasi & Michelle White, *Property tax limitations and mobility: the lock-in effect of California’s Proposition 13*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 59, 94 (Figure 2), 2005 (charting California’s homeownership rate by age bracket based on 2000 Census data).

<sup>301</sup> To illustrate 1978 inequalities, consider that the 1970 Census identified a 54% homeownership rate for all Californians in metropolitan areas and 61.4% in non-metropolitan areas, while African-American Californians had only a 39% homeownership rate in metropolitan areas and 44% in nonmetropolitan areas. U.S. CENSUS BUREAU, *1970 CENSUS OF POPULATION AND HOUSING: CALIFORNIA* 9 (1971). While mixed-race availability in the 2000 Census makes it unwise to create a comparison, we note that the homeownership rates for the 2000 Census were 56.9 percent overall in California, and the racial rates were 62.6 percent for those identifying only as white, 38.8 percent for those identifying only as African-American, and 43.7 percent for those identifying as Hispanic. U.S. CENSUS BUREAU, *HISTORICAL CENSUS OF HOUSING TABLES* (2000), <https://www.census.gov/hhes/www/housing/census/historic/ownershipbyrace.html> [<https://permacc/26RR-ULJM>]. Since 2000, the demographic composition of homeownership has continued to change. In 2000, there were approximately 4.3 million owner-occupied homes in California headed by non-Hispanic white people; 1.1 million by Hispanic people; 613,000 by Asian-American people; and 308,000 by African-American people. In 2010, there were approximately 4.2 million owner-occupied homes headed by non-Hispanic white people; 1.5 million by Hispanic people; 880,000 by Asian-American people; and 311,000 by African-American people. U.S. CENSUS BUREAU, *GENERAL HOUSING CHARACTERISTICS, QT-H1* (2000 and 2010 Census Summary Files).

<sup>302</sup> Wei Li, *Anatomy of a New Ethnic Settlement: The Chinese Ethnoburb in Los Angeles*, 35 *URBAN STUDIES* 479, 479 (1998) (“Ethnoburbs are suburban ethnic clusters of residential areas and business districts in large American metropolitan areas.”).

1978.<sup>303</sup> Residents of these ethnic enclaves must therefore pay proportionately higher taxes than residents of more long-standing but otherwise similar suburban communities.

In addition to the claims of current homeowners, a prospective buyer could allege that she would purchase a home, if not for the disproportionately high property tax burden.<sup>304</sup> To establish the disproportionate nature of the exclusion, she could compare the racial composition of the pool of potential buyers who could afford a lower overall cost (including a fairer property tax bill) with the racial demographics of potential buyers who could afford the homes amid the heightened newcomers' property taxes. To the extent that she would be unable to move into a community that was largely occupied by people of a different race or ethnicity, her plight could also present a claim that Article XIII A perpetuates segregated housing patterns—a “segregative effect” claim.

Where housing patterns reflect prior historical segregation, Article XIII A could be understood to have a segregative effect by maintaining or amplifying currently segregated patterns.<sup>305</sup> Under this theory, a plaintiff would seek to prove that Article XIII A disincentivizes property owners from moving and therefore calcifies existing, segregated housing patterns—particularly in communities that are predominantly composed of owner-occupied housing.<sup>306</sup> Empirical studies have documented the fall of mobility after the passage of Proposition 13 and suggested a causal relationship between the two.<sup>307</sup> These studies corroborate the economic intuition that households

<sup>303</sup> See, e.g., TIMOTHY FONG, *THE FIRST SUBURBAN CHINATOWN 174* (1994) (noting the stark rise of property values in Monterey Park, CA, an early “ethnoburb” in the late 1970s and early 1980s); WEI LI, *ETHNOBURB: THE NEW ETHNIC COMMUNITY IN URBAN AMERICA* (2009) (discussing how the migration of affluent immigrants has reshaped suburban America and discussing Fremont and Cupertino, CA in particular).

<sup>304</sup> For further insight on how a plaintiff might attempt to make such a case, see the discussion of zoning changes that make homeownership more expensive in Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases after Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 756–60 (2016).

<sup>305</sup> A leading commentator has called into question the viability of segregative effect claims, as they were not mentioned in *Inclusive Communities*. See Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities*, 115 COLUM. L. REV. SIDEBAR 106, 122 (2015).

<sup>306</sup> See CAL. LEG. ANALYST'S OFFICE, *COMMON CLAIMS ABOUT PROPOSITION 13*, 11–12 (2016), <http://www.lao.ca.gov/reports/2016/3497/common-claims-prop13-091916.pdf> [<https://permacc/U7TW-HMBD>] (describing the post-Proposition 13 ossification of the housing market, with property turnover falling from 16% in 1977 to 5% in 2012). In light of other contributors such as an aging population and rising real estate prices, one finding that has been used to validate Proposition 13's role in this trend is the fact that “homeowners 55 and over appear to be more likely to move in response to state laws allowing them to transfer their tax relief to a new home.” *Id.*

<sup>307</sup> See, e.g., Fernando Ferreira, *You can take it with you: Proposition 13 tax benefits, residential mobility, and willingness to pay for housing amenities*, 94 J. PUB. ECON. 661, 662 (2010) (estimating the lock-in effect using a regression discontinuity design comparing householders who are 55 with those who are 54 using finding that 55-year olds have a 1.2–1.5 percentage point higher rate of moving on top of a base rate of approximately 4%); Nada Wasi & Michelle White, *Property tax limitations and mobility: the lock-in effect of California's*

respond to the incentive to stay by, in fact, staying.<sup>308</sup> Segregative effect claims may accordingly be dependent on the housing patterns of a particular geography. Current homeowners could also bring a segregative effect claim under a line of Supreme Court cases recognizing that individuals who are deprived of an integrated community—for example white tenants whose landlord discriminates against African Americans—suffer sufficient cognizable injury to bring an FHA claim.<sup>309</sup> Injunctive relief would likely be necessary to remedy either of these segregative effects—a one-time compensation would not be likely to disrupt tax-related segregation.

Even apart from the treatment of initial owners themselves, a court would likely find the preferential treatment of transfers to children and grandchildren to raise the strong specter of discriminatory effect.<sup>310</sup> In *Inclusive Communities*, the Supreme Court identified a municipal ordinance “restricting the rental of housing units to only ‘blood relatives’ in an area of the city that was 88.3% white and 7.6% black” as lying within the “heartland of disparate-impact liability.”<sup>311</sup> Thus, the Supreme Court has made clear how hereditary housing privilege contravenes the FHA’s vision of pluralism.

The appropriate geographic scope of these claims would vary depending on the nature of the claim. A segregative effects claim requires analysis of specific housing patterns and a counterfactual analysis of prospective housing patterns without the higher cost and entrenchment caused by Article XIII A. These patterns would be more straightforwardly examined at a local level, establishing the effect of Article XIII A as implemented by a particular county or set of counties.<sup>312</sup> The success of such a segregative effect lawsuit would interfere with the intrastate uniformity of Article XIII A’s application,

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*Proposition 13*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 59, 60 (2005) (finding that Proposition 13 lengthened the tenure of owners in particular properties, with stronger effects as the effective subsidy provided by Proposition 13 was greater). *But see* Joseph Nagy, *Did Proposition 13 Affect the Mobility of California Homeowners?*, 25 PUBLIC FINANCE REVIEW 102, 103 (1997) (finding declines in mobility in seven California metropolitan statistical areas (MSAs) as well as in seven non-California MSAs, suggesting that the decline in mobility may have been following a national trend).

<sup>308</sup> Comment by Fernando Vendramel Ferreira on Nada Wasi & Michelle White, *Property tax limitations and mobility: the lock-in effect of California’s Proposition 13*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 59, 92 (2005) (“The lock-in effect of California’s Proposition 13 is very intuitive: households respond to those property tax incentives by staying longer in the same house. As a result, average tenure for households in California has increased since 1978.”).

<sup>309</sup> *See* Havens Realty Corp v. Coleman, 455 U.S. 363, 376–78 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109–11, 114–15 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–12 (1972).

<sup>310</sup> *See supra* note 56.

<sup>311</sup> *Inclusive Cmty.*, 135 S. Ct. at 2522 (citing Greater New Orleans Fair Housing Action Center v. St. Bernard Parish, 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009)); *see also* U.S. v. Town of Oyster Bay, 66 F. Supp. 3d 285, 291–92 (E.D.N.Y. 2014) (holding that allegations that a town had given a priority in its affordable housing program to children of the town’s residents to “keep our children here, keep the generations flowing in the Town” were sufficient to state a claim of intentional discrimination under the FHA).

<sup>312</sup> Even though California’s constitution binds county tax assessment, counties are the assessing jurisdiction in California. CAL. GOV’T CODE § 51501 (West 2018).

but such interference appears to be contemplated by the FHA's express preemption clause.<sup>313</sup> A plaintiff could establish a disproportionate effect theory, on the other hand, on a statewide basis, by aggregating higher taxes paid by minority newcomers across the state.

2. *"Preservation, Continuity, and Stability": Legitimate? Nondiscriminatory?*

In rejecting petitioners' constitutional challenge to California's Article XIII A, the *Nordlinger* majority identified two rationales "that justify denying petitioner the benefits of her neighbors' lower assessments."<sup>314</sup> The Court noted first that the State has a legitimate interest in "local neighborhood preservation, continuity, and stability," and second, that "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner."<sup>315</sup> Given judicial and intuitive recognition of these values, they may likely be invoked by defendants in a FHA case.

"[P]reservation, continuity, and stability" reflect not only the most salient justifications for Article XIII A but also ongoing themes in land use and property scholarship.<sup>316</sup> In fact, preservation of community character was presented as justifications for exclusionary zoning in the 1969 Stanford Law Review Article that popularized the term.<sup>317</sup> As Anika Singh Lemar has described in the context of aesthetic rulemaking, we have "embraced cultural stability and the preservation of buildings and places that are icons in the community mind . . . [reflecting] an assumption that a person's neighbors have a legitimate interest in 'preserving' the neighborhood in the state in which it existed on the day that they purchased their homes."<sup>318</sup> Yet as Singh Lemar aptly points out, "changing cultural norms, immigration, population growth, increasing diversity, and other evolving factors will often require society to reconsider whether stability is a worthy policy goal."<sup>319</sup>

<sup>313</sup> See *supra* note 289, and accompanying text discussing intrastate uniformity concerns.

<sup>314</sup> *Nordlinger*, 505 U.S. at 12.

<sup>315</sup> *Id.*; see also Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1404 (1994) (describing the Supreme Court's invocation of the "assumption that neighborhood stability is a positive good that fosters useful relationships among individuals" to uphold property tax schemes that discriminate in favor of longstanding residents).

<sup>316</sup> *Bd. of Supervisors of Cerro Gordo Cty. v. Miller*, 170 N.W.2d 358, 361 (Iowa 1969) (explaining that "[p]reservation of the character of the neighborhood is a valid reason for zoning regulations" and that such regulations "promote the general welfare and are valid where they stabilize the value of property, promote the permanency of desirable home surroundings and add to the happiness and comfort of citizens.").

<sup>317</sup> Sager, *supra* note 245, at 796.

<sup>318</sup> Anika Singh Lemar, *Zoning As Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1530–31 (2015).

<sup>319</sup> *Id.* at 1541.

The exclusion of newcomers resonates with California's fraught history of property-based racial exclusion, including its alien land laws.<sup>320</sup> Through the 1940s, California limited the property rights of non-citizens, and even attempted to extend these limitations to the citizen children of Japanese-American immigrants.<sup>321</sup> Notably, although Congress included protections for non-citizens in the Reconstruction era Civil Rights Acts, with an eye toward the treatment of Chinese immigrants in California, non-citizens were notably left out of the property-related protections that would later be codified at 42 U.S.C. § 1982.<sup>322</sup> Though Western frontier states initially used alien land rights to attract residents in the late nineteenth century,<sup>323</sup> property-based exclusion persisted in periods of relatively open European immigration in the twentieth century.<sup>324</sup> Perceptions of "discrete culture gardens, separated by different habits and values" motivated an early twentieth century California Congressman to argue for the law that barred immigration from India and Japan, restrictions that persisted until the Immigration and Nationality Act of 1965.<sup>325</sup> His exclusionary discourse ascribed "to [racially] different peoples different capacities for movement [and] different attachments to place."<sup>326</sup>

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<sup>320</sup> See Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 979-80 (2010) (discussing how California's Alien Land Law restricting property rights among Japanese Americans was ruled unconstitutional and how the ruling informs more contemporary local efforts to restrict property rights for undocumented immigrants); Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L. J. 101, 156-57 (2018) ("It is not particularly surprising that Arizona, California, Montana, Oregon, and Utah targeted Chinese restaurants, as those states had pervasive anti-Asian policies reflected by a range of anti-Asian statutes that prohibited Asians from intermarrying with whites and owning land. But eastern and midwestern states like Illinois, Massachusetts, Minnesota, New York, Ohio, and Pennsylvania had no antimiscegenation or property laws targeting Asians or any other races, and those states or cities within them carried on heretofore unexplored legal attacks on Chinese economic activity. Racial discrimination imposed by law was not restricted to the South, and racial discrimination with respect to Asians was not limited to the Pacific Coast or western states."); see also Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2140-46 (2014) (describing a 19th century Maryland Court of Appeals case, *Guyer v. Smith*, that legitimized property expropriation on the basis that the mother of the property's inheritors was "partly of African blood or descent," in purported violation of Maryland's then alien land laws).

<sup>321</sup> Cuison Villazor, *supra* note 320, at 992.

<sup>322</sup> Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 17-18 (2013).

<sup>323</sup> Polly Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 169 (1999).

<sup>324</sup> *Id.* at 184, 208 (discussing estimates of twentieth century immigration, particularly from Europe); see also Ran Abramitzky, Leah Platt Boustan, & Katherine Eriksson, *Europe's Tired, Poor, Huddled Masses: Self-Selection and Economic Outcomes in the Age of Mass Migration*, 102 AM. ECON. REV. 1832, 1832 (2012) (describing the "mass migration" of 30 million European immigrants to the United States between 1850 and 1913 as "one of the largest migration episodes in human history").

<sup>325</sup> Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 211-12, 246, 281 (2016).

<sup>326</sup> *Id.* at 248.

Proposition 13 need not have been motivated by the anti-Asian animus of California's historic discriminatory laws for courts to recognize the troubling parallel between this history and a law that "welcomes the stranger" with a higher tax burden—when that stranger is more likely to be Asian or Latino.<sup>327</sup> Advocates for "stability" may not only entrench old collectivities over new ones, but they may also presume that those nonnative peoples value stability itself differentially.

Regardless of its historical origins, a goal of unqualified community stability is inconsistent with the pluralist, and interventionist, vision of the FHA.<sup>328</sup> The FHA envisioned a *new* stability—as the Supreme Court articulated, there "can be no question about the importance to a community of promoting stable, racially integrated housing."<sup>329</sup> The path from stable, segregated housing to stable, racially integrated housing would require transition. Courts must therefore pause before labeling the goal of community stability "legitimate" and "nondiscriminatory" against the demands of the FHA.

Of particular concern are the hereditary housing privileges, including inheritable underassessments, that offend any legitimate conception of stability under the FHA. *Inclusive Communities* critiqued such policies as exemplifying what the FHA meant to prohibit.<sup>330</sup> In particular, the "parent-child tax exemption" that allows children to receive their parents' homes without an updated assessment for the purpose of property taxes preserves the biological, and likely racial, hue of a community. An interest in intergenerational community stability—maintaining the same "character" of residents in a community—is thus suspect under the FHA. Although there may be a legitimate interest in allowing certain cash-poor families to preserve homeownership, such an interest can be better served by less discriminatory means.<sup>331</sup>

*Nordlinger* also suggested that individual homeowners have an interest in a stable expectation of property tax. While the California Supreme Court correctly noted that, formally, Article XIII A benefits all by providing a more stable and certain estimation of future property tax liability, the amount of that benefit varies wildly, and such inequitable "benefits" are precisely what lie in the FHA's ambit.<sup>332</sup> Moreover, as *Nordlinger's* critics have written:

<sup>327</sup> See *Nordlinger*, 505 U.S. at 6 (describing Article XIII A as a "welcome stranger" assessment system).

<sup>328</sup> The purpose of the Fair Housing Act was "to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante*, 409 U.S. at 211 (quoting 114 CONG. REC. 3421, 3422 (1968) (statement of Sen. Mondale)); see also Austin W. King, Note, *Affirmatively Further*, 88 N.Y.U. L. REV. 2182, 2184 (2013) (collecting further legislative history).

<sup>329</sup> *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111 (1979) (quoting *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 94 (1977)).

<sup>330</sup> *Inclusive Cmty.*, 135 S. Ct. at 2522.

<sup>331</sup> See *infra* Section IV.B.3.

<sup>332</sup> *Nordlinger v. Lynch*, 275 Cal. Rptr. at 692, *aff'd sub nom.*, 505 U.S. 1 (1992) ("The change from a current value system to an acquisition system was intended to benefit all property owners, past and future, resident and nonresident, by reducing inflationary pressures in

A taxpayer has no right to insist that the taxing scheme in effect on his date of birth or on some other date is the only one that may apply to him throughout his life. Tax laws change; sometimes the changes are even retroactive. The mere fact of change in the law by itself never entitles the taxpayer to object to the law.<sup>333</sup>

Proposition 13 renders a preferential tax, based on one's ability to have purchased earlier, rather than a stable tax.<sup>334</sup> California's patterns of property ownership in the 1970s reflected racial wealth disparities, prior housing and lending discrimination, and recent racialized immigration policy.<sup>335</sup> The stable expectation, or reliance interest, is only persuasive for owners who struggle to afford tax increases. That is, the legitimate interest in stability should be homeowner-specific and implicated only as an individual means-tested safety net.<sup>336</sup>

Article XIII A does serve one truly non-discriminatory interest. Because property taxation reflects the value of illiquid capital, property value increases can strongly affect land-rich, cash-poor homeowners. Thus, caps can serve as a form of "insurance" against liquidity constraints.<sup>337</sup> It is legitimate and nondiscriminatory for a jurisdiction to enact some policy to further the interest of protecting those homeowners, but as we discuss below, acquisition-value taxation and many of its tax-revolt cousins are not the least discriminatory alternative to effect that goal.

### 3. *Less Discriminatory Alternatives*

Unlike the *Nordlinger* Court's constitutional rational basis query, our inquiry does not end with an assertion of a legitimate interest. Rather, the FHA's burden shifting framework provides, in some sense, more room for the logic of Justice Stevens's dissent. While he agreed that "neighborhood preservation" was a legitimate state interest, Justice Stevens thought "that a tax windfall for all persons who purchased property before 1978 . . . [was] too blunt a tool to accomplish such a specialized goal."<sup>338</sup> In disagreeing

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assessments, by limiting tax rates, and by permitting the taxpayer to make a more careful and accurate prediction of future tax liability.").

<sup>333</sup> John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFFSTRA L. REV. 79, 118 (1993).

<sup>334</sup> We note that an assessment limitation could preserve stable expectations without tying the assessment to transfers of ownership, as illustrated by the Nassau County system. See *supra* Part IV.A.1. In particular, the *Coleman* litigation illustrates that such limitations may nonetheless create different problematic racial effects as assessments stray further from the fair market value of the underlying properties, potentially leading certain communities to pay more than their fair share. *Id.*

<sup>335</sup> See *supra* notes 300-303, 316-326 and accompanying text.

<sup>336</sup> For example, see the discussion of Philadelphia's LOOP program, *infra* note 347, and accompanying text.

<sup>337</sup> See Nathan B. Anderson, *Property Tax Limitations: An Interpretive Review*, 59 NAT'L TAX J. 685, 687 (2006).

<sup>338</sup> *Nordlinger*, 505 U.S. at 36 (Stevens, J., dissenting).

with the Court's majority, and writing that "the severe inequalities created by Proposition 13 cannot be justified by such an interest," he raised the obvious question of what alternatives might arise.<sup>339</sup> This discussion of alternatives was academic in the context of the rational basis scrutiny employed by the *Nordlinger* Court. Under the Fair Housing Act, however, analysis of alternatives is required to prove an effects-based case,<sup>340</sup> if the defendant has articulated a legitimate non-discriminatory interest justifying the policy that causes an adverse impact or perpetuates segregation.

A less discriminatory alternative can be found in targeted property tax relief.<sup>341</sup> In fact, California currently offers one form of such relief: property tax postponement, which in other states is called deferral.<sup>342</sup> Property tax postponement allows qualified taxpayers to stay in their homes and delay property tax payment until the realization of their rising property value through a sale or probate.<sup>343</sup> Deferral might require the taxing authority to wait until the owner passes away and the estate is settled, with the back taxes secured by a lien on the property.<sup>344</sup> Tax deferral admittedly presents challenges for the heirs of the owner, as the back taxes become due if the homeowner dies (with an exception for surviving spouses). A tax deferral system thus allows low-income senior citizens to stay in their homes without creating a heritable entitlement.

Alternatively, property tax and assessment freezes can be tied to some combination of age, disability, and veteran status, as well as asset and income thresholds.<sup>345</sup> Some jurisdictions use means-tested limits on property taxes, rather than a freeze; these programs are often described as tax "circuit

<sup>339</sup> *Id.* at 38 (Stevens, J., dissenting).

<sup>340</sup> We use "effects-based" here to incorporate both discriminatory and segregative effects, and to distinguish between an intent-based disparate treatment case.

<sup>341</sup> Hui Shan, *Property taxes and elderly mobility*, 67 J. URBAN ECON. 194, 198 (2010) ("Deferral programs are considered by academics the most targeted and cost-effective way of providing property tax relief.").

<sup>342</sup> CAL. REV. & TAX CODE §§ 20501–20646 (establishing property tax assistance and postponement programs for low-income senior citizen and disabled homeowners). At the local level, senior citizens may also be exempt from non-ad valorem parcel taxes. See generally CALIFORNIA TAX FOUNDATION, CENTER FOR SPECIAL TAXES (2017), <http://www.caltaxfoundation.org/special-taxes/> [<https://permacc/YZ3T-YC6W>]. If one uses the "search by county" function, the website shows whether a local jurisdiction provides age-based exemptions.

<sup>343</sup> See CALIFORNIA STATE CONTROLLER, PROPERTY TAX POSTPONEMENT FACT SHEET, [http://www.sco.ca.gov/ardtax\\_fact\\_sheet.html](http://www.sco.ca.gov/ardtax_fact_sheet.html) [<https://permacc/JQ3F-9ZMV>]. We note that currently, California homeowners who are seniors, are blind, or have a disability need to meet certain criteria, including 40 percent equity in the home and an annual household income of \$35,500 or less, to avail themselves of the State Controller's Property Tax Postponement Program. *Id.* While the parameters of such a policy may need to be recalibrated, the very existence of restrictive parameters can render these policies less discriminatory for the purposes of the FHA analysis. Cf. Shanske, *Revitalizing Local Political Economy*, *supra* note 1, at 146 (explaining how a modern property tax "should be embedded in the income tax to make sure that the property tax never consumes more than a reasonable percentage of a taxpayer's income" and should take advantage of the information, and liquidity, provided by realization events).

<sup>344</sup> Andrew T. Hayashi, *Property Taxes and Their Limits: Evidence from New York City*, 25 STAN. L. & POL'Y REV. 33, 51 (2014).

<sup>345</sup> Shanske, *Revitalizing Local Political Economy*, *supra* note 1, at 146–47.

breakers.”<sup>346</sup> Consider, for example, Philadelphia’s Longtime Owner Occupant’s Program (LOOP), commonly referred to as the city’s “gentrification protection” program.<sup>347</sup> The program provides tax relief for homeowners who (i) have lived in their homes for at least 10 years, (ii) have income below a limit for a household of their size (about \$120,000 for a family of 4), and (iii) have experienced a reassessment that tripled the property’s “certified market value” from one tax year to the next.<sup>348</sup>

Some might argue that a fair housing challenge to Article XIII A would harm homeowners in gentrifying communities. As a predicate matter, protecting homeowners in gentrifying neighborhoods is distinct from protecting residents in gentrifying neighborhoods. Some residents are renters rather than homeowners. Moreover, although a disparate impact claim by prospective homeowners in a gentrifying neighborhood would be theoretically plausible, the threat is limited as an empirical matter. Isaac William Martin and Kevin Beck combine longitudinal data on individual residence with data on state property tax assessment and levy limitations to test how such property tax policies might preclude the displacement traditionally associated with gentrification. They find little evidence that these policies mediate the relationship between gentrification and homeowner displacement.<sup>349</sup>

Even if a court was to recognize an interest in family-related stability, there are certainly less discriminatory alternatives than inheritable assess-

<sup>346</sup> See NAT’L CONF. OF STATE LEGISLATURES, STATE PROPERTY TAX FREEZE AND ASSESSMENT FREEZE PROGRAMS (2012), <http://www.ncsl.org/research/fiscal-policy/state-property-tax-freezes-and-assessment-freezes.aspx> [https://permacc/7CTU-2SVB] (summarizing key features across 14 states). Often, under state law, localities may opt into such programs but are not required to do so, and the eligibility thresholds may differ across localities. *Id.*

<sup>347</sup> See Katie Colaneri, *Philadelphia City Council votes to extend ‘gentrification protection’ program*, WHYY (Mar. 17, 2016), <https://whyy.org/articles/philadelphia-city-council-votes-to-extend-gentrification-protection-program/> [https://permacc/CV5F-6NCZ].

<sup>348</sup> CITY OF PHILADELPHIA, LONGTIME OWNER OCCUPANTS PROGRAM, <https://beta.phila.gov/services/payments-assistance-taxes/income-based-assistance-programs/longtime-owner-occupants-program/> [https://permacc/G33H-RFSF]. The City Council voted to extend the original program in 2016. See Philadelphia City Council, Bill 160012, <https://phila.legistar.com/LegislationDetail.aspx?ID=2554763&GUID=F1CB6188-9714-41FD-82A5-A6Aafb71B289> [https://permacc/E73Y-YF39].

<sup>349</sup> Isaac William Martin & Kevin Beck, *Gentrification, Property Tax Limitation, and Displacement*, 54 URBAN AFFAIRS REVIEW 33, 50 (2016) (“We find no evidence for [ ] the hypothesis that property tax assessment limitation moderates the effect of gentrification on the probability that long-term homeowners will move out. We also find no evidence that property tax levy limitations reduce the probability that a homeowner in a gentrifying neighborhood will move out.”). Moreover, we would caution that the empirical realities of gentrification differ significantly from many common impressions of the trend. See, e.g., Jackelyn Hwang, *Pioneers of Gentrification: Transformation in Global Neighborhoods in Urban America in the Late Twentieth Century*, 53 DEMOGRAPHY 189, 189 (2016) (summarizing that, across 23 cities, “[a]n early presence of Asians was positively associated with gentrification,” “an early presence of Hispanics was positively associated with gentrification in neighborhoods with substantial shares of blacks and negatively associated with gentrification in cities with high Hispanic growth, where ethnic enclaves were more likely to form”, and “[l]ow-income, predominantly black neighborhoods and neighborhoods that became Asian and Hispanic destinations remained ungentrified despite the growth of gentrification during the late twentieth century.”) (emphasis added).

ments without qualification under Article XIII A. In California, a child who has never lived in the state, much less on the underassessed property, may nonetheless avail herself of a chronic underassessment. By contrast, targeted rent stabilization policies require a potential successor to have a minimum period of cohabitation with the original tenant.<sup>350</sup>

In sum, the FHA offers a new means to counter the effects of Article XIII A and its successors. The FHA prohibits government policies that have a disproportionate effect on particular racial or ethnic groups or have the effect of perpetuating segregation, unless the policy is justified by a legitimate nondiscriminatory interest and there is no less discriminatory means to reach that goal. In the context of California, we have provided preliminary evidence that Article XIII A has both disproportionate and segregative effects. We have also shown that traditional community interests in stability are unlikely, on their own, to survive the scrutiny demanded by the FHA, while identifying potential less discriminatory alternatives. The analysis above is specific to California's tax regime and the demographic changes that have occurred in the decades since Proposition 13. However, the broader nation's changing demography and historical exclusion of African-Americans, Latinos, and Asian-Americans from homeownership suggests that there are other places where acquisition-value property tax systems or similar tax-revolt efforts would produce disparate impacts.<sup>351</sup> To avoid liability under federal fair housing law, localities must recognize the unintended inequities and disparate impacts created by such broad-based tax policies and use finer instruments to address the legitimate issues of residential stability that arise under increasing tax burdens.

## CONCLUSION

The goal of fair housing requires fair property taxes, despite longstanding scholarly and judicial neglect of this relationship. By illuminating the potential for Fair Housing Act claims against a range of property tax policies, we hope to have unearthed the procedural complexities inhibiting such claims and the vision of equality that the federal civil rights statutes represent. The mathematical formulae of property tax assessment raise deep questions about the meanings of change and fairness in an America that increasingly diverse individuals aspire to call "home."

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<sup>350</sup> See, e.g., N.Y.C. RENT GUIDELINES BOARD, SUCCESSION RIGHTS (2016), <http://www.nycrgb.org/html/resources/faq/succession.html#rules> [https://permacc/7B9U-QC4H].

<sup>351</sup> See, e.g., *supra* notes 320–326, and accompanying text (describing the history of alien land laws); RICHARD ROTHSTEIN, THE COLOR OF LAW 63–67 (2017) (describing federal agencies' redlining practices starting in the 1930s and their limiting effects of homeownership by racial minorities); PEW RESEARCH CENTER, 10 DEMOGRAPHIC TRENDS THAT ARE SHAPING THE U.S. AND THE WORLD (2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/> [https://permacc/7VKL-3F9M] (documenting changes in the American population along axes of race, religion, national origin, and sex).