Residential Zoning Regulations and the Perpetuation of Apartheid

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RESIDENTIAL ZONING REGULATIONS AND THE PERPETUATION OF APARTHEID

Janai S. Nelson*

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INTRODUCTION

In January of this year, the South African Parliament ratified the long-awaited Land Reform (Labour Tenants) Bill, which has engendered heated controversy since its inception. For many, the success of the Land Reform Bill portends the economic and political future of South Africa and is a gauge of apartheid's vital signs. Without land, most South Africans would remain in the same impoverished and disenfranchised conditions that they were in under the apartheid regime. With land, however, South Africans have an improved chance to achieve economic equality.

1. The Land Reform Bill gives South African tenant laborers the right to apply for the ownership and purchase of the land that they have historically cultivated and occupied. See generally LAND REFORM (LABOUR TENANTS) BILL 1995 (on file with South African Embassy).


3. In this Comment, the term "South African" refers to those persons of the Black (see infra this note) race—the indigenous people of South Africa. For lack of a better alternative, I use the term "Afrikaner," a Dutch word which means African and refers to the Dutch residents of South Africa, to denote all white residents of South Africa despite its inaccuracies and its underinclusiveness of other white ethnic groups. I choose not to use the term "white South African" as I believe it is a misnomer and falsely characterizes history.

The word "Black" is capitalized throughout this Comment because, like the words "Latino," "Asian," and "European," it refers to a distinct cultural group and not simply a racial classification as does the word "white." See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1332 n.2 (1988); Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 STAN. L. REV. 1, 4 n.12 (1991). Furthermore, there is great significance in capitalizing the word "Black," as the act itself imports a message of pride, conviction, and self-conceptualization.
Land reform and land use have become particularly crucial issues in light of President Mandela’s promise to construct 1.5 million homes by 1999. This promise has raised serious concerns about what residential zoning regulations will guide South Africa through its period of transition and expansion.

In many respects, South Africa faces a challenge identical to that faced by the United States after desegregation, and, arguably, one that is more complex: South Africa must decide not only how to enforce post-apartheid legislation, but also how to foster economic and, consequently, racial integration. Indeed, after nearly fifty years of apartheid, the mere abolition of apartheid legislation will not result in integrated communities. Rather, the South African government must take deliberate steps to ensure that integration occurs, and that a nation emerges that is truly deserving of the appellation “A New South Africa.”

This Comment argues that one way for South Africa to move toward achieving racial residential integration is to implement residential zoning regulations different from those promulgated by the United States when it found itself at a similar point of departure in history. To this end, this Comment attempts to prove that residential zoning regulations in the United States are not realistic for South Africa.

4. AFRICAN NATIONAL CONGRESS, RECONSTRUCTION AND DEVELOPMENT PROGRAMME § 2.5.2 (1994) [hereinafter RDP] (identifying the construction of at least one million new homes as one of its “key programmes” over the next five years); see also Carrie Shook, Layman Homes to Start Building in South Africa, BUS. FIRST-COLUMBUS, Aug. 15, 1994, § 1, at 25, available in WESTLAW, BUSFSTC OL Database. At present, 70% of the housing need in South Africa is unmet. Id.

5. Whether racial integration is a fitting solution to poverty among Blacks in the United States and South Africa is not resolved in all aspects in this Comment. Rather, this Comment presents integration as a pragmatic solution to poverty from the limited standpoint that, due to the disparity of wealth between whites and Blacks in both countries, the resulting inequitable access to resources, and the circular redistribution of wealth that ensues from any segregative condition, integration is one way for Blacks to obtain objectively “better” living conditions.

6. For an introduction to the history of apartheid from diverse perspectives, see generally THE ANTI-APARTHEID READER: THE STRUGGLE AGAINST WHITE RACIST RULE IN SOUTH AFRICA (David Mermelstein ed., 1987); LEO MARQUARD, THE STORY OF SOUTH AFRICA (1968); RICH MKHONDO, REPORTING SOUTH AFRICA (1993); JORDAN K. NGUBAINE, AN AFRICAN EXPLAINS APARTHEID (1963); CAROL SUMMERS, FROM CIVILIZATION TO SEGREGATION (1994).

A thorough analysis of the history of apartheid and its deleterious effects is beyond the scope of this Comment. Instead, this Comment will cursorily address the ills of the apartheid system as they pertain to housing segregation. See infra Part II.C.

United States are one of the myriad causes of racial residential segregation and a de facto cause of poverty among African Americans. Furthermore, if employed in South Africa, these regulations could not adequately serve the interests of South Africans or further the goals set forth in the African National Congress’s (ANC) Reconstruction and Development Programme (the “RDP”).

Part I briefly examines the history of zoning in the United States and explores the reasons why and the degree to which facially neutral zoning regulations promote racial residential segregation. Part II presents a comparative analysis of the economic disparity between Blacks and whites in South Africa and the United States, the political disenfranchisement of Blacks in both countries, and the residential segregation of Blacks from whites.

Finally, Part III proposes a progressive zoning model—centralized performance zoning—that draws upon centralized planning and performance zoning schemes. Part III then evaluates the proposal by illustrating how it would promote integration in a rural area in the South African province of KwaZulu/Natal and determining whether it will serve the goals of South Africans as defined in the RDP, as well as comport with the South African Constitution. This Comment concludes that centralized performance zoning would allow South Africans to enjoy a residentially integrated society that the United States has yet to achieve in the thirty years since the fall of “American apartheid.”

8. “The RDP is an integrated, coherent socio-economic policy framework. It seeks to mobilize all [citizens of South Africa] and [South Africa’s] resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future.” RDP, supra note 4, § 1.1.1 (emphasis added).

9. The analysis in this Part is based on the interim Constitution of South Africa because this Comment was written and edited prior to the approval of the permanent Constitution of South Africa. However, it is unlikely that the cited provisions will be changed substantively.

10. In this Comment, the term “American apartheid” refers to the period in American history, roughly from 1865 to 1955, during which there was de jure segregation in the United States. For an engaging historiographical account of the desegregation movement, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1989), and RICHARD KLUGER, SIMPLE JUSTICE (1976).
I. RESIDENTIAL ZONING REGULATIONS IN THE UNITED STATES AS A DIRECT CAUSE OF RACIAL RESIDENTIAL SEGREGATION AND A DE FACTO CAUSE OF POVERTY AMONG AFRICAN AMERICANS

In 1926, the United States Supreme Court established zoning as a valid exercise of local governmental power in Village of Euclid v. Ambler Realty Co.\(^\text{11}\) Euclid also provides the legal rationale for protective zoning—the preservation of the quality of a residential environment.\(^\text{12}\) Certain residential communities in the United States, however, have historically received significantly greater protection than others, and "the color line" is the mark of this distinction.

The Euclid Court's rationale for allowing municipalities such wide-reaching control over what amounts to the mobility of persons outside their jurisdictions was based on a theory of self-protection.\(^\text{13}\) In essence, the Court reasoned that municipalities needed greater powers in order to fend off the problems of urbanization.\(^\text{14}\)

Notwithstanding this rationale, the end result of exercising this zoning power is to promote racial residential segregation. Zoning has this effect for two primary reasons. First, zoning historically impeded racial residential integration through race-based legislation.\(^\text{15}\) Second, zoning regulations increase housing costs thereby fostering economic, and, ultimately, racial exclusion.\(^\text{16}\) A by-product of the segregation that zoning fosters is the perpetuation of poverty among the excluded groups. Thus, zoning is both

\(^{11}\) 272 U.S. 365 (1926) (holding that a state has the right to separate incompatible uses). But see Joel Kosman, Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning, 43 CATH. U. L. REV. 59, 62 (1993) ("[T]he Court in Euclid, blinded us to zoning's exclusionary core and facilitated its role as an acceptable, neutral bureaucratic power.").

\(^{12}\) Euclid established distinct zoning districts in land use planning—residential, commercial, and industrial—and subcategories within each. Euclid, 272 U.S. at 380–81. Presumably, residential areas are protected by being segregated from other land uses.

\(^{13}\) See id. at 387, 394–95. For an analysis and critique of the Court’s rationale, see Kosman, supra note 11, at 96–97.

\(^{14}\) Euclid, 272 U.S. at 386–87.

\(^{15}\) See infra Part I.A.

\(^{16}\) See infra Part I.B.
an indirect cause of, and an inextricable link to, the perpetuation of poverty, inequality, and, in the extreme, apartheid.

A. Zoning as a Direct Cause of Racial Residential Segregation

To understand fully how residential segregation is an inevitable consequence of most residential zoning schemes in the United States, one must first take into account the economic and political inequalities that exist between Blacks and whites in this country and the history of zoning in the United States. Only then does it become evident that zoning has historically impeded integration by creating wealth-based enclaves. The sections that follow examine these aspects of zoning as they exist in the American context.

1. Zoning Is Rooted in Intentional Racial Segregation

In postbellum America, residential communities were substantially integrated. Covenants restricting racial residential integration were not implemented until the twentieth century. However, restrictive covenants proliferated after the well-known Buchanan v. Warley decision invalida-

17. But see Karl E. Taeuber & Alma F. Taeuber, Residential Segregation in the Twentieth-Century South, in THE RISE OF THE GHETTO 89, 91 (John H. Bracey, Jr. et al. eds., 1971) (asserting that until at least 1960, Charleston, South Carolina never had a racially segregative zoning ordinance, thereby implying that segregation occurred through "natural conditions and desires rather than by law"). However, the absence of exclusionary zoning in a segregated area does not conclusively refute the notion that zoning regulations are a cause of segregation. Indeed, neutral zoning regulations can have exclusionary effects. See infra Part I.A.3.

18. See Reginald L. Robinson, The Racial Limits of the Fair Housing Act: the Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority, 37 WM. & MARY L. REV. 69, 91 (1995); Richard C. Wade, Residential Segregation in the Ante-bellum South, in THE RISE OF THE GHETTO, supra note 17, at 10. Integration during this period was due largely to the fact that slavery made it efficient to have African Americans live close to or even in the same house as whites and to keep African Americans spatially dispersed. See John H. Bracey, Jr. et al., Introduction to THE RISE OF THE GHETTO, supra note 17, at 1, 2 ("After the Civil War, residential intermingling decreased, but not infrequently whites and [B]lacks were still living in the same block, or . . . whites were on one side of the street with Negroes on the other."); Wade, supra at 10. For well-documented studies of postbellum integration and the development of urban ghettos in America's largest cities, see CONSTANCE McLAUGHLIN GREEN, THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL 127 (1967); ALLAN H. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890-1920, at 7 (1967); OLIVIER ZUNZ, THE CHANGING FACE OF INEQUALITY: URBANIZATION, INDUSTRIAL DEVELOPMENT, AND IMMIGRANTS IN DETROIT, 1880-1920, at 274-375 (1982).

dated race-based zoning ordinances. Restrictive covenants served to segregate the areas in the United States that were previously integrated, and to further exacerbate the segregation in those that were not, well before zoning regulations were held constitutional in *Euclid*. By 1929, sixty percent of all Americans lived in areas where zoning regulations were a function of land use.

Although the Supreme Court has since held that race-based zoning violates the Equal Protection Clause, “nonexclusionary” zoning regulations have still resulted in de facto residential segregation. Nonexclusionary regulations are facially neutral and based in part on economic rather than racial exclusion in order to prevent property devaluation. However, because America’s poor have historically been disproportionately African-American, economically driven zoning regulations perpetuate residential segregation.

The most candid example of zoning’s roots in racial bias is the “Chinese Laundry Laws” adopted by local governments in the late nineteen-

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20. 245 U.S. 60 (1917). Restrictive covenants were later invalidated by the Supreme Court. See Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

21. Angry whites were frightened by the prospect of a loss of status from having Black neighbors. They were also fearful of a decline in the property value of their homes—a loss engendered by their own panic. In addition to physical intimidation, white homeowners initiated legal steps to stop the expansion of the Black ghettos. This took two forms: (1) residential segregation ordinances and (2) covenants... among homeowners not to sell to Blacks.

22. 272 U.S. 365 (1926).


25. See infra notes 50–53 and accompanying text.

26. Other ethnic minorities, particularly Latinos, also represent a disproportionate number of persons living at or below poverty level. See generally Nancy A. Denton & Douglas S. Massey, *Residential Segregation of Blacks, Hispanics, and Asians by Socioeconomic Status and Generation*, 69 Soc. Sci. Q. 797 passim (1988). However, to better compare the situation of African Americans and South Africans, the plight of other ethnic minorities will not be addressed in this Comment.
teenth century. The policy expounded for promulgating these laws was that the laundries, which were primarily owned and operated by Chinese immigrants, created a fire hazard because most operated in wooden buildings. In addition, these laws prohibited laundry owners from using their businesses to house diseased Chinese persons.

The neutral language of the Chinese Laundry statute at issue in *Barbier v. Connolly* did not amount to a Fourteenth Amendment violation under then-existing standards of judicial review. In fact, several similarly neutral, yet racially motivated, statutes were upheld during that period. However, in an era plagued by popular Chinese resentment and pervasive anti-Chinese violence, the Supreme Court could not ignore the racial motivations behind the enactment of these laws and, thus, invalidated the statute.

The Chinese Laundry Laws demonstrate how racial bias can remain safely ensconced in legislation until a deliberate effort is made to acknowledge it. Such laws also reveal how the ostensible regulation of land use can camouflage the subtle regulation of a class of persons. Nevertheless, the Supreme Court’s later decision in *Buchanan v. Warley* illustrates how courts typically view exclusionary zoning ordinances as only affecting property rights and rarely as a tool for racial bias.

In *Buchanan*, an African American brought an action for the specific performance of a contract for the sale of real estate. A local ordinance

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27. See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 27 (1885) (upholding a San Francisco ordinance that limited the number of Chinese laundries and thwarted the operation of existing laundries).
28. Id. at 27–30.
29. Id. at 28.
30. The challenged section of the statute, as characterized by the Court, “was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o’clock at night until six o’clock on the morning of the following day.” Id.
31. See, e.g., *Soon Hing v. Crowley*, 113 U.S. 703, 710–11 (1885) (upholding a statute that restricted laundries’ business hours to 6 a.m. to 10 p.m. despite substantial evidence of racial bias). Until 1890, San Francisco had a zoning ordinance that required all persons of Chinese descent to leave a certain San Francisco neighborhood within 60 days or face penalties. In re *Lee Sing*, 43 F. 359 (N.D. Cal. 1890) (overturning the statute).
34. 245 U.S. 60 (1917).
prohibited this transaction by "mak[ing it] unlawful for any colored person to move into and occupy as a residence . . . any house upon any block upon which a greater number of houses [were] occupied . . . by white people than are occupied . . . by colored people."\(^3\)

Despite its cognizance of prevailing racial prejudices,\(^3\) the Supreme Court conspicuously avoided invalidating the ordinance on grounds of racial discrimination, and, instead, based its decision on the right of whites to sell property without restriction.\(^7\) By choosing the latter rationale as the basis of its decision, the Court tacitly approved the use of racially motivated zoning ordinances.\(^3\) The Court’s passive stance and political "bowing out" are widely criticized as squandering an opportunity to effectuate the eradication of change in the future of racial residential segregation.\(^3\)

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35. Id. at 70–71.
36. Id. at 73, 80 ("This interdiction is based wholly on color; simply that and nothing more. . . . That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a degree of consideration, may be freely admitted.").
37. See id. at 78. [Can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser . . . for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?]

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.

Id. at 78, 82.
38. See id. at 81; see also Jon C. Dubin, From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color, 77 MINN. L. REV. 739, 745 (1993) ("The Supreme Court specifically declined to invalidate racial zoning on equal protection grounds."); Kosman, supra note 11, at 75 ("Rather than promoting the civil rights of ‘colored’ persons, the [Buchanan] decision rested upon . . . an unlawful infringement of property rights.").
39. See, e.g., Kosman, supra note 11, at 76–77. [By failing to invalidate the ordinance [at issue in Buchanan] on the social context of exclusion, . . . the Court protected only those “colored” persons who owned property. . . . The Court’s approach also ignored the effect that these ordinances could have on the ability of the “colored” race to rise within a “white”-dominated society and, more immediately, to live in more desirable neighborhoods of their towns.

Id. The Supreme Court continued its passive role in this regard even when it reaffirmed the Buchanan decision. In addition, it passed up subsequent opportunities to establish a social norm against race-based zoning legislation. See Dubin, supra note 38, at 750. Indeed, the Court “failed to supply reasoning or moral suasion to the principled distinction between protective ‘use’ zoning and apartheid.” Id.
As a result of *Buchanan*, racially restrictive covenants became the alternative measure through which to racially segregate communities. Indeed, the prohibition of blatantly race-based regulations provided the impetus to draft more cleverly fashioned, racially motivated regulations. Most of these new "neutral" regulations were allegedly purposed to champion property and home ownership rights. Eventually, these rights were deemed worthy of exclusive protection. Regulations enacted to maintain the character of a neighborhood that is already segregated are perfect examples of this phenomenon. Thus, zoning is partially rooted in racial exclusion because of its historical foundations as exemplified by cases such as *Barbier* and *Buchanan* and its modern application, which serves to preserve the inequitable distribution of property rights.

40. Dubin, supra note 38, at 750–51. Even the United States government participated in promoting alternative residentially segregative policies. Id. at 751. Government programs that were allegedly for the purpose of bettering general living conditions negatively impacted the intended beneficiaries through relocation programs in which families were uprooted from their neighborhoods and placed in substandard housing projects so that higher cost housing could be built. Id. at 751–56.

41. "Modern" zoning has come to be viewed as an essentially neutral, bureaucratic tool that, in its extreme form, could be used for racially- or class-based exclusionary purposes. As a result, it becomes impossible to see zoning's racist and classist bedrock, and to recognize that, at its core, zoning is an exclusionary device. Kosman, supra note 11, at 61.

Kosman also questions the difference between the Chinese Laundry Laws and present zoning regulations that give preferential treatment to certain property owners. See id. at 70 ("If . . . particular places where only certain 'types' of people lived, such as detached dwellings, were given preferable treatment over other types of buildings, such as apartment buildings . . . the similarities between the unlawful laundry ordinances and the modern zoning ordinances could not be so easily put aside."); see also James J. Hartnett, Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration, 68 N.Y.U. L. REV. 89, 99 (1993) ("Despite the successful efforts of fair housing legislation to curb the most blatant forms of housing discrimination, the isolation of the urban ghetto is perpetuated today by more subtle discriminatory practices such as exclusionary zoning." (emphasis added)).

42. See Kosman, supra note 11, at 82–83.

43. See, e.g., Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972) (upholding zoning ordinance designed to protect the allure of a small New England town despite demonstrated exclusionary effects); see also Paul K. Stockman, Note, Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing, 78 VA. L. REV. 535, 540 (1992) (arguing that municipalities who use zoning to "preserve the character of the neighborhood" are often masking a desire to preserve economic, ethnic, and racial homogeneity).

The concept of upholding the "character" of a particular neighborhood is itself suspect given that a prevalent characteristic about most suburban areas in the United States is that they are primarily white. See Hartnett, supra note 41, at 101.
2. Zoning Regulations Increase Housing Costs, Thereby Pricing Out Economically Disadvantaged Groups That Are Disproportionately Minority

The most significant way in which facially neutral zoning regulations perpetuate racial residential segregation is by increasing housing costs. By manipulating restrictions on matters such as lot size, lot width, building size, or the number of bedrooms in multiple-family units... a municipality can make housing within its borders too expensive for low- and moderate-income groups. Certain regulations, particularly those enacted to control population density in a given area, have served to significantly increase housing costs for low-income persons. Examples of such regulations are (1) minimum lot-size regulations, (2) single-family ordinances, and (3) the exclusion of apartment houses from residential classification. Moreover, the implementation of zoning regulations is costly. Part of that cost is spread to prospective residents, further augmenting the cost of housing in highly zoned areas.

Requiring a minimum lot size in order to build or maintain a house in a particular area is one of the most popular forms of zoning for population density control. However, depending on the minimum lot size that the regulation requires, this type of zoning regulation can greatly increase the cost of housing. The discretion exercised in creating such regulations is subject to little restriction. In general, community residents determine minimum lot sizes in a locality without input from the local government so long as the minimum size is not so large as to constitute a taking or other-

44. Exclusionary zoning regulations "include a plethora of devices that increase the cost of housing." Dubin, supra note 38, at 755. In addition, exclusionary zoning regulations thwart the development of residential housing in general, and low-income housing in particular. For example, some zoning regulations prescribe a maximum number of bathrooms or bedrooms in multi-family units or encroach upon the development of low-income housing by requiring approval through a public referendum. Id. at 756 n.74.

45. J. Gregory Richards, Zoning for Direct Social Control, 1982 Duke L.J. 761, 764. Richards argues that all zoning has direct socioeconomic implications and that zoning for direct social control is, in most instances, accepted by the judiciary. He defines zoning for direct social control as "a zoning ordinance... used... when land users are authorized to live in a residential district, or potential land users are excluded from the same, on the basis of relatively immutable personal characteristics that are explicitly defined in the ordinance." Id. at 765.


47. See id. at 141 (asserting that lot-size regulations increase housing costs significantly).
wise violate the Constitution. Thus, such regulations often go unscrutinized, and their effects unchallenged.

Depending on the demand for land in a particular area, requiring persons to purchase a minimum amount of land in order to live in that area would certainly exclude persons who are financially incapable of doing so. In this way, minimum lot-size requirements result in market interference: The quantity of available land parcels is artificially restricted, land becomes scarce, and, consequently, more expensive. Alternatively, even if the price of land remains constant, the fact that land can only be purchased “wholesale” precludes true price bargaining. For example, if no minimum lot-size requirement were imposed, some persons would still opt to purchase large plots of land, while others would buy only the space that they could afford. Such a “free market” would recreate access to, and mobility within, areas that have been artificially stymied by the imposition of minimum lot-size requirements.

Similarly, single-family ordinances impose economic constraints, while also reflecting moral judgments about the structure of lower income families by those having wealth and political control. Essentially, single-family ordinances prohibit “nontraditional” families from living in particular areas and, thus, among “traditional” families. Nontraditional families are generally defined in zoning ordinances as families with more than two persons unrelated by blood, adoption, or marriage living in the same household. Data suggest that African Americans comprise a disproportionate number

48. See id. at 67. The litigation that has occurred over lot-size requirements offers no concrete indicia of what lot-size requirement would constitute a constitutional violation. Courts have upheld ordinances requiring as much as 160 acres and invalidated ordinances requiring one acre. Id. In some cases, lot size is dictated by the availability and cost of land derived from its location in relation to employment opportunities. Id. at 257.

49. Minimum building-size regulations and setbacks create similar problems by artificially dictating a minimum price for a house within an area, and not letting market conditions prevail.

50. Richards, supra note 45, at 769–70; cf. Robin M. Collin & Robert W. Collin, Are the Poor Entitled to Privacy?, 8 HARV. BLACKLETTER J. 181, 212–13 (1991) (asserting that “[t]he definition of family found in zoning ordinances reflects our idealized notion of family.”). However, the average two-parent, two-child family’s increasing difficulty in purchasing a home, coupled with the constantly evolving structure of family composition (e.g., homosexual couples are denied the right to marry and thus cannot form the legal relationship required by the statute), bespeak the need to modernize the anachronistic definition of family to include the diverse living arrangements and moral suasions in contemporary American society. See id. at 213 (“The reality of the traditional family today is far removed from those families encapsulated in suburban zoning ordinances. We are, in demographic fact, moving quickly away from the traditional family.”).
of nontraditional families and are, thus, disproportionately affected by single family ordinances.\(^{51}\) Such regulations have an increasing exclusionary impact as the percentage of nontraditional families rises overall. In addition, single family ordinances create an economic impediment because fewer unrelated persons are allowed to live together, thereby reducing the number of salaried persons that can reside in the same household when such persons do not together constitute a traditional family.

The rationale driving density control regulations that work against nontraditional families is based on the presumption that such families are not "self-limiting," as are traditional families, and, therefore, tend to expand in number and collectively generate congestion.\(^{52}\) Municipalities also justify their exclusion of nontraditional families under the guise of protecting the general welfare.\(^{53}\) However, despite plausible justifications of promoting the general welfare,\(^{54}\) "[a]t its theoretical core, [a single family zoning ordinance] balance[s] the individual's right to his property against the 'collective' property right of the community at large."\(^{55}\)

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51. In recent years, the African-American community has broken from the typical family structure because of the increase in unwed mothers and an increased life expectancy, causing elderly relatives to live together or with their children. "In terms of purchasing a house on a large lot with a specified number of rooms, [nontraditional] households, without two people earning money, are forcefully excluded from the secure, high-quality housing of the suburbs. These nontraditional households are likely to be female, poor, and Black." See Collin & Collin, supra note 50, at 213 n.182.

52. See id. at 212.

53. "We try to encourage those [families] that can afford to fit our stereotypical idea of family to reside in places where they are sheltered from 'negative' and 'corrupting' forces in our society." Id. at 212–13. But see Swan, supra note 19, at 20 ("[G]overnment may contribute to discrimination by permitting white neighborhoods in the path of an expanding African American population to zone against occupancy by not allowing more than one family per house." (citing GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 80–81 & n.9 (2d ed. 1971))).

54. For example, some zoning advocates desire to segregate the races on the premise that it would promote general societal welfare. The argument is that an economically homogeneous society spawns independent thought, interest in national, state, and local affairs, and self-respect. See, e.g., Robert H. Whitten, Zoning and Living Conditions, 13 PROC. NAT'L CONF. CITY PLAN. 27–28 (1921). However, while there is a strong correlation between economic homogeneity and racial segregation, the correlation is not altogether perfect given that extreme wealth and poverty exist within all races.

55. Kosman, supra note 11, at 86. Note that even the dichotomy of community versus individual right is still based on the notion of membership within a greater community and, thereby, excludes and completely ignores the rights of those who do not have the opportunity to enter these desired communities. See id. at 87.
Yet another kind of zoning regulation that tangibly increases housing costs and is, by far, the most invidious, is one that excludes apartment houses from residential classification and, instead, categorizes them as a commercial use. The rigid distinction between commercial and residential use limits the land space that can be used for high-density residential development. The resulting scarcity of land space inevitably increases the cost of housing according to simple market theory: When there is a limited supply of a commodity—e.g., land upon which to build high-density housing—and a corresponding great demand—e.g., numerous persons who cannot afford to live in low-density suburban areas or purchase “median-priced” homes within their community—the cost of that commodity will naturally rise, allowing only the highest bidders to have access to the commodity.

The rationales for separating apartment houses from detached units are all based on maintaining and promoting a quality of life that is desirable to all persons regardless of race or economic status—low traffic, low noise, low congestion, and sufficient air space. However, the biased protection and exclusion fostered by this distinction are manifest. For example, if overcrowding is a general societal concern, then it would seem logical that apartment houses, which unquestionably cause congestion, should not be zoned together. Unfortunately, the underlying bias in favor of detached housing, which stems from a moral and social presumption that detached

56. Edward D. Landels, Zoning: An Analysis of Its Purposes and Its Legal Sanctions, 17 A.B.A. J. 163, 165 (1931) (“If a duplex dwelling may be prohibited in one district on the grounds of health and safety, it is embarrassing to try and justify ten story apartments in another.”). The absurdity of this double standard is compounded by the fact that, in most zoning ordinances, apartment houses, which, by definition, shelter more persons than detached single- or two-family homes, are allotted significantly less space than other uses. For example, the zoning ordinance upheld in Euclid allowed the plaintiff developer to use 150 feet exclusively for single-family housing, 470 feet exclusively for two-family dwellings, and only 130 feet for the nonexclusive use by apartment complexes. See Euclid, 272 U.S. at 365; see also Hartnett, supra note 41, at 98 (“[S]elf-interested land use policies have resulted not only in the exclusion of a new generation of modest-income families, but also the exclusion of racial minorities in particular.”).

57. The Ohio Supreme Court recognized this fact in a 1925 opinion that determined the validity of a zoning ordinance that prohibited a developer from erecting an apartment building on his lot. City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 844–45 (Ohio 1925), overruled by Hudson v. Albrecht, Inc., 458 N.E. 2d 852, 855–56 (Ohio 1984) (noting that, because apartment houses tend to bring more traffic and noise into an area, they should not be built in areas already plagued by heavy traffic and high congestion).
housing receives undeserved special protection at the expense of apartment dwellers, causes legislatures to defy logic.  

Finally, zoning involves excessive regulations that raise the general costs of housing. For instance, most zoning regulations provide that uses can be rezoned or special exceptions to the regulations can be granted. However, the necessary approval processes and permit requirements add to administrative and development costs, thereby increasing the eventual cost of housing.

Admittedly, population density control is a valid exercise of zoning power and a protection of property rights as they have been inequitably established in American society. In fact, there is a surfeit of economic justifications for exclusionary zoning that are primarily tied to property rights. However, while economic segregation is a large factor leading to racial residential segregation, racism also plays a significant role in its promotion. The exclusionary roots of zoning and the resulting residential segregation are sufficient indicia that some facially neutral regulations are motivated by racist ideology. Indeed, even the most legitimate econ-

58. Kosman, supra note 11, at 79.
59. See Hartnett, supra note 41, at 97.
60. Two prominent scholars have characterized the justifications for, and purpose of, exclusionary zoning in the following manner: "[Exclusionary zoning] . . . essentially close[s] an entire community to unwanted groups—typically people of low income who might put a heavy burden on the public fisc yet at the same time contribute little to it, resulting in increased property taxes and reduced land values throughout the community." JESSE DUKEMINIER & JAMES E. KRAIER, PROPERTY 1104 (3d ed. 1993) (emphasis added).
61. "The nature of zoning is such that it is difficult to disentangle its control over physical development per se, its influence over the economic status of prospective residents, and its use to discriminate against specific ethnic or racial groups." ADVISORY COMM. TO THE DEPT OF HOUSING AND URBAN DEV., NAT'L ACADEMY OF SCIENCES, NAT'L ACADEMY OF ENG'G, FREEDOM OF CHOICE IN HOUSING: OPPORTUNITIES AND CONSTRAINTS 31 (1972), quoted in EDWARD M. BERGMAN, ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS 15 (1974). Furthermore, this is suggested by the fact that white neighborhoods in the United States are far more economically integrated than African-American neighborhoods, which leads one to believe that economic exclusion may be one, but certainly not the sole, motivation for residential segregation.
62. As one commentator points out, "Because government-approved, or de jure, segregation had its genesis in theories of white supremacy, it is not surprising that de facto inequality often followed separateness." Dubin, supra note 38, at 758. Furthermore, studies show that when whites think of living with Blacks they envision an immediate influx of poverty into their neighborhoods. Richard H. Sander, Housing Segregation and Housing Integration: The Diverging Paths of American Cities 9 (Dec. 1, 1988) (unpublished manuscript, on file with author). Thus, it is not surprising that some residential zoning regulations maintain a certain quality of housing that is economically unfeasible for many African Americans to obtain.
omic arguments should be challenged if they are products of racist underpinnings. Furthermore, economic arguments, aside from their merit or legitimacy in economic terms, simply fail to address matters of racial justice, which should be accorded higher value than abstract economic logic.

Even if one considers the earnest ideal of zoning regulations to create and sustain economically and socially viable communities, the fact remains that a tangible margin of de facto class-based exclusion occurs as a result of the cultivation of suburbia. Moreover, the objective of a zoning regulation need not be the deliberate exclusion of low-income housing to cause the same to occur: "Facially neutral local statutes can exclude vulnerable blocs." In sum, zoning promotes economic segregation through increased housing costs and disproportionately affects economically disadvantaged classes, which "as a matter of American history have tended to be disproportionately [African-American]." However, because segregation transcends all economic classes in the African-American community, it is clear that zoning, to the extent that it increases housing costs, is not the sole cause of residential segregation. Nonetheless, it is a real one.

63. For example, in a discussion on what caused whites to form a community group called the "Neighborhood Improvement Association" in response to what they considered a "Negro Invasion," one author notes that while loss of property value was a key concern to the whites, it was a loss "engendered by their own panic." Bracey et al., supra note 18, at 3.

64. "To the extent the ideal community is removed from the reality of our multiple class, multi-ethnic urban regions, this ideal serves the purpose of perpetuating the exclusion of poor people from housing opportunities." Collin & Collin, supra note 50, at 208.

65. Id. at 209.


67. From as far back as Euclid, courts have acknowledged that economic segregation was an indubitable effect of zoning regulations. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), rev'd, 272 U.S. 365 (1926) ("In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."). But see Whitten, supra note 54, at 28 ("A reasonable segregation is normal, inevitable and desirable and cannot be greatly affected, one way or the other, by zoning.").

68. Swan, supra note 19, at 42; see also Collin & Collin, supra note 50, at 213 n.182. Furthermore, 57% of all American families cannot afford a "median-priced" house in the neighborhoods in which they live. Iver Peterson, Battling Barriers to Affordable Homes, N.Y. TIMES, Aug. 18, 1991, at 10-3. African Americans and Latinos comprise 75% of such families. Moreover, 33% of African Americans are below the poverty level, as compared to only 9% of whites. Id.

69. See Massey & Denton, supra note 19, at 84–88 (suggesting that the residential segregation of African Americans is not linked to economic status because segregation exists across all income levels).
B. Residential Segregation as a Direct Cause of Poverty Among African Americans

Residential segregation is one of the countless causes of urban poverty in America. Moreover, without racial residential segregation, a significant amount of the urban poverty that plagues America today and nourishes current sociological and political debate would not exist. The following discussion will show how residential segregation exacerbates social ills such as unemployment and substandard education—both products and sources of poverty—and culminates in a cycle of inescapable indigence.

For example, class-based residential segregation exacerbates social ills by concentrating a weak tax base in a specific area, thereby creating substandard educational facilities that turn out unemployable young adults. In addition, the relocation of companies to the suburbs, in conjunction with limited accessibility to housing in the suburbs, indirectly escalates the unemployment rate in urban areas. As a result, suburbanites generally

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70. "Although exclusionary zoning practices alone did not create the racially segregated communities we call "urban ghettos," such zoning practices have virtually ensured that ghetto residents—typically [B]lack and Hispanic—will remain isolated from mostly white suburbanites." Hartnett, supra note 41, at 98.

71. "If it were not for inner-city segregation—enforced by public policy—it is doubtful that we would today be conducting debates about the alleged underclass, with its concentration effects." Dennis R. Judd, Segregation Forever?, NATION, Dec. 9, 1991, at 742. Of course, there are other notable causes of poverty in the African-American community, namely unemployment and substandard education. However, these additional causes do not diminish the very tangible effect that residential segregation has on this community. See Massey & Denton, supra note 19, Preface (claiming racial residential segregation is the "principal structural feature" of the perpetuation of urban poverty and racial inequality in America today).

72. Massey & Denton, supra note 19, at 130.

Poverty, of course, is not a neutral social factor. Associated with it are other social ills such as family instability, welfare dependency, crime, housing abandonment, and low educational achievement. To the extent that these factors are associated with poverty, any structural process that concentrates poverty will concentrate them as well. Id.; see also Paul H. Brietzke, Urban Development and Human Development, 25 IND. L. REV. 741, 741 (1991) ("Along with economically disadvantaged rural areas, the ghettos or slums of our cities form an entrenched Third World of the United States. Levels of ghetto unemployment and underemployment, substandard and nonexistent housing, malnutrition, health care, and education approximate those found in many Third World countries . . . ."

73. Hartnett, supra note 41, at 105. But see Farley & Allen, supra note 21, at 156 (stating that there is only "mixed support" for the proposition that residential segregation is a factor in urban unemployment because the rate of unemployment among suburban African Americans is nearly the same as that of those living in urban areas).
receive the dual benefit of living in a desirable area and having greater employment opportunities.

Moreover, poverty creates a dearth of adequate goods and services because impoverished neighborhoods typically cannot retain or establish a viable business sector. The result is that no common interests are shared, and, thus, none of the alliances that lead to the political and, consequently, economic advancement of other racial groups are formed. Thus, these other groups have no vested interest in forming political alliances with the segregated African-American community. As a result, all issues "cleave along racial lines."

Furthermore, residential segregation and its resulting poverty have historically confined African Americans to urban areas in which rental housing pervades. Upon acquiring wealth, most people seek to improve their living conditions because better living conditions afford increased opportunity for socioeconomic success. People usually better their living conditions by moving into a community that is more economically prosperous than the one from which they departed. However, once shut out from ownership opportunities, African Americans, who are statistically renters of real estate rather than owners, cannot accumulate the capital necessary for upward residential mobility. In fact, one commentator has found zoning to be the root cause of residential immobility among African Americans and an impediment to realizing the "bootstrap" ideal that is often suggested as the nostrum for urban poverty.

74. Massey & Denton, supra note 19, at 136.
75. But cf. Farley & Allen, supra note 21, at 155 (asserting that African-American clusters temporarily increase political representation because of a general tendency of persons to vote for members of the same race).
76. See generally Massey & Denton, supra note 19, at 153-60 (stating that the residential segregation of African Americans impedes pluralist politics).
77. Id. at 155. This holds true for all minority groups that are spatially isolated from one another. Id. at 157.
78. Swan, supra note 19, at 27.
79. In his article advocating for invalidation of exclusionary ordinances to establish a more "inclusionary jurisprudence," Joel Kosman recounts how his cursory inspection on the New York City subway system of the outside neighborhoods provoked candid questions and ostensible answers about why residential racial segregation persists in that city. "Why do people living amidst this decay not pick themselves up and leave? I found zoning to be the root of the answer. . . . [Z]oning also seemed to prevent people from moving into various suburban municipalities by establishing certain economic and racial barriers to keep such suburbs homogenous and affluent." Kosman, supra note 11, at 60.
Zoning also creates homogeneity in types of housing, and, thus, economically homogenous communities. Through the use of zoning power... local governments have maintained the beauty and homogeneity of their borders at the expense of those who could not afford to surmount the barriers erected through zoning ordinances. It is the existence of racially and economically segregated areas and the subsequent formation of urban ghettos that encapsulate economic turmoil in economically underprivileged areas.

Finally, spatial concentration of poverty is the most ostensible and fatal consequence of residential segregation. Concentrated poverty develops according to a simple rationale: If overall poverty increases among members of an excluded group, the geographic concentration of poverty in the area in which they live increases directly. Spatial segregation provides a buffer for whites when poverty rates increase in general because a large portion of poverty's effects is concentrated in African-American neighborhoods to which whites have no ties or economic dependency. As a result, African Americans bear the brunt of this intensified poverty, while whites are spared from the full impact of the economic decline.

In sum, by fostering social ills in excluded communities and facilitating an overall increase in concentrated poverty through residential segregation,
II. AMERICAN APARTHEID AND ITS PROJECTION FOR SOUTH AFRICA

Because the historical oppression of South Africans is substantially similar to that of African Americans,87 the history of segregation and zoning in the United States provides a basis for formulating a progressive zoning strategy for South Africa. The legal status and rights of South Africans under the regime of apartheid greatly resemble those of African Americans during segregation. In addition, like South Africans, African Americans were, and consistently remain, poorer, politically weaker, and disproportionately excluded from quality housing as a result of certain zoning regulations.

By drawing comparisons between issues of racial residential segregation in South Africa and the United States, and ultimately devising a new and different zoning strategy, South Africa can avoid the pitfalls created in postsegregation America and move toward achieving residential equality and economic integration. Furthermore, comparing the United States and South Africa can serve as a helpful guide for social change because “both histories illustrate how the legal system has frequently operated as a tool to oppress [B]lacks.”88

Presently, residential segregation in South Africa is strikingly analogous to the segregation existing in major urban areas in the United States. This fact is disturbing evidence of America’s failed efforts at integration.89 Eighty-six percent of white suburbanites in the United States live in communities that are less than 1% Black. Seventy-five percent of white


Americans live in suburban or rural areas as compared to only 25% of African Americans. Both in 1969 and in 1991, African Americans dominated the populations of central cities. Thus, in comparing the degree of residential segregation in South Africa, a country three years out of a rigid apartheid regime, and in the United States, a country thirty years out of de jure segregation, one finds little difference.

A. A Comparison of Economic Disparity Between Blacks and Whites in South Africa and the United States

One of the economic characteristics common to the United States and South Africa is the continual concentration of wealth among whites in both countries. The income differentials between Blacks and whites in both countries offer substantial evidence of the historical and contemporary wealth disparity. For example, since the collapse of South Africa's apartheid regime in 1991, Afrikaners have averaged nearly six times the annual income of South Africans. When American apartheid legally disintegrated in the early to mid-sixties, the median family income of white families was nearly double that of African-American families. This gap has hardly narrowed in the thirty years following desegregation.


While the majority of South Africans live in rural areas and the majority of African Americans live in central cities, this difference does not decrease the similarity between the historical oppression of South Africans and African Americans. The overall poverty level of the two groups is significantly larger than that of whites in both countries. This suggests that the relative geographic location of an oppressed group is irrelevant if the concentration of wealth is elsewhere.

91. In South Africa, over 90% of South Africans live in segregated areas. In the United States, more than 50% of African Americans live in racially segregated areas. See MASSEY & DENTON, supra note 19, at 62–67.

92. See SOUTH AFR. INST. OF RACE RELATIONS, RACE RELATIONS SURVEY 1994/95, at 493 (1995) [hereinafter RACE RELATIONS SURVEY 1994/95]. This figure was estimated from a survey undertaken by the South African Advertising Research Foundation between 1987 and 1992. Id.

93. See SELECTED CHARACTERISTICS: MARCH 1969, supra note 90.

Horrifying statistics of poverty, illiteracy, and unemployment suggest that the economic disparity between whites and South Africans, and between whites and African Americans, is likely to persist. For example, gross unemployment characterizes the economic history of both South Africans and African Americans. In 1991, 23.3% of South Africans were unemployed as compared to only 4% of Afrikaners. In 1969, the unemployment rate for African Americans was approximately 20%. In 1993, the unemployment rate of African Americans was more than double that of whites, totalling 14% and 6% respectively, and has, for the most part, steadily increased in recent years.

In addition, the poverty among African Americans and South Africans is wildly inconsonant with the poverty rates of whites. For example, in rural areas, 68% of South Africans live in poverty. This figure reflects a poverty level nearly double that of South Africans in urban areas and sixty-eight times that of Afrikaner urbanites. Overall, there are twelve times as many South African households living below the poverty level as there are white households. Moreover, 60% of South Africans live without electricity. Comparatively, in 1965, almost 47% of African Americans were considered poor as compared to only 13% of whites. The current statistics from the 1991 Census show little change in the poverty ratio between African Americans and whites.

Inadequate education is certain to impede any group from achieving wealth through peaceful means. Thus, the high illiteracy rates and low school enrollment among South Africans provide a dismal forecast. A 1993 study conducted by the Development Bank of Southern Africa revealed that 46% of South Africans are illiterate, and the percentage in rural areas is substantially greater. In addition, the educational

95. **RACE RELATIONS SURVEY 1994/95**, supra note 92, at 487. The overall unemployment rate in May 1994 was estimated at 30%. Id.
96. **U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, NEGRO POPULATION 71 (1970).**
97. **BENNETT, supra note 94, at 9.**
98. See id. at 100.
100. Only 1% of Afrikaners residing in urban areas live below the poverty level. Id.
101. See id. ("[I]n 1993 there were 95,000 African households, . . . and 8300 white households living below the poverty line.").
102. **SELECTED CHARACTERISTICS: MARCH 1969, supra note 90, at 6.**
103. **BENNETT, supra note 94, at 2, 15.** Thirty-three percent of African Americans live in poverty as compared to only 11% of whites. Id. Currently, 3.5 times the number of African-American families live below poverty than white families. Id.
104. **RACE RELATIONS SURVEY 1993/94, supra note 99, at 724.**
advancement of South Africans lags terribly behind that of whites. According to the 1991 Census, 73.6% of the population has less than the American equivalent of a junior high school or eighth grade education.¹⁰⁵ South Africans comprise an astoundingly high percentage of this total. Moreover, in 1991, nearly four times as many Afrikaners as South Africans received certificates, degrees, or diplomas from universities in South Africa.¹⁰⁶ These numbers are particularly alarming in light of the nearly six-to-one population ratio between Blacks and whites in South Africa.¹⁰⁷ Similarly, in 1965, half of the African-American males between the ages of twenty-five and twenty-nine had completed fewer than four years of high school.¹⁰⁸

Furthermore, African Americans and South Africans are significantly disadvantaged on all basic levels in comparison to whites. This was true for African Americans during the period right after desegregation and holds true today. Likewise, South Africans are presently in the same transitional period as that endured by African Americans at the end of segregation, and are experiencing the same lingering inequalities between whites and Blacks with no positive indication that the future will be any different unless affirmative and innovative steps are taken.

B. A Comparison of the Political Disenfranchisement of African Americans and South Africans

Political power is the wished-for tool of the underclass. South Africans stand a good chance of gaining considerable political power by sheer numbers alone if the new government is steadfast in implementing democracy at all levels of government. By contrast, in the United States, a self-proclaimed democracy since its inception, the political power of African Americans will always be limited by their minority status. As former-Judge Higginbotham aptly noted,

[p]erhaps the single most significant difference [between the United States and South Africa] is the fact that from the inception of the United States, whites have constituted a numerical majority and have acquired a predominance of economic and political power. . . .

¹⁰⁵. See id. at 90. The survey states that 37.4% of the population has a "standard six or higher qualification," which is equivalent to a junior high school or eighth grade education in the United States.
¹⁰⁶. See RACE RELATION SURVEY 1994/95, supra note 92, at 230.
¹⁰⁷. See infra note 111 and accompanying text.
¹⁰⁸. SELECTED CHARACTERISTICS: MARCH 1969, supra note 90, at 2, 10.
Because of the secure political and economic power, and numerical dominance, of whites in the United States, accommodation of the legitimate demands of [B]lacks would not result in a substantial diminution of their power.¹⁰⁹

This "minority/majority inverse" between Blacks in South Africa and in the United States creates a crucial distinction in their similar histories and future solutions.¹¹⁰

In South Africa, whites risk a near total loss of power and wealth if the interests of the majority are put first. Recent statistics fortify this assertion: the total population of South Africa as of 1993 was roughly 40 million,¹¹¹ of which South Africans comprised 76% (30.7 million), while whites comprised a mere 13% (5.2 million). Thus, any post-apartheid political disenfranchisement of South Africans would develop at an economic and, then only by default, racial level because South Africans have the immeasurable advantage of being the majority in a democratic society.

In sum, bridging the economic gap between Blacks and whites in South Africa will, in many respects, be more difficult than in the United States because of the inordinate economic disparity between Blacks and whites in South Africa. Moreover, creating an informed and active electorate will be a significant challenge given the pervasive lack of education among the South African citizenry.¹¹²

C. A Comparison of the Historical Legal Oppression of African Americans and South Africans and Their Residential Segregation from Whites

Part of the problem of understanding apartheid is that many persons do not comprehend its pervasiveness and crushing venality.

109. Higginbotham et al., supra note 88, at 775 (footnotes omitted).
110. The President's Council report published in August 1992 relays this prediction. RACE RELATIONS SURVEY 1993/94, supra note 92, at 94–95. Another study forecasts an estimated increase of more than twenty million South Africans in residential urban areas over the next four years. See id. at 95.
111. RACE RELATIONS SURVEY 1994/95, supra note 92, at 4–5. This figure and all population statistics for South Africa in this Comment were determined by adding the population estimate of the Urban Foundation, which updated the estimate from the 1991 census but did not include population statistics from the 10 "independent" homelands in South Africa, and the estimate provided by the Development Bank of Southern Africa in 1991 of the population of those excluded areas. See id.
112. See supra Part II.A.
Apartheid affects all aspects of a Black person's life. Under apartheid laws, Blacks have no right to equal or integrated housing; no right to freedom of movement, assembly or association; no right to equal political representation; and no right to equal or integrated education.\textsuperscript{113}

Under apartheid, housing segregation existed on two fronts. First, territorial residential segregation relegated South Africans to rural areas encompassing only thirteen percent of the country.\textsuperscript{114} This isolation inevitably created a severe housing shortage for South Africans. Second, urban residential segregation designated certain pockets for South Africans within the "white only" areas.\textsuperscript{115} A web of intricate segregative sub-policies existed under the rubric of urban residential segregation such as homelands, group areas, and influx control. These policies regulated land division and segregation within business and residential districts, and the mobility of South Africans between racially designated areas.\textsuperscript{116}

The primary legislative acts that made this structured residential segregation possible were the Land Acts of 1913 and 1936, and the infamous Group Areas Act enacted in 1950. The South African parliament passed the Land Acts mainly in response to disgruntled Afrikaners desiring segregation. As a result of the Land Acts' enactment, droves of South Africans were brutally ejected from their homes, limited to roughly half the land they previously occupied, and prohibited from purchasing land outside of the areas designated to them under the Acts.\textsuperscript{117} Before 1913, there were few legal limitations on South Africans' right to purchase property.\textsuperscript{118} However, the 1950 Group Areas Act ordered the establishment of racially segregated residential areas for nonwhites living in white areas, with its ultimate goal being the absolute segregation of all ethnic groups across business and residential lines.\textsuperscript{119} Moreover, the Group Areas Act specifi-
cally regulated interracial property transactions: Persons were prohibited from owning property outside their designated area. 120

Very calculated rationales went into devising these regulations, as is evidenced by a statement of the former Prime Minister during parliamentary debates:

If we could succeed just to this extent in keeping the Native population in the reserves—and getting them to live there, . . . —if we could achieve that measure of separation, then . . . white South Africa will be saved. 121

In essence, the goal of governing Afrikaners was to remove South Africans from all aspects of life except the provision of cheap labor. 122 During the latter years of apartheid, the people of South Africa directly challenged many of these policies in court and through various protest movements, but largely to no avail. 123 In more recent years, integration has slowly occurred through the migration of South Africans into white areas, precipitated by the decreased enforcement of the Group Areas Act when South Africa came under international scrutiny. However, the greatest change occurred

120. Id. The Group Areas Act was to function as a catchall component to the 1913 and 1936 Land Acts by providing for residential segregation on all levels that the Land Acts had missed. Id. at 787 n.96; see also HORRELL, supra note 118, at 27–28. It was also impossible for South Africans to "marry into" another area. For example, the Group Areas Act held that a white marrying a South African was considered a South African for the purposes of the Group Areas Act. R. v. George, 1954(2) S.A. 243, 246 (N).

121. Higginbotham et al., supra note 88, at 780 n.62 (quoting Dr. H. F. Verwoed, Minister of Native Affairs).

122. Id. at 781 n.69.

123. Id. at 782; see also Mpanele v. Botha, 1982(3) S.A. 633 (C) (action enjoining the enactment of a statute by Parliament which, if granted, would impose additional procedural limitations on the process of granting homelands independence); Mustapha v. Receiver of Revenue, Lichtenburg, 1958(3) S.A. 343 (A.D.) (challenging the 1936 Land Act which prohibited South Africans from owning land and non-Africans from living in "African" areas). In both cases the courts upheld the segregative acts of urban residential and territorial segregation. Higginbotham et al., supra note 88, at 785. By contrast, the Group Areas Act has never been directly challenged.


For a general background of the history of popular resistance and protest against apartheid legislation, see ABEL, supra note 88; WILLIAM COBBETT & ROBIN COHEN, POPULAR STRUGGLES IN SOUTH AFRICA (1988); EARL DENMAN, THE FIERCEST FIGHT: A DOCUMENTED ACCOUNT OF THE STRUGGLE AGAINST APARTHEID IN SOUTH AFRICA (1985); THOMAS KARIS & GWENDOLYN M. CARTER, FROM PROTEST TO CHALLENGE: A DOCUMENTARY HISTORY OF AFRICAN POLITICS (1972–77).
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in 1991 when the South African parliament repealed the Group Areas Act and passed the Abolition of Racially Based Land Measures Act (the "Act"), marking the end of apartheid.\(^ {124} \) Presently, the Act provides for the reallocation of undeveloped rural and government-owned land tenured under apartheid legislation.

Despite these very significant victories in the history of South Africans, residential integration has not materialized, nor is it expected in the near future.\(^ {125} \) Institutionalized segregation was challenged more successfully in the United States.\(^ {126} \) In fact, several policies and programs aimed at fostering integration arose out of the litigation brought by African Americans against segregation and its progeny.\(^ {127} \) Although many of the challenged laws were enacted through local governments and were thus primarily supported by politically empowered local communities, the United States federal government also expressly promoted racial segregation at a national level by denying minorities access to federally subsidized housing in white areas and demanding that white suburbs have racially restrictive covenants before they could receive such funding.\(^ {128} \) As a result, a very

\(^{124}\) Proposed amendments to the Act are still awaiting passage by Parliament. If passed, the amendments will serve to include land in urban areas seized from South Africans under the 1966 Group Areas Act, extend the statute of limitations for filing land restitution claims, and permit investigation into privately owned land procured under apartheid legislation. RACE RELATIONS SURVEY 1993/94, supra note 99, at 326.

\(^{125}\) Id. at 344. Furthermore, a 1992 survey conducted by The Estate Agent, a South African news publication, exposed the "negligible" increase in South Africans purchasing homes in white areas since the repeal of the Act. Id.

\(^{126}\) "The 1960s mark a crucial turning point in race relations. Old policies were challenged and replaced by new policies that eventually produced modest declines in segregation." Farley & Frey, supra note 89, at 26.

However the comparative success of the civil rights movement in ending residential segregation should not be misconstrued as an easy battle:

In the 1960 presidential campaign, Kennedy vowed to end racial discrimination in housing with the "stroke of a pen," but civil rights groups pressured him for almost two years before he issued a timid Executive Order banning discrimination, but exempting all existing housing and all new housing except that built or directly financed by the Federal Government.

Id. at 26. Furthermore, the enactment of the heralded Fair Housing Law of 1968 was in many respects an effort to mollify the outrage of African Americans over the murder of the foremost civil rights leader of that time, Dr. Martin Luther King, Jr. See id. For a critical analysis of the extent to which civil rights laws have triumphed over racial oppression in the United States, see generally Crenshaw, supra note 3.


\(^{128}\) Between 1930 and 1950, the U.S. government provided mortgage insurance for three out every five homes purchased in America. Prospective mortgagors were required to use the subsidy for property in racially segregated areas and areas of low minority presence based on the
small percentage of the homes purchased under this program were purchased by minorities. In sum, South Africans were systematically and legally denied the right to integrated housing whereas African Americans were initially precluded by law and later by de facto segregation resulting from lawful regulations.

The future of integration in both countries is uncertain. Even in the face of declining residential segregation “the racial attitudes of whites may limit integration” in America. For example, most whites in the United States oppose integration altogether, or will tolerate it only if the integrating African Americans have the same socioeconomic status as such whites and will constitute a numerical minority in the neighborhood. The result of this scenario is that, in the United States, the migration of a small yet significant number of African Americans to smaller metropolitan areas in which whites are a solid majority may be the window to integration since whites will not fear becoming a minority in the residential area. In fact, sociologists tracing decennial patterns in residential segregation predict such a migration is the future trajectory of integration in the United States. In South Africa, however, a more immediate solution is necessary in order to avoid the perpetuation of racial residential segregation through zoning.

III. CENTRALIZED PERFORMANCE ZONING AS AN EFFECTIVE MEANS OF ACHIEVING RESIDENTIAL INTEGRATION

Surveys predict that by the year 2010, at least 69% of South Africans will live in urban areas while only 31% will live in rural areas. How this geographical shift in composition will occur is unknown, and it is unlikely to occur without affirmative steps toward economically integrating Black and white residential communities in South Africa. In the interim, South Africa must plan its urban landscape cautiously and intelligently in order to extinguish the burning embers of apartheid. South Africa must learn from the United States’ failure to achieve racial residential integration through

theory that the presence of minorities substantially lowered property values. In addition, mortgagees in the private sector adopted the government’s lending policy, thereby making it nearly impossible for minorities to purchase homes in nonminority areas. See Beth J. Lief & Susan Goering, The Implementation of the Federal Mandate for Fair Housing, in DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 228–29 (Gary A. Tobin ed., 1987).

129. Farley & Frey, supra note 89, at 40.
131. Denton & Massey, supra note 26, at 1–14; Farley & Frey, supra note 89, at 41.
traditional zoning strategies. As evidenced by the use of facially neutral, yet discriminatory, zoning regulations in a racially and economically divided postsegregation United States, certain zoning regulations will only serve to perpetuate racial divisions. Thus, new zoning strategies are sorely needed.

One of the primary objectives of any zoning scheme adopted by South Africa should be economic integration, which inevitably results in some degree of racial integration. With this objective in mind, I propose and evaluate centralized performance zoning as a viable scheme for residential zoning in South Africa. I demonstrate the feasibility of this scheme by illustrating its hypothetical application in the South African province of KwaZulu/Natal. Finally, I assess the extent to which centralized performance zoning comports with the South African Constitution and the RDP.

A. What Is Centralized Performance Zoning?

In order to understand centralized performance zoning, one must have at least a synoptic understanding of performance zoning and how it differs from traditional zoning schemes. Performance zoning is a method of regulating land use that does not distinctly segregate uses, but, rather, relies on a developer’s compliance with performance standards in order to avoid nuisance. It offers a comprehensive and dynamic scheme for land use planning. In fact, the absence of rigid land use districts is the principal factor distinguishing performance from traditional zoning. Furthermore, performance zoning’s elasticity allows for case-specific evaluations, consistent determinations, and agile responses to fluctuating market conditions.

These unique aspects of performance zoning serve to further differentiate performance from traditional zoning because of their theoretical and practical ability to produce a more integrated environment. For example, to the extent that exclusionary zoning regulations and, consequently, residential segregation are products of intentional exclusion, the use of objective standards that are based on measurable environmental conditions is likely to produce zoning regulations with a less exclusionary effect.

132. It is important to note that the degree of racial integration sought in the United States must be carefully chosen so as to avoid diluting the clustered political power of African Americans. See supra notes 109-112 and accompanying text (discussing how the numerical minority status of African Americans limit their political power in the United States).
134. See supra Part I.A.1.
Furthermore, to the extent that segregation of certain land uses disparately affects the economically underprivileged,\textsuperscript{135} performance zoning's pliant or nonexistent-use districts remedy this impact. Moreover, the objectivity that undergirds performance zoning allows for easier monitoring of intentional exclusion as well as increased accountability of zoning authorities.\textsuperscript{136}

Performance zoning works by setting forth criteria known as performance standards that embody objectively desirable characteristics of a community,\textsuperscript{137} and then requiring developers to meet these standards before developing a given area.\textsuperscript{138} Specifically, developers must submit a plan demonstrating how their proposed project will meet the performance standards of a particular municipality. Performance standards are the muscle of performance zoning and, to the extent that they are enforced, the governing precepts of land use. Typical performance standards regulate traffic generation, noise, lighting levels, drainage, wildlife or vegetation preservation, and architecture.\textsuperscript{139}

When applied specifically to residential zoning, performance standards could include density, lot sizes, setbacks, and most other traditional residential zoning concepts.\textsuperscript{140} However, when these traditional concepts are united with performance zoning they are adopted for practicality, not exclusionary purposes, and are based on objectively measurable standards.\textsuperscript{141}

\textsuperscript{135} For example, the exclusion of multifamily dwellings from suburban residential areas has disproportionate adverse effects on African Americans. See supra notes 56–58 and accompanying text.

\textsuperscript{136} See infra notes 165–168 and accompanying text.

\textsuperscript{137} This idea is analogous to the concept of "general welfare" in the traditional zoning schemes. See David L. Callies et al., Cases and Materials on Land Use 25–29 (2d ed. 1994).

\textsuperscript{138} See Porter et al., supra note 133, at 11.

\textsuperscript{139} Id.

\textsuperscript{140} Performance standards for planned unit developments have even more detailed density regulations such as floor area, open space, livable space, recreation space, and parking. Id.

\textsuperscript{141} A standard is stated in objectively measurable terms if it will consistently yield the same result regardless of when or by whom the standard is applied. An example of a standard stated in objectively measurable terms is one that forbids noise emissions over a certain decibel level between 8:00 p.m. and 10:00 a.m. An example of a standard that is not stated in objectively measurable terms is one that forbids "all offensive noise."

Thus, a minimum lot-size criterion would likely be based on spatial necessity rather than on creating aesthetically homogenous communities. Most importantly, performance zoning can function to directly promote integrationary goals by requiring proponents of new developments to provide desirable and affordable housing for all segments of the population.142

Centralized performance zoning is performance zoning under a federal regulatory hegemony. Pliant, yet definite, criteria for performance standards are set at the federal level, but provinces and local governments can add community-specific criteria143 so long as they accord with federal policy.144 Furthermore, the standards directly address potential nuisances and segregation. In other words, centralized performance zoning addresses the effects and not the causes of nuisance as well as segregation, thereby effectively combatting both harms.145

Although performance zoning typically eschews the notion of exclusive-use districts, it is possible to direct similar uses into separate areas and still engage in performance zoning. This sort of “combination zoning” was championed by a well-known planner, Lane Kendig. Kendig’s zoning scheme allows for eight distinct land use districts.146 However, unlike most traditional zoning schemes that impose either exclusive-use districts or a tiered-use pattern, Kendig’s paradigm establishes use districts that are nonexclusive. Because South Africa already has segregated land-use cores in its urban areas, Kendig’s approach may be more adaptable than an unrestricted elastic zoning scheme such as pure performance zoning.

B. Applying Centralized Performance Zoning in the KwaZulu/Natal Province

This section demonstrates how centralized performance zoning would hypothetically function in a rural area of the South African province KwaZulu/Natal by examining how a new housing development would come to fruition under this scheme. The following analysis tests the overall

142. See infra notes 150–158 and accompanying text.
143. Provincial governments in South Africa are comparable to state governments in the United States.
144. The American analogue to this scheme is the State Zoning Enabling Act through which states are charged with zoning power in accordance with the general welfare of their citizens.
145. This approach of regulating effects, and not causes, has received some criticism. See Acker, supra note 141, at 375 (commenting that performance standards are ineffective at minimizing nuisance costs because they regulate uses and not nuisance costs).
146. LANE KENDIG ET AL., PERFORMANCE ZONING 299–305 (1980).
utility and efficiency of implementing centralized performance zoning to promote economic and, consequently, racial integration.  

KwaZulu/Natal is comprised of six subregions and the self-governing territory of KwaZulu. As is the case in all South African provinces, most white KwaZulu/Natal residents live in urban areas while Blacks make up the overwhelming majority in the rural regions. Residential segregation in KwaZulu/Natal is longstanding and extreme, mirroring the disparity in living conditions between Blacks and whites in that region. Consequently, white integration into Black areas will not occur unless substantial incentives are given to both developers and potential integrators. Thus, in order to promote economic integration and new development in a peri-urban area of KwaZulu/Natal the following performance standards should be adopted:

1. Maximum density standards must be no lower than that necessary to maintain objectively safe and healthy living conditions

147. South Africa consists of nine provinces. I based my hypothetical in KwaZulu/Natal, as opposed to one of South Africa's other eight provinces, because KwaZulu/Natal is characterized by some of the starkest socioeconomic contrasts between Blacks and whites in South Africa today. For a detailed history of the political and economic structure in South Africa's Black homelands, with a particular focus on the KwaZulu region, see generally BUTLER ET AL., THE BLACK HOMELANDS IN SOUTH AFRICA (1977). Furthermore, KwaZulu/Natal houses the largest percentage of South Africa's total population—approximately one-fifth—of which 83% is Black. DEVELOPMENT BANK OF S. AFR., SOUTH AFRICA'S NINE PROVINCES: A HUMAN DEVELOPMENT PROFILE 18, 23, 63-65 (1994).

148. DEVELOPMENT BANK OF S. AFR., supra note 147, at 65.

149. For a brief history of the development of residential housing for South Africans in Natal under the apartheid regime, see generally PAULINE MORRIS, A HISTORY OF BLACK HOUSING IN SOUTH AFRICA 8-9 (1981). See also LEO KUPER ET AL., DURBAN: A STUDY IN RACIAL ECOLOGY 143-74 (1958) (discussing voluntary and compulsory racial residential segregation in Durban, Natal).

150. For an overview of the format of flexible zoning ordinances in the United States, see PORTER ET AL., supra note 133, at 19.

151. One of the principal performance measures employed in flexible zoning is density of development. Density concepts in flexible zoning differ from those in conventional zoning by their reliance on broad measures of density rather than restrictions on lot size, setbacks, and other tediously detailed regulations of lots and buildings. In this sense, the concept of density is employed as a fundamental indicator of performance rather than translated into requirements reflecting certain preconceived arrangements of lots and buildings. Id. at 28. For example, minimum lot size can be no larger than the number or fraction of acres that the average South African can afford based on the median national per capita income. Alternatively, minimum lot-size regulations could be completely eliminated and replaced with floor/area and open-space ratios. This more flexible standard would allow for autonomous decision-making regarding lot size without forfeiting the benefits of overall density regulations. See id. at 60.
given the total population size and mean national per capita income. 152  
(2) Twenty percent of all new housing must be leased or sold to persons who previously lived in historically white areas and intend to inhabit the premises. Alternatively, if the housing is built in an area that is more than twenty percent white, it must be affordable to the average South African based on the mean national per capita income. 153  
(3) Buffer zones 154 may serve to remedy nuisances and to allow for the coexistence of otherwise incompatible uses.  
(4) Other objectively measurable criteria should regulate conditions such as noise, traffic, construction, and drainage.  

Accordingly, a developer seeking to purchase and develop land in a rural area in KwaZulu/Natal would present to a local planning board a detailed plan that explicitly demonstrates how its proposed housing development meets the performance standards listed above. Performance standard (1) requires the developer to adhere to a preset minimum lot size. Adherence can be easily and objectively verified by checking the anticipated footage of each housing plot. The developer can meet performance standard (2) by creating small, low cost, mid-quality housing for average income South Africans (those earning the national mean per capita income), and building larger, more extravagant houses for whites that are cheaper than houses in urban areas in order to encourage white integration. Finally, compliance with performance standards (3) and (4) will be governed by community-specific criteria and will be easy for a local planning board to verify because that agency would have been responsible for developing the criteria in light of the natural geological environment, local population size,  

152. In sum, all density regulations operate such that one community’s desire to create or maintain a low-noise, low-traffic environment will not result in the formation of rural or urban clusters with less stringent regulations, thereby reducing the overall quality of life for urban or rural residents. Thus, as the general population expands and contracts so will the general density guidelines set forth at the national government level. As a result, no single community will be subjected to substandard living conditions at the expense of another.  
153. These percentages can be adjusted according to the index of economic integration desired by the South African government and the extent to which that index is a function of racial residential integration.  
154. Buffer zones, also known as buffer yards, are landscaped areas positioned between land with otherwise incompatible uses. For example, if a factory that emits offensive fumes desires to locate in a predominantly residential area, its developers would have to submit a development plan that demonstrated that the factory would be sufficiently enveloped by buffer zones to meet the performance standard that regulated emission levels. See generally PORTER ET AL., supra note 133, at 43-49.
and overall planning goals. Thus, the local planning board will know first-hand what development goals conform to its performance standards.

After the local planning board verifies that the developer's plan meets performance standards, the board will draft a brief explanatory report about how the plan coincides with the overall criteria, and, in particular, the community-specific standards of that locality. Finally, the board will submit the report to the provincial planning agency for final approval. The provincial planning agency's role will be to expediently and independently evaluate the plan's feasibility, and to strictly enforce the overarching policy considerations of centralized performance zoning. Construction of the new development can begin only after receiving such final approval from the provincial planning agency. This second step in the regulatory process is necessary to monitor implementation of the goals of the RDP.155

Under such a scheme, residential segregation is treated as a nuisance and is centrally regulated. The unfortunate drawback of this proposal is that the disparity in the quality of housing between Blacks and whites will still exist, although to a lesser degree. For example, complying with performance standard (2) will require developers to build housing that is both affordable to the majority of the area's residents as well as desirable for persons of all economic classes. Thus, whites will benefit from the incentives that developers will be forced to create for them in order to encourage integration. As one commentator has suggested, "the crux of the matter is that . . . persons must be attracted to their new areas."156 Furthermore, members of South Africa's underclass will still be left on the fringe because their income, if existent at all, will still be significantly below the per capita average. The only alternative is a forced redistribution of wealth—an option that has already been considered and rejected by the present government.157

On the other hand, this scheme will solve some of the immediate problems surrounding residential segregation by placing the burden of integration on private developers who themselves have an incentive to develop housing in South Africa due to the great demand for affordable housing and the government's dedication to ensuring that all of its citizens have access to affordable housing.158 The ultimate costs will likely be born by the government, which will have to provide sufficient incentives to private

155. See infra note 173 and accompanying text.
156. KUPER ET AL., supra note 149, at 174.
157. See RDP, supra note 4, § 2.4.
developers to enter South Africa's fertile housing market. Post-apartheid coverage of housing development in South Africa suggests that developers of all types are flocking to South Africa to benefit from the boon that a newly opened market provides. Integration is likely to ensue because integrated housing will be virtually infeasible in new housing developments if centralized performance zoning is consistently enforced, and whites as well as upper class Blacks receive effective incentives.

Centralized performance zoning encourages development by making plan approval more predictable and streamlining the regulatory process. Finally, centralized performance zoning encourages white influx into Black areas allowing many South Africans both to remain in the areas in which they presently reside and have developed community ties, and to gain access to resources that heretofore have only been available in white urban areas.

By the same token, if no affirmative steps are taken to ensure integration, it could potentially occur in twenty to thirty years upon the emergence of a significant Black middle class. However, the United States provides the best case study from which to draw the conclusion that integration would still be unlikely to occur without prompting, given that in spite of a comparatively well-established African-American middle class, residential segregation persists in the United States. In addition, the emergence of a significant Black middle class in South Africa is somewhat dubious, if not altogether unthinkable, without taking deliberate efforts to economically empower South Africans. Thus, the South African government should initiate economic integration through progressive legislation such as centralized performance zoning, rather than passively waiting for a substantial Black middle class to evolve.

C. The Pros and Cons of Centralized Performance Zoning in South Africa

Centralized performance zoning is an imperfect solution to racial residential segregation because of the myriad interests it must serve across political, economic, and social levels. Even by enforcing uniform criteria such as maximum minimum lot sizes, South Africans on the fringe of the economy will still be unable to purchase land in certain areas because the

159. See, e.g., U.S. HOUSING TRADE MISSION TO VISIT SOUTH AFRICA, REUTER EUROPEAN BUSINESS REPORT, July 11, 1994 ("The U.S. government announced today that it would sponsor a mission for American businesses to explore opportunities for investment and trade in the housing and construction industry in South Africa." (internal quotation marks omitted)).
concentrated wealth among whites skews the average per capita income, thereby raising the maximum minimum lot-size requirement.\textsuperscript{160} Depending on how change is envisioned in South Africa, this drawback can be detrimental. In essence, those persons situated at the extreme polarities on the economic spectrum are unlikely to be greatly affected by the implementation of centralized performance zoning. However, in light of the radical change that needs to take place in South Africa, a centralized tool is necessary to establish equality even if a small percentage of South African citizens will remain unaffected.

In addition, the centralized performance zoning scheme proposed in this Comment allows South Africa to maintain land-use districts—areas in which a particular land use dominates. Some critics deem any maintenance of use districts inconsistent with the concept of performance zoning on the ground that use districts do not serve to prevent nuisance.\textsuperscript{161} Although this contention has merit, it is not altogether convincing because the non-exclusivity of the uses still captures the essence of performance zoning and furthers the goal of flexibility. Furthermore, obliterating use districts from a zoning scheme may prove too unconventional for the South African government to adopt at this protracted stage of political negotiation. Thus, in practical terms, enforcing nonexclusive use districts would be the better approach.

A final potential drawback is that a presumptive degree of rigidity attaches to any scheme that involves centralized control. In the context of centralized performance zoning, such control could conceivably compromise performance zoning's integral advantage of flexibility over traditional zoning. However, the flexibility of performance zoning lies in its goal of non-segregation, and its focus on regulating the effects rather than the causes of nuisance. These aspects of performance zoning foster innovative land use and development within definitive parameters that sustain, rather than decrease, flexibility. Indeed, local land use agencies operating within the rubric of centralized performance zoning would not be accorded the power to grant variances, or any similar discretionary powers that tend to lessen the rigidity of traditional zoning. Nevertheless, the inherent flexibility of performance zoning obviates the need for such authority.

The potential benefits to South Africans offered by centralized performance zoning are manifold. First, a centralized plan gives rise to effective

\textsuperscript{160} A more controversial strategy would be to set all the performance standards on the economic and social interests of South Africans. However, because South Africa is striving for a nonracial politic, it is unlikely that it would embrace such a proposition.

\textsuperscript{161} Acker, supra note 141, at 379.
procedural safeguards because it reduces the number of regulatory agencies involved and thus diminishes the opportunity for corruption and politicking. This is an important consideration given that a key procedural safeguard is an impartial decision-maker. In fact, impartiality is central to the strength of all other procedural safeguards, and vital to determining the validity of land-use regulations in light of the pervasive bias in that domain.

Land use is particularly vulnerable to procedural bias because the decision-making power rests mainly with local governments. The localized nature of zoning makes it ripe for conflict largely due to the decision-makers’ inevitable familiarity with local issues and predilection toward particular positions. In South Africa, maintaining a localized decision-making process could be unfavorable to South Africans because whites have come to occupy a significant portion of valuable land under apartheid, and have the economic strength and, possibly, the political muscle to create legislation preserving the status quo. Indeed, as former-Judge Higginbotham has noted, “[a] meaningful constitutional revision without an enlightened racially pluralistic judiciary committed to equality of opportunity for all South Africans will not assure . . . even the limited protection against housing segregation that some [B]lack Americans have received.”

Furthermore, procedural issues arise mainly in the context of accepting or revising an established zoning ordinance. However, as noted earlier, because centralized performance zoning is so flexible, reasons for seeking variances will usually not exist. Also, having a centralized zoning scheme will encourage the influx of capital by creating a single regulatory agency and minimizing the bureaucratic red tape of local governments. Finally, and most importantly, performance zoning eliminates rigid exclu-

162. See Mark Cordes, Policing Bias and Conflicts of Interest in Zoning Decisionmaking, 65 N.D. L. Rev. 161, 161 (1989) (“Biased decisionmakers not only threaten accurate decisions, but also undermine the legitimacy of governmental processes.”).
163. Id. at 161–62.
164. Id. at 162.
165. Id.
166. Although the potential iniquity of autonomous local rule may seem counterbalanced by the majority presence of Blacks in South Africa, the hurdle remains of creating and maintaining an informed and politically active Black electorate.
167. Higginbotham et al., supra note 88, at 770.
168. See Acker, supra note 141, at 374. Generally, the performance standards are based on the requirements necessary to prevent a particular harm, and, thus, any use that does not conform under such flexible standards probably does not belong in that area.
sive use districts that serve to segregate "society's least advantaged members." 169

No matter how innovative the scheme, however, improved zoning controls will not by themselves lead to economically integrated communities in South Africa. Legislation comparable to Title VIII of the United States Civil Rights Act of 1968 170 should be adopted as part of any centralized scheme for land use and redistribution. In light of the struggle waged by African Americans to amend the Civil Rights Act of 1968 to include Title VIII, South Africans should not have to vigorously fight to demonstrate the need for such legislation. Moreover, Title VIII is very relevant in the South African context because it was promulgated for the direct purpose of ending, or at least minimizing, racial residential segregation. 171

South Africa should adopt centralized performance zoning because performance zoning greatly increases the potential for economic integration even if property values in a given area are high. Under such a zoning scheme, an excessive minimum lot standard will not further restrict consumers from purchasing land. Rather, nationally determined performance standards will limit minimum lot sizes by requiring that the maximum minimum lot size be proportionate to the amount of land affordable to the average citizen of South Africa based on the mean national per capita

169. See id. at 378.
170. Title VIII reads in relevant part that, "it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or] color . . . ." 42 U.S.C. § 3604(a) (1994). Preceding sections of Title VIII limit the legislation's scope of enforcement and protect certain property rights. 42 U.S.C. § 3603(b) (1994) (exempting the sale or rental of a single-family home or the rental of rooms or units in a dwelling of no more than four families by its owner who (1) owns three houses or less concurrently, (2) does not employ the services of a broker to assist with the sale or rental, (3) does not use discriminatory advertising as defined in § 3604(c), and (4) if not residing on the premises, conducts such a transaction no more than once a year).

In addition to enforcing nondiscriminatory behavior in sales and rentals by individuals, Title VIII has served to invalidate certain land-use mechanisms that promoted discrimination. See Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 130 (3d Cir. 1977) (finding Philadelphia's procrastination in the development of low-income housing was discriminatory under Title VIII), cert. denied sub nom., Whitman Area Improvement Council v. Resident Advisory Bd., 435 U.S. 908 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1187–88 (8th Cir. 1974) (holding under Title VIII that town could not incorporate for the deliberate objective of enacting zoning legislation that would prohibit the construction of low-income housing); United States v. Yonkers Bd. of Education, 624 F. Supp. 1276, 1542 (S.D.N.Y. 1985) (holding that city policy that relegated low-income housing construction to minority communities violated Title VIII).

171. See Hartnett, supra note 41, at 93.
income. Objective health criteria would determine the minimum lot size. Thus, exclusive use districts in South Africa would cease to exist.

The nonexclusionary feature of performance zoning and its objective performance standards are the aspects of performance zoning that will benefit South Africans the most because they allow a majority of the populace to have access to all residential areas and require economic, and by extension, racial integration. The premise is that, if a wealthy minority is interspersed in poor majority communities, the mere presence of those minority members will serve to upgrade the services and living conditions in that area. However, it is the centralized construction of performance zoning that will ensure its success and guarantee conformity.

D. The Extent to Which Centralized Performance Zoning Comports with the RDP and the South African Constitution

South Africa needs a centralized zoning scheme to effectuate the transition to a racially and economically integrated society. The disparity, oppression, poverty, powerlessness, and lack of education among South Africans are extreme, thereby warranting, if not mandating, that an extreme measure be taken. By implementing centralized performance zoning, the South African government will be fulfilling the objectives of the ANC Reconstruction and Development Programme ("RDP"), and taking its canons to their logical conclusion. Furthermore, centralized performance zoning seems to accord with the South African Constitution.

1. Centralized Performance Zoning and the RDP

The general goals of the RDP are to develop an integrated and sustainable program through a people-driven process, to safeguard national peace and security, to build a strong nation, to jointly reconstruct and develop communities, and to implement democracy in South Africa. Centralized performance zoning satisfies each of these goals.

Due to its inherent flexibility, centralized performance zoning allows for coordinated policies throughout South Africa in the area of housing development and land use that can withstand the expansion of the country in its effort to continue to supply 1.5 million homes over the next three

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172. "Zoning should seek to promote urban development patterns consistent with RDP objectives." RDP, supra note 4, § 2.5.11.
173. Id. § 1.3.
years and beyond. In addition, this flexibility would enable South Africans to determine their own land uses subject only to “general welfare” guidelines, as opposed to fixed regulations that prohibit certain land uses in particular areas, thereby fostering a people-driven process.

A centralized scheme of any sort could serve to unify a citizenry, thereby promoting national peace and security by instilling national values and highlighting common objectives. By slowly eradicating racial residential segregation in conjunction with other national land reform and redistribution policies, centralized performance zoning will eliminate the spatial dimension of apartheid, and establish a viable nation with less economic disparity. Furthermore, centralized performance zoning facilitates development because its flexibility and uniformity can link reconstruction and development. Finally, although the centralized focus of the proposed scheme lends itself to socialist ideology, implementing such a scheme can help “democratize” South Africa by setting a standard of equal access to resources, which is a fundamental feature of democracy.

2. Centralized Performance Zoning and the South African Constitution

The Parliament in South Africa has unlimited legislative authority subject to the provisions of the Constitution. The Constitution nowhere excludes a policy of centralized land use or implies that such a policy would be beyond the scope of powers vested in the Parliament. In fact, the provincial legislative authority includes the regulation of matters that, “to be performed effectively, require[] ... regulat[ion] or co-ordinat[ion] by uniform norms or standards that apply generally throughout the Republic.” Centralized performance zoning certainly qualifies under this definition.

Furthermore, the South African Parliament specifically regulates the restitution of land rights, which is in the same realm as land use and planning. The fact that the provincial legislature can participate in

174. S. AFR. INTERIM CONST. ch. 4, cl. 37, reads in relevant part:
Legislative Authority of Republic
37. The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament which shall have the power to make laws for the Republic in accordance with this Constitution.
175. Id. ch. 9, cl. 125.
176. Id. ch. 8, cl. 121, subsec. 1 (“An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.”). The remainder of this section of the Constitution suggests that the land restitution is a national, centralized scheme. See id. ch. 8.
national policymaking does not diminish Parliament's overarching supremacy because an act of Parliament prevails over a provincial law if the act applies uniformly throughout the Nation. Moreover, the South African Constitution affords provincial governments less authority than the United States Constitution affords to states. Thus, while a centralized legislative scheme, such as centralized performance zoning, might raise issues of federalism under the United States Constitution, if the performance standards employed serve to directly benefit one racial group and not the others, centralized performance zoning probably would not violate the principles of federalism outlined in the South African Constitution.

Finally, centralized performance zoning would seem to invoke equal protection analysis under the United States Constitution. The South African Constitution offers similar protection in its chapter on Fundamental Rights: "Every person shall have the right of equality before the law and to equal protection of the law." However, if South Africa is to establish equality on various levels among its citizenry, the equal protection doctrine cannot serve to impede redistribution of rights and resources. Indeed, "resources spent on individuals must be equalized, forcing either a diminution of [social and economic] rights for those who already have them, or an increase of these rights for those who have been denied them." Nonetheless, the outcome of an equal protection challenge to centralized performance zoning remains unclear in light of the dearth of post-apartheid equal protection jurisprudence in South Africa. Hopefully, courts would find that centralized performance zoning legislation passes constitutional muster because it clearly comports with the goals of the RDP.

177. Id. ch. 9, cl. 126, subsec. 4.
178. As one commentator explains, "South Africa's new constitution . . . does give South Africa a federal structure—but one in which the power of the component states, or rather 'provinces,' is decidedly more limited than the authority of the states which make up the United States of America." Stephen Ellmann, The New South African Constitution and Ethnic Division, 26 COLUM. HUM. RTS. L. REV. 5, 21 (1994). See Bertus de Villiers, Federalism in South Africa: Implications for Individual and Minority Protection, 9 S. AFR. J. HUM. RTS. 373 (1993), for an interesting examination of federalism in general and how it should function in South Africa.
179. S. AFR. INTERIM. CONST. ch. 3, cl. 8, subsec. 1 (emphasis added). The Constitution further provides that "no person shall be unfairly discriminated against, directly or indirectly," on the basis of "race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language." Id. cl. 8, subsec. 2.
CONCLUSION

I think one of the things America has to address very, very squarely is whether or not we can live with continued vast spatial separations between the poorest of our populations, concentrated in public housing and central cities, and the vast differences that exist across our urban geography to the suburbs, which are essentially white.\textsuperscript{181}

South Africans will have to address a similar issue when implementing the new Land Reform Bill and voting on land issues in local government elections. Finding itself at a point of departure similar to the position of the United States after desegregation, South Africa will hopefully choose a path that will benefit those deprived for too long of their equitable share, and thus surpass the United States in its efforts toward residential integration.\textsuperscript{182}

Whether centralized performance zoning will prove useful to South Africans depends largely on what additional measures the South African government takes to establish and ensure long term economic equality and integration. In addition to any legislation that promotes economic integration, South Africans must be able to acquire the educational and financial means to elevate their socioeconomic status.\textsuperscript{183} Adopting centralized performance zoning as a deliberate effort to avoid the course of the United States will mean that the residential segregation of African Americans and its injurious effects were not borne in vain if they inform the creation of a "New South Africa."

\textsuperscript{181} This Week with David Brinkley (ABC television broadcast, Apr. 11, 1993) (quoting Henry Cisneros, United States Secretary of Housing and Urban Development).

\textsuperscript{182} It seems that South Africa is already doing so in the sphere of affirmative action, which may ultimately impact land acquisition and housing. See Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709, 1790 (1993). Professor Harris notes:

The South African concept of affirmative action expands the application of affirmative action to a much broader domain than has typically been envisioned in the United States. That is, [the people of South Africa] consider affirmative action a strategic measure to address directly the distribution of property and power, with particular regard to the maldistribution of land and the need for housing.

\textit{Id.} (footnotes omitted).

\textsuperscript{183} South Africans must gain access to these essentials in addition to having their basic needs met. See Phillip Van Niekerk, The Road Ahead: Handing Back the Land Is Only the Beginning, The Guardian (London), May 22, 1994, at 21 ("[South Africa's] land reform programme will only be successful if there's a package of support offered to people . . . . I'm talking of water, electricity, housing and clinics." (quoting Derek Hanekom, Minister of Land Affairs and Head of the ANC Land Commission)).