

Opening Up the Suburbs: Notes on a Movement for Social Change

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"We Can 'Live Anywhere' High Court Rules"
Banner headline in the Pittsburgh Courier, a Negro paper, May 18, 1948, following the U.S. Supreme Court's decision in Shelley v. Kraemer holding racially restrictive covenants unconstitutional.

"If the courts start ordering minority housing dispersal across the board in metropolitan areas, it will provoke a far greater social crisis than the school busing one."
HUD Secretary Romney, November 1971.

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This article is based on a series of thirty-eight interviews with civil rights and housing activists, government officials, private attorneys and foundation managers between November, 1971 and March, 1972. A list of these is printed at the beginning of the footnotes section below. The authors are indebted to Professor Quintin Johnstone of the Yale Law School and Jack Greenberg, Director of the N.A.A.C.P. Legal Defense and Education Fund, for their very helpful suggestions at early stages in the development of this article. Research was made possible by a grant from the Urban Studies Committee of the Yale Law School.

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Introduction

In the short space of three years, a handful of attorneys operating through a dozen or so major civil rights organizations have created a national movement to break down suburban land-use restrictions and open these areas to low-income families and racial minorities. Supported principally by a small number of private foundations, these activists have generated the legal and economic doctrines which underpin the movement and have begun to establish these doctrines through case law, legislation, administrative regulation, and educational efforts. These activists have also stimulated other institutional powers, such as the federal government,

private industry and, to some degree, the poor and racial minorities themselves, to take at least limited action in support of opening the suburbs.

The efforts of the organizations described below to end suburban land-use restrictions represent a discrete and readily studied example of a movement for social change initiated and directed by a small band of lawyers working on behalf of racial minorities and the poor. This article will present a case history and analysis of the open suburbs movement, describing its rapid development, its pluralistic structure, and the diverse techniques it has employed in its quest for change. In addition, the impact the movement has had on other institutions, such as private industry and federal government, will be examined, as will its prospects for continued growth. Throughout, the campaign to open the suburbs will be compared with past organized efforts to protect and advance the rights of minorities. These historical references will be made for the purposes of identifying problems which confront such movements generally and of suggesting ways in which the problems may be met.

I. The Prime Movers: The National Civil Rights and Housing Groups

Thirteen groups now form the core of the open suburbs movement. To familiarize the reader with the unique organizational characteristics of each group and with its contribution to ending suburban exclusion, each will now be described in some depth.

The reader may wish to omit this catalogue for the present and proceed directly to the analysis of the movement, using the section following immediately below as a reference when the groups it describes are mentioned in the text.

The National Housing Committee Against Discrimination in Housing (N.C.D.H.)

N.C.D.H. is a twenty-year old, foundation-supported "umbrella" organization which represents fifty affiliated national religious, civil rights, labor and civic organizations. At the present time it is the only national civil rights group whose efforts are directed exclusively to ending residential segregation. Its activities in the area are multifaceted and include monthly publication of *Trends in Housing*, research,¹ administrative lobbying,² technical planning assistance to national, state and community organizations in the development of urban renewal and public housing,³ housing sponsorship and administration, and litigation and legal consultation. As part of its efforts in this last context it brought the *S.A.S.S.O.* suit in Union City, Cal.,⁴ *Dailey v. City of Lawton, Oklahoma*⁵ and filed an amicus brief in *Kennedy Park Homes v. City of Lackawanna, N.Y.*⁶

N.C.D.H. has two offices, its national headquarters in New York City, and a satellite office in San Francisco.

The staff of the New York office includes among others an urban planner, a field researcher a one-man public relations staff, and one attorney, Richard Bellman.

While efforts to end exclusionary land-use practices form only a part of N.C.D.H.'s program, all its litigation is in this or closely related areas. Currently, Bellman is litigating three actions: one against the City of New York for delaying construction of a "scattered site" housing development in the Riverdale section of the Bronx;⁷ a second against the General Services Administration⁸ to block construction of an Internal Revenue Service facility at Brookhaven, Long Island, on the grounds that the site is not accessible to adequate low-and middle-income housing for the facility's prospective employees, as required under G.S.A. regulations;⁹ and a third suit before the New Jersey Civil Rights Commission, to require the town of Mahwah, N.J., to alter its zoning practices so as to permit the development of low-and middle-income housing, in particular for the workers at the Ford Motor Company plant located there.¹⁰

Suburban Action Institute

Suburban Action is a foundation-sponsored White Plains, New York-based organization whose program is even more specialized than that of N.C.D.H.—its one central purpose is to gain access to the suburbs for low-and moderate-income families. To achieve this end Suburban Action was founded in 1969. Suburban Action's founders and co-directors Paul Davidoff and Neil Gold, are lawyers and city planners and carry those twin viewpoints into their work at Suburban Action. They stress the need for metropolitan-wide remedies and the use of the courts to stimulate the other branches of government to end exclusionary zoning.

Suburban Action engages in a wide variety of publicity techniques. For example in 1970 one of its co-directors, Paul Davidoff, ran for Congress in Westchester County, New York, on the platform of opening the suburbs to low-income families. Though Davidoff had no success in his Congressional bid, Suburban Action has had marked success in getting national news coverage on exclusionary zoning. In the fall of 1971 *Newsweek* ran a cover story on the suburbs which emphasized exclusionary zoning and the work of Suburban Action,¹¹ while the *New York Times Magazine* carried an article by the co-directors of Suburban Action.¹²

The six-man organization (two co-directors, Davidoff and Neil Gold, two litigators, Dennis Ray and Lois Thompson, and two community workers) also has an extensive litigation program. To date all its litigation has been in New York, New Jersey, and Connecticut. Its most notable court victory to date is the *Madison Township*¹³ case in which substantive due process and statutory arguments¹⁴ persuaded a New Jersey Superior Court judge to hold invalid the Township's zoning law. This was the first zoning case in the nation to impose an area-wide remedy. Currently Suburban Action has several suits pending, one against Mahwah, New Jersey¹⁵

challenging its zoning ordinances, one against the Town of North Hempstead, New York arguing that its Housing Authority has an affirmative duty to provide adequate housing for low-income residents, a third suit to require that Mitchell Field, sold to Nassau County, New York by the federal government, be developed for low-income housing and, finally, a class action against twelve New Jersey towns challenging all of their exclusionary zoning laws. In addition it has filed several complaints with the Equal Employment Opportunity Commission (E.E.O.C.) charging that a number of corporate relocations from New York City to suburban areas are racially discriminatory, on the grounds that a smaller fraction of blacks than whites will be able to move with their jobs, with the result that the relocation will cause a disproportionate number of blacks to lose their present employment.¹⁶

The American Civil Liberties Union (A.C.L.U.)

The American Civil Liberties Union is a nation-wide litigation¹⁷ organization with a membership of 170,000, most of which is white and middle class. Traditionally the A.C.L.U. has focused its attention on the rights of free speech and fair trial, but recently, following the appointment of a new director, it has become involved in a number of other areas¹⁸ including suburban exclusionary practices.

The Union is composed of forty-nine regional or state affiliates and about 325 smaller local chapters, and has a national office in New York, staffed by eight attorneys. The great majority of A.C.L.U. cases are brought by the local or state branches rather than by attorneys from the national office. The central office, however, can encourage certain kinds of litigation and influence the planning of litigation strategy on a particular case. This ability stems from the national organization's control of funds which it can disburse to local organizations as it chooses and the presence of the eight excellent full-time attorneys at the national office who are available to work on litigation.

The national A.C.L.U. made a commitment to exclusionary zoning litigation for the first time in mid-1970 when it hired Lawrence Sager, formerly a theoretician of the application of Equal Protection doctrine to exclusionary zoning,¹⁹ on a full time basis.

In 1970 Sager became involved for the A.C.L.U. in the much publicized case of *Parkview Heights Corp. v. City of Black Jack*.²⁰ This year Sager is working about three-quarters time for the A.C.L.U. national office and part-time as a professor at N.Y.U. Law School.

A second A.C.L.U. case with major significance to the exclusionary zoning field, brought by Chicago A.C.L.U. attorney Al Polikoff, is *Gautreaux v. Chicago Housing Authority*.²¹ This extremely complex and politically explosive case was brought without central office participation. Again, the role of the central (New York) office is one of occasional involvement: it is not the coordinator and director of all major A.C.L.U. cases.

The A.C.L.U. a non-tax-exempt organization, is supported financially mainly through membership dues and private contributions, although some funds it

receives are channeled through its tax-exempt arm, the A.C.L.U. Foundation (and are used to support strictly exempt activities, such as the litigation performed by the national office).²²

The Lawyers' Committee for Civil Rights under Law (Lawyers' Committee)

The Lawyers' Committee's program is directed at eliminating racial discrimination through court action and is currently working in the areas of voting rights, education, criminal justice, employment, health and housing. The Committee employs forty-five attorneys in offices in eleven cities throughout the country and has a highly developed network of "pro bono" attorneys from private law firms, who work under the coordination of its salaried staff and its two hundred or so active volunteer members.²³ It is funded by foundations,²⁴ private law firms, public corporations and the federal government. Of its 1971 budget of 1.6 million dollars, forty-three per cent came from the first of these sources.

Like the A.C.L.U. the Lawyers' Committee offices operate autonomously. Again, like the A.C.L.U., there is a national office—the Special Projects Unit—which provides services to the local branches, but does not direct their operations. The dual role of the Special Projects Unit is to develop programs which can be replicated in all the local offices and to serve as a clearinghouse for information among the local offices.

The Lawyers' Committee has been among the most active organizations in the open suburbs movement. Ned Wolf of the Philadelphia Lawyers' Committee brought *Shannon v. HUD*,²⁵ which led to HUD's important project selection criteria; the Chicago Lawyers' Committee is bringing suit in suburban DuPage County to require the inclusion of low-and moderate-income housing in all major new sub-divisions; the Washington, D.C. Committee is, or will soon be involved in, more than a half dozen suits challenging various suburban practices which exclude minorities; and finally the Special Projects Unit—with the aid of Yale Law student Marvin Wexler—has begun to develop an exclusionary practices litigation handbook for distribution to local attorneys as a guide for bringing suits against restrictive suburbs.

The N.A.A.C.P. Legal Defense and Education Fund

The Legal Defense Fund (or the "Inc." Fund as it is known for short) is a national civil rights litigation organization with its main office in New York, a branch office in San Francisco, field offices throughout the South, and over one hundred cooperating attorneys scattered around the country. The Fund's program concentrates on protecting the constitutional rights of blacks and traditionally the greater part of its activity has been in the South, although some of its major campaigns, for instance that against capital punishment have been plainly national in scope and have aided a

predominantly nonminority client group. The Inc. Fund has brought most of the important Southern school desegregation cases.

Although the Fund was originally founded as the legal arm of the National Association for the Advancement of Colored People (a group that will be discussed below) since the mid-1950s²⁶ it has been a totally separate organization, financed by foundation grants.

To date the Fund has not devoted a substantial part of its resources specifically to the elimination of restrictive suburban land-use practices. Perhaps, as Jeffrey Mintz, Inc. Fund staff attorney, points out this is because major campaigns in this area are already being undertaken by other national civil rights and housing groups. The Fund is, however, bringing one suburban zoning challenge—*English v. Huntington Township*²⁷—although even this zoning challenge, it must be noted, is part of a broader suit attacking the racially discriminatory effects of Huntington's urban renewal program.

Though suburban restrictive zoning is not high on the Inc. Fund's list of concerns, discriminatory housing practices are, and the Fund has brought a number of important suits in this area, namely *Kennedy Park Homes v. City of Lackawanna*, *Ranjel v. City of Lansing*,²⁸ and *Western Addition Community Organization v. Weaver*.²⁹ All of these suits and particularly the *Lackawanna* case, have established precedents which are of significance to the exclusionary zoning field.

Recently, Michael Davidson, the Legal Defense Fund attorney who brought *Ranjel* and *Lackawanna* filed a case in Selma, Alabama³⁰ alleging that the long-term affects of proposed federally sponsored sewer and highway programs near a black residential section of the city will be to displace these residents, through the industrialization of the area. The suit seeks to enjoin construction of the projects until the federal agencies involved insure that adequate replacement housing for the displaced families will be available within Selma.

The National Association for the Advancement of Colored People (NAACP)

The N.A.A.C.P. is a national lobbying organization dedicated to the elimination of discrimination against black persons, with its national office in New York and 1700 local branches throughout the country. The Association, because of its lobbying activities is not a tax-exempt organization. It is supported by membership dues and private contributions. Its legal department, attached to the national office, consists of four staff attorneys and one general counsel. The department is financed separately from the N.A.A.C.P. itself, through the N.A.A.C.P. "Special Contributions Fund." This permits the litigation arm of the Association—which does not lobby—to have tax-free status. The N.A.A.C.P. Housing Program, which gives technical advice to local N.A.A.C.P. subsidized housing sponsors, does administrative lobbying, and publicizes the N.A.A.C.P. housing position, is a similar appendage and like the legal department is financed largely through foundation grants.

While housing is but one of the many N.A.A.C.P. concerns, the organization has made a major commitment to the open suburbs movement and is proceeding on three fronts to attack suburban land-use restrictions. Nathaniel Jones is lobbying in Washington, D.C. and elsewhere for legislative action; William Morris, head of the Housing Program is pushing for beneficial administrative regulations³¹ and has made major efforts to educate suburban residents to understand the need for ending restrictive zoning;³² finally Jim Meyerson of the Association's Legal Staff is conducting a major law suit against the town of Oyster Bay, New York.³³ This town's refusal to accept a zoning plan providing for multi-family dwelling (or any compromise plan) proposed by the N.A.A.C.P. is being challenged on equal protection grounds as racially discriminatory. The suit will attempt to prove a history of private discriminatory practices and action by the town to perpetuate these through zoning restrictions. The suit will try to show both racially discriminatory motive and effect in the town's exclusion of the poor.

The National Housing and Economic Development Law Project

This is an Office of Economic Opportunity funded project which is one of several O.E.O. Legal Services "back-up" centers, doing major test case litigation on behalf of local Legal Services offices. The Project is located in Berkeley, California, with one attorney, Arnold Steinberg serving as its counsel in Washington, D.C. The Project has not to this date directly engaged in any exclusionary zoning cases, but has concentrated on the closely related area of local approval requirements in the National Housing Act for public housing and for rent supplement program participation (as in *Moody v. Bangor Township*).³⁴ Request for help specifically on zoning matters—which are increasing in number—are referred to other housing groups, such as the National Urban Coalition, discussed below.

(The National Housing Law project will not be treated in greater depth in this article because the authors were unable to interview any of its members and develop further information about its activities.)

The Leadership Conference on Civil Rights

The Leadership Conference is a coalition of 127 civil rights, labor religious and civic organizations, including the A.C.L.U., the N.A.A.C.P., the American Jewish Committee, the League of Women Voters and the A.F. of L-C.I.O. It is dedicated to "the achievement of equal opportunity and the advancement of civil rights."³⁵ The Leadership Conference's usual mode of operation is through legislative lobbying at the national level and it is credited with having had major influence in gaining passage of the 1968 Fair Housing Act.

One of the organization's subcommittees is the Task Force on Housing,³⁶ which together with the Center for

National Policy Review, a group discussed below, seeks to secure better performance by the federal government of its civil rights responsibilities. To achieve this, the Task Force monitors the action of the Department of Housing and Urban Development (HUD) and other federal agencies and pushes for strong administrative regulations favoring equal housing opportunity. The Task Force has strongly supported open suburbs and has lobbied for governmental regulations³⁷ which will put pressure on exclusionary communities. The Conference and the Task Force are funded through contributions by the member organizations.

The Center for National Policy Review

The Center is a Ford Foundation-funded,³⁸ single office organization housed at the Catholic University Law School in Washington, D.C. and headed by William Taylor. The program of the Center is to seek strong enforcement and implementation of existing civil rights legislation solely through administrative lobbying, i.e. by "watchdogging" the federal bureaucracy's actions and urging the implementation of strong administrative rules and enforcement policies.

The Center, which was established in the late 1960's, has no membership or constituency of its own but rather is an independent office providing staff services to other civil rights groups like the Leadership Conference's Task Forces on Housing and Employment and the League of Women Voters. The services it provides are varied and include the preparation of comments on proposed rule making by federal agencies, preparation of petitions for regulatory changes, and, for the League of Women Voters, the development of a handbook on exclusionary zoning challenges for distribution to local Leagues.

The Center does, however, seek administrative changes in its own behalf, and does not prepare papers only for use by other organizations. Moreover in its various spheres of interest which include housing, employment and criminal justice among others, it has developed a series of particular independent positions and takes as clients only those organizations which agree with its own stance in these areas. Thus, in the housing field where it favors dispersal of low-income housing according to metropolitan area-wide plans, it does not serve those groups which argue that all new housing and federal spending should go solely to inner city projects.

The Housing Opportunities Council of Metropolitan Washington

The Housing Opportunities Council is a three-and-a-half year old, Ford Foundation-sponsored organization, engaged primarily in monitoring the Department of Housing and Urban Development (HUD). Located in Washington, D.C., it comments on all new HUD proposed rules which might affect the housing opportunities of blacks and occasionally proposes new rules. Its most impressive victory to date was its proposal that HUD adopt affirmative marketing regulations³⁹ requiring all developers of federally subsidized housing

to advertise in the minority media and solicit black tenants and home buyers. Its suggestions were formulated by HUD as a proposed rule and ultimately adopted.

At the local level, the Council is headed by James Harvey, a black man who first became active in the open housing movement by working for the American Friends Service Committee to stir local committees to pass open housing laws. The Council publishes a newsletter which keeps community housing groups in and near Washington aware of new housing laws and programs. The newsletter is used as a tool to arouse the black community's interest in federal action to improve their housing. It is also sent to government officials and other housing organizations to mobilize their support and bring pressure for increased government involvement in housing for low-income families.

Harvey also heads up the Leadership Conference on Civil Rights' Housing Task Force.

The National Urban Coalition

Following a wave of urban disorders across the nation, the Coalition was formed in 1967 to publicize the needs of the urban poor and to lobby for state and federal programs in their behalf. The Coalition's members are national leaders who represent government, civic, labor and civil rights groups; they are organized into thirty-eight local Urban Coalitions, with national offices in Washington, D.C. and New York City.

The major contribution of the Urban Coalition to the open suburbs movement has been its sponsorship of the quarterly Exclusionary Land-Use Practices Clearing House Conferences, which were originated by the Taconic Foundation in mid-1970 and shortly thereafter taken over by the Urban Coalition. These Conferences bring together open suburbs activists from the national housing and civil rights groups, HUD and Justice Department officials, home builders and others interested in ending suburban exclusionary practices and will be discussed at greater length below.⁴⁰

The Coalition is funded forty per cent by foundations and sixty per cent by corporations and has itself made grants to other housing organizations, including a \$25,000 grant to N.C.D.H. in 1971 for litigation expenses.

The League of Women Voters

The League is a 170,000-member political organization which supports numerous causes, including voters' rights, equality of education, welfare reform, and the elimination of suburban exclusionary practices. Its members, who are mostly white, middle-class and suburbanite are organized into 1250 local chapters and have been especially active in the open suburbs area as a recent article in the League's in-house publication *Voter*⁴¹ points out:

More than a hundred local Leagues have worked to implement existing laws by helping to establish housing authorities, by

building subsidized housing for low-income groups, and by opening up the private housing market. They have helped to organize nonprofit groups to sponsor low-and moderate-income housing developments. They have monitored enforcement of fair housing laws and marketing practices. They have gone to court to challenge housing discrimination. And they have increasingly worked for regional solutions to housing needs.

Leagues are heavily committed to these activities in California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ohio and Virginia: local Leagues are also at work in Pennsylvania, North Carolina, Georgia and Florida, and are on the move in Louisiana and Texas.

In addition it filed an *amicus* brief in *Gautreaux v. Romney*, and has joined the Black Jack, Mo., Mahwah, N.J., and Brookhaven, New York suits. Local Leagues in the Dayton, Ohio area campaigned actively for the Dayton Plan⁴² and the Fairfax County League gave strong backing to that county's zoning ordinance requiring developers of fifty or more units to assign 15 per cent to low and moderate-income housing. The grass roots strength of the local Leagues suggests that this organization will have a very important role to play in opening the suburbs.

Virtually all of the League's activities are supported by members' contributions, although some programs, such as its litigation office are funded by foundations. A recent Taconic Foundation⁴³ grant will enable the League to develop a handbook for attacking exclusionary zoning practices which will be distributed to local Leagues after passing through a number of revisions at regional conferences, and which will enable local branches with limited know-how to maximize their impact. An additional program of the League—presently funded by the Norman Foundation—is its “monitoring” effort which will attempt to collect precise data on HUD's implementation of its recent Project Selection Criteria,⁴⁴ i.e. to determine which applications for subsidized housing are being accepted and rejected and the reasons for these decisions.⁴⁵

The League, and other intra-suburban groups like the American Jewish Committee (described below) are uniquely valuable to the open suburbs movement because they (1) have voting strength inside suburban communities and, though a minority, can pressure local leaders for change and (2) can educate their fellow residents in an atmosphere free from elements of racial or economic confrontation. As Judy Morris of the League of Women Voters' National Office states:

Our constituency is best able to handle breaking down zoning barriers in terms of eliminating prejudice and fears; they're right next door to the people they're trying to persuade.⁴⁶

The American Jewish Committee

The American Jewish Committee whose activities are centered in the New York and Chicago metropolitan areas is representative of a number of middle class mostly suburban, religious groups including the Unitarian Universalist Church, the Christian Family Groups (Roman Catholic) and the Anti-Defamation League of

B'nai B'rith (Jewish) and like them is moderately active in the challenge to exclusionary zoning practices. The Committee is funded by individual contributions and has been in existence for several decades.

Presently it is filing an *amicus* brief for plaintiffs in the N.A.A.C.P.'s suit against the town of Oyster Bay,⁴⁷ in N.C.D.H.'s Mahwah, N.J. cases⁴⁸ and in *Parkview Heights v. Black Jack, Mo.* It has also published a pamphlet on scattered-site housing with recommendations to municipal officials as to how community tempers can be kept calm. A third project is a poll examining the attitudes of public corporations seeking suburban plant and office locations towards exclusionary zoning.

The policy of the American Jewish Committee in this area, generally, is “de-polarization” of the open suburbs issue. Thus it emphasizes that zoning restrictions prevent a town's young marrieds, elderly, and service personnel—policemen, teachers, etc.—from residing within town borders, and plays down the importance of minority access to suburban housing.

A. The Advent of the Movement

The advent of the open suburbs movement can be traced to the period of 1967 to 1969 which saw the publication of Lawrence Sager's *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*,⁴⁹ Richard Babcock's *The Zoning Game*,⁵⁰ and the National Committee Against Discrimination in Housing's (N.C.D.H.) study, *The Impact of Housing on Job Opportunities*,⁵¹ the first scholarly works to link suburban land-use restrictions with the social and economic problems of the inner city poor. In 1969, the year following the N.C.D.H. study and during which Sager's article and Babcock's book were published, the *Housing Bulletin* of the National Association for the Advancement of Colored People (N.A.A.C.P.) announced that suburbia would be “the new civil rights battleground” and stated:

... we must become prepared to do battle out in the townships and villages to lower zoning barriers and thereby create new opportunities for Negroes seeking housing closer to today's jobs at prices they can afford to pay...⁵²

This was also the period during which Suburban Action and the Housing Opportunities Council, two organizations particularly concerned with suburban land-use problems, were first funded and during which N.C.D.H. determined that suburban zoning would be one of its major program areas. Thus by the end of 1969 the exclusion of the poor from the suburbs had become a live issue and commitments by a number of groups to the area had been made. The movement was launched.

Today the thirteen organizations described above comprise the nucleus of the open suburbs movement. These will be termed “national” civil rights and housing organizations because, though they may deal with local cases or problems, they seek situations which will have importance nationally and therefore, unlike commu-

ity-based housing and civil rights groups, they represent the interests of the poor and/or minorities as a class rather than the interests of a given local population.

Viewed as a group the national civil rights and housing organizations have together been responsible for virtually all the major litigation in the exclusionary land-use practices field and, through their lobbying efforts, have generated considerable pressure at the federal government level which has resulted in favorable legislation and administrative regulations. The groups, however, differ significantly among themselves as to (1) their commitment to housing and zoning matters, (2) their internal structure and geographic "base", and (3) the means they employ to bring about change. For the most part these differences are rooted in the history of the civil rights movement and will not be dealt with here.⁵³

The history of the civil rights movement does, however, shed light on the problems which any organized effort to seek social change will encounter today and thus brief comparison of the open suburbs movement to earlier civil rights campaigns is useful.

A number of past campaigns, such as that against racially restrictive covenants conducted in the late 1940's by the N.A.A.C.P. and the Legal Defense Fund's drive against Southern school segregation in the early 1950's, while also conducted by civil rights lawyers, differ markedly from the present day assault on exclusionary suburbs. The anti-restrictive covenant and school desegregation campaigns were conducted exclusively in the courts under the single doctrinal banner of the Equal Protection Clause and culminated—or so it was thought at the time—in the major Supreme Court victories of *Shelley v. Kraemer*⁵⁴ and *Brown v. Board of Education*.⁵⁵ In addition these were highly planned campaigns, co-ordinated from the national headquarters of the N.A.A.C.P. and the Legal Defense Fund, respectively: as the campaigns developed, virtually no cases were brought in either area of the law without the participation, or at least the advice, of the national litigation offices. By contrast, as the three sections immediately following will respectively describe, (1) litigation, while the major weapon of the open suburbs movement is for a variety of reasons, but one of several modes of attack it employs to attain its goals; (2) the doctrinal bases of the fight against suburban exclusion of minorities are numerous and their number increasing; and (3) the movement is pluralistic and its decision-making decentralized and only loosely coordinated.

The two concluding sections of this part will examine the open suburbs movement's relations with the underlying constituency it serves, minority groups and the poor, and with its principal source of financial support, the private foundations. As will be seen, the lack of strong minority backing for open suburbs and the structure of the foundations' decision to finance the movement raise questions as to the movement's legitimacy, a legitimacy which previous civil rights movements have been more safely able to assume they possessed.

B. Strategic Choices: Litigation in the Vanguard

Partly as a result of the failure of past litigation campaigns (like the two noted above) to achieve the degree of social change hoped for by civil rights advocates even after major court-room victories, and partly as a result of the proliferation of federal civil rights laws and federal enforcement agencies in the sixties, open suburbs activists have recognized that state and federal courts are but two of many political institutions through which minority rights may be vindicated and have aimed their campaign at the full array of institutions which today make and enforce law. Thus in addition to their litigation efforts the open suburbs groups are (1) seeking local, state, and federal legislation, (2) working to insure enforcement by HUD and other federal agencies of existing law, and (3) trying to develop grass roots support for suburban integration through educational campaigns within both the suburbs and the center city.

As the earlier description of the thirteen principal organizations fighting suburban exclusivity indicates, the various organizations have made differing decisions as to which lines of attack to pursue. Invariably these decisions have been made on a strictly decentralized basis, with each organization determining for itself the most beneficial expenditure of its human and financial resources. A number of factors have contributed to the choice made by each group. For some, such as the Legal Defense Fund, the A.C.L.U., the Lawyers Committee, the Center for National Policy Review, and the Leadership Conference, the commitment to a particular mode of attack existed prior to their involvement in the open suburbs area. For others, like, N.C.D.H., Suburban Action, and the League of Women Voters purely strategic considerations have determined the particular mix of activities in which they have engaged.

While the movement as a whole has thus focused on a fairly broad range of action, the pattern which has emerged from the series of decentralized decisions noted above is that the movement's main thrust has been in the area of litigation. There are several reasons for this overall outcome.

Lack of Popular Support for Open Suburbs

No major segment of American society is today giving active and vocal support to the open suburbs campaign, and as a result, open suburbs activists have had to rely in large measure on a technique for creating change, litigation, which seemingly does not need such support to be effective.

The inner-city black community is one group which has not to date espoused the cause of suburban integration, even though the battle to open the suburbs is being waged on its behalf. James Harvey of the Housing Opportunities Council notes for example,

Most blacks and black leaders do not yet consider exclusionary zoning a gut issue. They do not feel it every day like they do job discrimination, and did de jure segregated schools and segregated public facilities.

Indeed some black leaders, including Anthony Henry of the National Tenants Organization⁵⁶ actively oppose suburban dispersal of minority populations, seeking instead to maximize the political power minorities are now inheriting in the cities. Robert Chandler of the Ford Foundation, finally, suggests that even among those leaders who do support open suburbs, few have it at the top of their list of priorities.

The result is that open suburbs advocates have been foreclosed so far from using mass demonstrations and protests by minority group members as a technique for moving the country toward changing its housing practices, a technique which has been used to counter Southern segregation and to press for welfare reform.

The low level of inner-city support for suburban integration is attributable, as Harvey suggests, to the low visibility of suburban exclusion when compared with other problems inner-city residents face daily and also to the obscurity of the genuine causal link between suburban exclusion, and these problems of job discrimination, unemployment, poor schools, and de facto segregation of public facilities.

To bring home this nexus and elevate suburban exclusion to a major concern for the inner-city poor, groups like Suburban Action, and the N.A.A.C.P. have begun educational campaigns—so far quite modest—directed at this population; and, some local groups are performing the same function. Thus the Metropolitan Washington Housing and Planning Association recently leafleted employers at the American Automobile Associations downtown Washington headquarters to warn them that the Association's planned relocation of its headquarters to suburban Fairfax County might force many of them to leave their jobs: the new headquarters will be a \$2.80, two-and-a-half-hour busride away from downtown, and Fairfax County has virtually no moderate-or low-income housing to permit workers to live closer to the new facility. Such efforts at building inner-city grass-roots support may permit direct action to play a role in the open suburbs movement in the future and thereby relieve the emphasis now placed on litigation.

As might be expected, the open suburbs movement has found it even more difficult to win adherents in the suburbs themselves. The existing pattern of exclusion of the poor and racial minorities from these communities and the repeated refusals of individual suburbs such as Black Jack, Mahwah, and Oyster Bay to curtail their exclusionary practices even when under strong pressure in the form of costly litigation to do so, suggests that opposition to the movement on the part of suburbanites is strong, to say the least.⁵⁷

This population, whose national voting strength now outweighs that of the cities, has made its voice heard in Washington: in his June 11, 1971 Statement on Equal Housing Opportunity, President Nixon stated his administration would "not seek to impose economic integration upon an existing local jurisdiction." (The effect of this policy on federal housing and litigation programs will be discussed below.)⁵⁸ Similarly, suburban legislators can be expected to oppose congressional action designed to integrate their

constituency.

At the local level, suburban proponents of the status quo have enjoyed repeated successes in blocking local plans for opening their communities. Thus the Dayton Plan,⁵⁹ the Massachusetts anti-snob zoning law, the New York State Urban Development Corporation with its local zoning override powers, and the Fairfax County, Va. law requiring fifteen percent of all new subdivisions to be low- and moderate-income housing have all failed to produce suburban housing opportunities for minorities as a result of strong protest activities by present suburban residents.

With such opposition making federal legislation difficult to obtain and making state and local legislation ineffective even when passed, open suburbs activists have been largely foreclosed from a second means for bringing about changes in housing patterns and again forced to turn to litigation as a way of establishing rights where political support is absent and political opposition strong.

The open suburbs groups—in particular the League of Women Voters—are beginning to make efforts to educate suburbanites both to the role they play in perpetuating the plight of the center city poor and to the fact that suburban integration need not destroy the present character of any community. Interestingly,—and this again points up the fact that the participants in the movement are in no way of one mind—John Ferren, the Washington attorney responsible for the Fairfax County law, and groups like the American Jewish Committee have emphasized in their educational campaigns the housing needs of moderate-income whites—a suburb's own police, teachers, elderly, young marrieds—and have played down the needs of inner city blacks. Other groups like the League of Women Voters and the N.A.A.C.P. have taken exactly the opposite approach. As yet neither faction's efforts have borne fruit and legislative solutions to exclusionary zoning remain elusive.

There is a third major political force whose support the open suburbs movement has as yet failed to mobilize. This is the broad, shifting "liberal" coalition, headed by national political figures, churchmen, educators, and intellectuals, and supported by a broad segment of the population at large, which in the past has thrown its weight behind issues like Southern desegregation, welfare and prison reform, relief for migrant workers, consumerism, and environmental protection and thereby lent legitimacy to these efforts. The absence of backing from this block has added to the inability of open suburbs groups to obtain federal legislation to break down suburban restrictions and, again, caused them to rely on litigation as the principal tool for change.

Numerous reasons may be advanced, to account for the failure of a "blue-ribbon" liberal movement to coalesce around the issue of open suburbs. First, the inherent nature of exclusionary zoning is less shocking or appalling than acts such as prison brutality or abuse of migrant workers which have formed the nucleus of many liberal causes. Secondly, restrictive land-use practices discriminate directly against the poor and

“only” indirectly against racial minorities. American society embraces the concept that distinctions based on wealth are normal and even desirable as incentives,⁶⁰ while it generally disdains overt racial discrimination. As a result, exclusionary zoning has not received the kind of sympathetic attention which overt racial discrimination received in the 1960’s. Third, the causal relationship between the evils of inner-city life—which evils the liberal coalition has recognized—and suburban zoning practices is not clear-cut: while lack of education and job discrimination have been identified as contributing to these evils and have been addressed by liberal leaders, they have yet to “see” the role which suburban exclusion plays here. Fourth, unlike Southern school segregation or exploitation of migrants which are phenomena confined to particularized geographic areas, exclusionary zoning is nation-wide and many persons who have spoken out against abuses in other regions are not prepared to object to discrimination practiced, literally, in their own one-acre backyard. At the same time, finally, exclusionary zoning has not attracted the support of two other national issues—consumerism and environmentalism—because unlike those issues it does not address itself to wrongs perpetrated on the white middle-class majority, but to wrongs perpetrated by them on minority groups in the society.

While efforts by Suburban Action⁶¹ and the national media, generally, have begun to build public awareness of the open suburbs issue, and while some public figures such as Governor Cahill of New Jersey⁶² and Senator Ribicoff of Connecticut⁶³ have spoken out against suburban land-use restrictions, the reasons outlined above suggest that a national momentum for suburban housing change will not be likely to develop in the near future and that the emphasis which the present open suburbs movement has given to “non-popular” modes of creating change will continue.

In the absence of popular support for open suburbs, one technique which might be employed to obtain Congressional action would be for the national civil rights and housing groups to confront legislators face to face and attempt to persuade them of the discriminatory character of local zoning restrictions and of the moral rightness of legislation to eliminate them. Few groups engage in such lobbying, however, because under their reading of the federal tax laws they believe such activity is prohibited.

The federal tax laws prohibit tax-exempt organizations from engaging in any “substantial” amount of legislative lobbying on the penalty of losing their tax-exempt status.⁶⁴ With the exception of the NAACP, the Leadership Conference and the A.C.L.U. which do engage in such lobbying, all of the national groups involved in the open suburbs movement have such tax-exempt status under § 501(c)(3) of the Internal Revenue Code—that is, in general, they need pay no taxes on their income and contributions to them are deductible by the donor under § 170. Precisely what actions by these groups in the legislative arena would constitute a “substantial part” of their activities and cause loss of their exemptions is somewhat unclear, but the case law suggests that any concerted on-going

program to influence legislators on specific pieces of legislation or to mobilize the public to contact their legislators for this purpose would be forbidden.⁶⁵

Were a 501(c)(3) organization to engage in such activities on a substantial on-going basis the almost certain result would be the termination of foundation support,⁶⁶ which, as will be detailed below,⁶⁷ would mean at least the drastic curtailment of the organization’s activities, if not its complete demise.⁶⁸

The restrictions of the federal tax code on legislative lobbying do not, however, apply to efforts to influence actions by “executive, judicial, or administrative bodies.”⁶⁹ Thus the program of the Center for National Policy Review and the administrative lobbying activities of various other groups are within the ambit of permissible conduct, as are, of course, all litigation efforts. The tax laws also specifically allow civil rights groups to provide technical advice or assistance to a governmental body (e.g. to testify before a Congressional Committee) in response to a written request by that body and also permit publication of the results of non-partisan research, study, or analysis.⁷⁰

There can be little doubt that these regulations have had a significant effect on channelling the activities of the civil rights groups in the anti-exclusionary area. Spokesmen for these groups⁷¹ and for the foundations⁷² repeatedly asserted that all efforts to influence legislation were to be avoided, citing the possible loss of their organizations’ tax exemptions or, in the case of foundations, other penalties⁷³ as their reason.

Despite this restrictive view of permissible legislative lobbying, much can be done in the legislative arena. First, as the examples in the footnotes suggest⁷⁴, the sponsoring foundation will probably not be penalized for non-earmarked grants to public charities (including most national civil rights groups) where the grantee engages in insubstantial, or even substantial, lobbying. Thus foundation-imposed restrictions on grantee lobbying, in such cases, seem uncalled for. Secondly, the grantee civil rights groups themselves should explore the limits of the zone of permissible lobbying under the “not a substantial portion of its activities” test; clearly some limited amount of lobbying is allowed and the groups should not ignore this opportunity to promote social change. Finally, using the invitational and non-partisan analysis alternatives previously mentioned, which presumably include expression of conclusionary findings tending to support specific legislation, civil rights groups can “influence” legislation without running afoul of the law. Use of this technique, now employed by a few groups, should be expanded. Thus the open suburbs groups could do much to aid the passage of one of the bills now before Congress affecting suburban land-use patterns.⁷⁵ Given the major impact of past legislation, such as the 1968 Fair Housing Act, on the suburban land-use field, it is surprising that the tax-exempt civil rights groups have not fully exploited the opportunities the law apparently allows, but on their own initiative and that of their sponsors, have, to some degree at least, narrowed the scope of their legislation-directed conduct.

Litigation as a Positive Choice

The long-standing preference, mentioned earlier, of a number of civil rights and housing groups for test case litigation suggests that its prominence in the open suburbs movement is due at least in part to the inherent value of this approach and is not merely the result of a dearth of promising alternative techniques for achieving the movement's goals. This is indeed the case, and there are a number of positive reasons for its popularity.

First, while no case in the exclusionary zoning field has yet gained relief for the entire class of inner-city residents, court action has advanced the housing interests of particular, individual and group plaintiffs in a large number of instances.

Second, litigation has exerted a strong influence on other institutions such as private industry,⁷⁶ and state and federal governments. President Nixon's decision to push Justice Department suits against communities which are motivated to pass zoning laws by their desire to exclude racial minorities was strongly influenced by the *Lackawanna* decision.⁷⁷ Similarly, in late 1970 Governor Cahill of New Jersey was moved by recent court decisions to exhort the state legislature to move overcome exclusionary zoning.

After citing *SASSO* and other recent cases, Governor Cahill said:

These decisions and other cases presently pending in the courts of this State and Nation have led knowledgeable attorneys to freely predict that large acreage and large square foot requirements, along with absolute prohibition against apartment construction, will soon be held to be violative of the Constitution and outside the scope of planning and zoning officials. It seems to me, therefore, that the message should be loud and clear! We must undertake corrective measures now if we are to insure the maintenance of controls in the hands of local officials . . . some way must be found . . . to overcome abusive application of local zoning laws.⁷⁸

Larry Perl, a program director in the Equal Housing Opportunity Section at HUD said that HUD's development of the new project selection criteria was in response to the Third Circuit U.S. Court of Appeals decision in *Shannon v. HUD*⁷⁹ and the Seventh Circuit decision in *Gautreaux*. Both these decisions required dispersal of federally subsidized housing into racially integrated areas. Thus, recent court decisions on zoning have stimulated executive and administrative action.

A third factor making litigation an attractive tool for the open suburbs movement is the publicity major zoning challenges generates locally and/or nationally. Such publicity serves an important educational function by high-lighting the fact of suburban exclusion of minorities and underscoring the causal connection between this exclusion and the general inability of the inner-city poor to achieve social and economic betterment. Paul Davidoff, co-director of Suburban Action, states that he picks suits largely for their publicity value: he wants cases which will dramatize the plight of the poor and reveal the racial and class prejudices of suburbia to the nation via the media.

Fourth; litigation is a tool of considerable flexibility and leverage in a local situation. Civil rights and housing

groups can use the threat of a lawsuit against local officials to enhance their bargaining position in negotiations for zoning change; they can file suit to increase the pressure, and then drop it if a settlement is hammered out; in some cases they can get preliminary injunctions which hamstring local officials for an extended period until the main case is tried. Litigation puts the initiative in the hands of the open suburbs activists, and where his case is strong, gives him considerable clout in the bargaining situation.

The fifth and perhaps most important benefit which litigation offers the open suburbs advocate, however, is the possibility of making law, i.e. of establishing new rights for the whole class of inner city residents and of prohibiting entire ranges of conduct by local zoners. The decision in Suburban Action's case in Madison, N.J. for instance, prohibited local zoning boards from continuing or developing land-use patterns which did not take account of the housing needs of the entire region, including the needs of inner city residents of near-by Newark. Similarly, the *Shannon* and *Gautreaux* decisions established the broad rule that new publicly-supported housing must be dispersed into non-ghetto areas. Court decisions can thus establish the rules which require the changes the open suburbs movement seeks; hence litigation is a crucial part of the movement's activities.

Finally, court victories help demonstrate the legitimacy of the movement, elevating activists' calls for housing change from the status of impudent demands on behalf of a bunch of down-and-outers to firm insistence on the enforcement of constitutional and statutory rights.

C. Strategic Choices: Legal Theory & Jurisdiction

While most of the national organizations in the movement have thus come to agree on the value of litigation in achieving their goals, considerable diversity of opinion exists among them as to how best to proceed before the courts. The range of doctrinal and jurisdictional alternatives which confronts open suburbs litigators is extremely broad, and in itself distinguishes the movement against suburban land-use restrictions from a number of earlier litigation campaigns, such as that against racially restrictive covenants, where these choices were considerably less complex.

To date the main threshold question for exclusionary zoning challengers, has been whether to concentrate on state court litigation using mainly substantive due process arguments or whether to go to federal courts with equal protection arguments. Because these doctrinal approaches have been covered so thoroughly in the legal literature, the reader is referred elsewhere for a discussion of its development.⁸⁰ Until recently certain organizations specialized in certain types of arguments. Suburban Action brought suits on substantive due process grounds in state courts, especially in New Jersey.⁸¹ The National Committee Against Discrimination in Housing specialized in federal equal protection doctrine arguments in federal courts,⁸² as did the

A.C.L.U.⁸³ However, recent court cases have forced the litigators to reconsider their focus, and now N.C.D.H. is bringing cases in both state and federal courts,⁸⁴ as is Suburban Action.⁸⁵ This shift in emphasis is due in part to the desire for variety of attack by the organizations and in part as a reaction to two important decisions—the U.S. Supreme Court's *Valtierra* decision and a New Jersey Superior court's *Madison Township* decision. *Valtierra* suggests that racially discriminatory intent has to be proven in order to win a zoning case on equal protection grounds—that a showing of economic discrimination will be insufficient to trigger the stringent suspect classification test needed to overturn a zoning ordinance.⁸⁶ *Madison Township* was the first case to order that the zoning for an entire area, rather than just for one parcel, be changed.⁸⁷ The court in *Madison* accepted the theory that for a community zoning law to be a valid exercise of the local police power, it must serve the general welfare of residents of the metropolitan area as a whole—not just the interests of the citizens within a particular community.⁸⁸ Area-wide housing needs and population pressures were declared to be very important in deciding what is in the general welfare.⁸⁹

Thus, while the United States Supreme Court appears to be withdrawing from the expansive and constantly growing breadth of interpretation given to the Equal Protection Clause under the Warren Court, *Madison* and other state opinions signal a growing state judicial willingness to recognize metropolitan housing needs and to strike down city zoning laws through the use of the Due Process Clause.

Though there has been, in general, a shift toward greater emphasis on state court litigation, suits continue to be filed in federal district courts.⁹⁰ The federal court cases since *Valtierra* have met with some marked successes for the open suburbs advocates. For example, in *Crow v. Brown*, a Georgia District Court ordered dispersal of subsidized housing programs throughout the entire Atlanta metropolitan region.⁹¹ Though that case deals with dispersion of subsidized housing, its principles are readily transferable to the zoning field.

Again unlike many previous movements for social change through litigation, the open suburbs movement is faced with a complex of institutional actors who importantly contribute to the status quo and can therefore effectively be named as defendants. Initially the national organizations perceived the problem as existing on only one level, that of local government. Gradually they recognized the importance and vulnerability to suits of other actors in the process. The federal government usually in the person of the Secretary of Housing and Urban Development has appeared as defendant in more and more of this litigation. State government as the delegator of powers to local government is also appearing on more complaints. Corporate America is the next target.

The litigators have also begun to develop more novel lines of attack. One promising approach is the filing of suits against private employers⁹² to block the relocation and construction of facilities in exclusionary suburbs.

During the past year anti-exclusionary zoning groups have taken a number of actions to prevent the movement of employment opportunities to areas which are inaccessible to low- and middle-income families, for want of adequate near-by housing. These actions are based on the rationale that the location of employment facilities in these communities deprives low- and middle-income workers (especially minority group workers) of jobs which would be available to them but for the exclusionary practices of the communities. These practices are claimed to prevent lower income employees from living near to the job site and thus foreclosing employment to this group at the new facilities. Plaintiffs in these actions hope either to force the employer to choose a different, non-exclusionary location for his offices, or to require the employer to take affirmative action in the community he has initially chosen to insure the availability of adequate low- and middle-income housing for his employees. In either case, the exclusionary community, in order to reap the additional taxes which will be generated by the proposed facility, will be under considerable pressure to change its zoning requirements. Similar suits have been filed against the Federal government.⁹³

A second new approach to exclusionary zoning is a voting rights argument first articulated by a Yale Law student and based on the proposition that the poor are disenfranchised by zoning laws from their right to influence those who decide where they cannot live; it is now part of the A.C.L.U.'s *Black Jack* brief.

The Thirteenth Amendment, reincarnated in *Jones v. Mayer*,⁹⁴ is now considered another possible way to bolster an attack on suburban exclusionary practices. In *Ranjel v. Lansing*,⁹⁵ the district court, in a decision reversed on appeal, seemed to have adopted this approach.

The Workable Program Requirements, which are administrative interpretations by HUD of the Housing Act of 1949, 42 U.S.C. 1451(c), specify that no urban renewal shall take place if it does not increase the supply of low- and moderate-income housing. Several suits have been filed very recently, for example, *West v. Housing Authority of the City of Atlanta*⁹⁶ and *Camden Coalition v. Nardi*, to enforce this hitherto ignored law.⁹⁷

Eleven federal agencies are charged with the duties to "promote fair housing throughout the United States" and to assure that federal funds are used in a non-discriminatory fashion, by Title VIII of the 1968 Civil Rights Act and by Title VI of the 1964 Civil Rights Act. These laws, which were construed in *Shannon* to bar the Federal government from building public housing in areas of racial concentration, are now considered a major weapon for pressuring the Federal government into shifting its subsidized housing effort from the central cities to the suburbs. Using this legislation as a basis, the open suburbs advocates are planning to pressure HUD to withhold money for suburban use—such as sewer and water grants—unless the suburb accepts some low-cost housing. HUD will also be pressured to use the area-wide planning powers given to it by Section 204 of the

Metropolitan Development Act of 1966, 42 U.S.C. 3334, to promote metropolitan-wide residential integration.

Sections 1981, 1982 and 1983 of Chapter 42 of the United States Code may represent another lever to open the suburbs.

A final doctrinal argument which was employed in the Urban Coalition's *Valtierra* amicus brief and thought to be promising by Fred Bosselman is a right to travel argument.⁹⁸

Thus, the area is rich with doctrinal bases for suits. The trend is toward use by each organization of several of these arguments—and of several jurisdictions—rather than concentration in one court or on one doctrinal argument.

D. Pluralism and Coordination

Owing to the large number of independent national organizations now active in the open suburbs field, and to the complexity of their activities aimed at a whole range of local and national institutions, the movement has not achieved the degree of coordination which characterized "classic" civil rights campaigns like those against Southern school segregation and capital punishment, both of which were totally orchestrated by the Legal Defense Fund. In the past such coordination has been perceived as desirable: it permitted methodical development of legal doctrine based on the strongest possible fact situations and it minimized the risk of adverse precedents. Most open suburbs activists,⁹⁹ however, feel that such total coordination, if it could be achieved at all, would not be desirable for the campaign against exclusionary zoning, because it would curtail the rich creativity, described in the preceding section of this article, which has characterized the movement to date and would dampen the competitive excitement among activists which supplies at least a part of the movement's elan. The feeling is all but unanimous that the drive to open the suburbs should maintain its present decentralized, multifaceted approach, although there is recognition that a moderate degree of horizontal coordination among the major groups, such as that supplied by the National Urban Coalition Exclusionary Land-Use Practices Clearing House discussed below, is useful and that some increase in vertical coordination with local groups, permitting them to bring a larger number of exclusionary zoning suits, would also be beneficial.

The most significant effort to coordinate among the national organizations has been the Exclusionary Land-Use Practices Clearing House. Herbert Franklin, Director of Housing Policy for the Urban Coalition, is the coordinator for the conferences. He plans the agenda for each meeting, decides who should be invited and sends out various materials between meetings. Forty to sixty people—members of the national civil rights organizations, HUD, the Justice Department, major corporations, representatives of the National Association of Home Builders, and a few law professors—attend each

conference and the total mailing list is approximately one hundred and twenty. Mailings of complaints, briefs, new HUD rules and other relevant materials go out about once a month. Those who attend the conference meet in a single large room, listen to and critique two to six presentations during the one-day sessions. This format is conducive to educating those who attend the conferences, but produces neither close coordination in deciding what kinds of cases to bring nor joint writing of briefs. However, some of the informal contacts made at these meetings do result in critique of briefs and suggestions for further litigation strategy.¹⁰⁰ The meetings have focused on litigation tactics rather than administrative lobbying, legislative lobbying, or public relations, though all of these topics have been discussed. The Clearing House has provided a good opportunity for civil rights litigators to recruit others for *amicus curiae* briefs.¹⁰¹ It also gives them an opportunity to request that other groups comment on pending HUD rules.

The civil rights and housing activists attending the Urban Coalition Conferences and the major litigation and lobbying offices in which they work can be viewed as forming the upper portion of a two-tier system: the lower tier is composed of local civil rights and fair housing groups¹⁰² (some of them chapters of national organizations), O.E.O. Legal Services offices,¹⁰³ non-profit subsidized housing sponsors,¹⁰⁴ and private attorneys,¹⁰⁵ all of which participate to some extent in open suburbs activities at the community or grass roots level.

Generally speaking the pattern is that community groups turn to the specialized national-level, offices for aid when local authorities have resisted efforts to bring about a desired change in housing patterns, and outside help—advice, political support or a major law suit—is required. The local groups—be they affiliated with the national organization or independent—may thus be viewed as the clients of the nationals' litigation or lobbying services.

The development of the N.A.A.C.P.'s suit against the town of Oyster Bay, N. Y., is illustrative. Initially the Glen Cove (a town which borders Oyster Bay) branch of the N.A.A.C.P. sought to change Oyster Bay's restrictive zoning pattern by negotiating with town officials. When this failed it obtained the help of Bill Morris from the national office of the N.A.A.C.P. and of Suburban Action who together conducted a grass roots campaign within Oyster Bay to attempt to modify the attitudes of residents towards lower-income, higher-density housing. Despite modest successes here, town officials refused to alter their stand and the local and national offices decided to bring suit—a suit which would be conducted by the national office, since it alone had the financial resources and necessary expertise to do so. It was at this point that individual plaintiffs were sought for the suit, to represent the class of excluded blacks; the local chapter had responsibility for recruitment.

As a general rule the litigation offices of the national organizations do not operate at the grass roots level. They pick up cases after a local action group has been formed and after a particularized problem has arisen

which the action group feels unable to deal with alone, i.e. after the plaintiff, defendant and the controversy have "ripened." Similarly the lobbying offices such as the Leadership Conference, and the Center for National Policy Review do not act at the grass roots levels, but respond to directives from national coalitions of local groups.

Local attorneys, whether they be OEO neighborhood lawyers, attorneys affiliated with the A.C.L.U., the National Lawyers Committee, or the N.A.A.C.P. Legal Defense Fund, or private attorneys interested in doing *pro bono* work in this area do not currently have a way of easily marshalling the doctrinal arguments. They also lack form pleadings and briefs to speed their work in preparing an anti-zoning case and are often unaware of the best ways to make discovery for such suits.

This lack of information on the local level is probably one of the main reasons that few major cases are being brought by local lawyers. As pointed out above, the area is almost totally dominated by a handful of attorneys working at the headquarters of national organizations. To remedy this the League of Women Voters and the Lawyers' Committee are developing litigation handbooks to increase the ability of local action groups to use the courts to advantage.

E. Clientele, Legitimacy and Accountability

While at the present time the clientele for the major litigation and lobbying units operating in the open suburbs area is becoming fairly well established,¹⁰⁶ initially it was the activists working in the specialized litigation and lobbying offices of the national civil rights and housing groups who identified exclusionary zoning as an issue:¹⁰⁷ their interest in the area preceded awareness of suburban restrictive practices at the community level. Thus in 1969 William Morris of the N.A.A.C.P. called suburbia "the new civil rights battleground"¹⁰⁸ and only subsequently did his organization's members endorse "metropolitan-wide approaches to freedom-of-choice in housing location" in their Convention Resolutions;¹⁰⁹ today Morris is still building support for the issue among N.A.A.C.P. membership.¹¹⁰ Similarly, Suburban Action Director Paul Davidoff calls himself a "self-proclaimed advocate" of open suburbs and part of his organization's program was (and is) generating inner-city interest in this area.¹¹¹ Thus in choosing suburban land-use restrictions as an area of concern, many of the activists working in the top echelons of the national civil rights organizations were not acting in response to the felt needs of the community whose interests they represent; they were themselves initiating a new movement for social change.

This situation, it can be argued undercuts the legitimacy of these national civil rights group planners who purport to speak for and act in behalf of racial minorities and the poor. Their legitimacy would seem to depend on their being representatives, in fact, of this broad constituency and not mere elitist policy makers. To the extent that civil rights activists pursued their own

ideas rather than the felt needs of the class of persons they represented, they, arguably, fell in the latter category.

The subsequent history of the open suburbs movement, and particularly the emergence of a number of local housing groups supporting this policy, indicates to some degree, however, that the national office activists were indeed representing the needs of their constituency, but needs which had not yet found expression. Of course these local groups are not democratically chosen and their existence does not provide an absolute indicator of community support for open suburbs. Nonetheless, given that the population the national activists represent is poorly educated and, owing to its social isolation, is unlikely to look beyond its immediate needs in the inner city, while the civil rights activists themselves are highly trained professionals with a national outlook, it could be argued that part of the *duty* of these activists is to look for and identify new areas of likely importance to their constituency: Viewed in this light, the self initiated involvement of the activists with the open suburbs issue cannot be deemed improper.

It is important to note, however, that if the community—i.e. racial minorities and the poor—does not support a given issue raised by the national civil rights activists only a few of the national civil rights organizations are structured to permit this community to voice its disapproval and to steer its representatives into different areas of activity. Thus the N.A.A.C.P., whose members are also members of the community whose interests are ultimately represented and who meet annually in convention, can be said to be directly responsible, at least in its general policy choices to the constituency it serves. The Leadership Conference and N.C.D.H. are two more examples: they respond to the directives of their member organizations, many of which are themselves representative bodies whose members are black and/or poor. The Center for National Policy Review, however, is a borderline case: it selects from among competing representative groups with differing housing policies those which it will provide with lobbying services.¹¹² Its decisions, however, are not subject to review by its underlying constituency, the black and poor communities.

The litigation offices of the national civil rights organizations are even more insulated. The policies they develop are subject to review neither by their clientele—composed of discrete and unrelated local organizations—nor by their ultimate constituencies, the minority groups and the poor, with whom the litigators rarely deal until their concerns have ripened into justiciable controversies. Moreover, the diffuse membership of the A.C.L.U., the Lawyers' Committee, and even the N.A.A.C.P. can do little more than give direction to the overall policy of the organization: members clearly cannot review decisions to take on or reject a given case, nor have they sufficient knowledge of the facts or the legal expertise to determine whether the organization's general litigation strategy is the optimal one for achieving the organizational policy which they, the members, have helped to decide.

In addition to having little control over the policies of

the national civil rights litigation and lobbying office, the community these groups represent is equally without power to review the quality of the representation it receives. Because civil rights litigators and lobbyists are so few in number and because the poor and racial minorities lack funds to purchase the services of private groups, they are forced to accept the representation which the national civil rights offices offer them: they cannot go elsewhere if they feel the quality is inferior.

One institution, however, does possess the power to review both the policies of the national civil rights litigation and lobbying offices and the quality of their work: this is the private foundation whose support is essential to virtually all of these offices and whose decisions on funding are based both on the programs the civil rights groups propose and on how well they can be expected to perform these programs.

F. The Role of the Private Foundations

At the present time eleven foundations provide the financial support of the open suburbs movement. These are the Field, Stern, New York, Taconic, New World, Norman, Carnegie, Rockefeller, Wallace-Elgabar Schumann and the Ford Foundations, the last being by far the largest contributor to the movement. All of these are New York area based, liberally oriented foundations, and with the exceptions of Ford, Rockefeller and Carnegie Foundations, are fairly small. If their support were withdrawn the movement against exclusionary land-use practices would be dramatically curtailed. Suburban Action, and the Housing Opportunities Council of Metropolitan Washington, would cease to exist. The work of Richard Bellman at N.C.D.H., Laurence Sager at the A.C.L.U., Jeffrey Mintz, Michael Davidson and John Shapiro at the Legal Defense Fund, and Jim Meyerson and William Morris at the N.A.A.C.P.—men who have made and are making major contributions to the field—would be halted and programs at the Center for National Policy Review, and the League of Women Voters, eliminated. The activities of the Lawyers' Committee and the National Urban Coalition Conferences and Clearinghouse on Exclusionary Land-Use Practices would also be sharply reduced, although, since both organizations have significant amounts of non-foundation support, their zoning programs might be continued on a modest scale. A handful of other groups, such as O.E.O. Legal Services offices and the National Housing and Economic Development Law Project—which have been responsible for a number of anti-exclusionary zoning cases¹¹³—would continue to function, however, as would the Leadership Conference on Civil Rights and the lobbying arm of the N.A.A.C.P.

Determining the precise monetary contribution of the foundations to open suburbs is virtually impossible since most grants are made to organizations' general purpose funds or for their housing equality program, and thus only a portion of the total grant is actually spent for opposition to zoning restrictions; the organizations' own

budgets, in turn, do not break down expenditures by program.¹¹⁴ There are, of course, some exceptions to this rule: all of Suburban Action's budget, for example, goes for this purpose. An extremely rough estimate would place foundation contributions to the open suburbs movement in the neighborhood of three quarters of a million dollars annually.

It has been the pattern that the grantee civil rights organizations, and not the foundations, have initially identified exclusionary zoning as an issue and have developed programs to combat these restrictions. The foundations' role has been confined to endorsing decisions made by grantees to enter this field or to funding new programs which are focused on opening the suburbs. In no case have the foundations sought out groups interested in this area, or urged "general" housing groups to take on this issue. Thus, though the foundations have the power to determine the litigation and administrative lobbying policies of the national civil rights organizations, they do not exercise this power actively, but leave the initiative in the hands of their grantees.

The relationship between the Ford Foundation and N.C.D.H. is typical: Ford made grants to N.C.D.H. for the purpose of fostering equal housing opportunity; N.C.D.H. then identified exclusionary zoning as a major obstacle and gave high priority to this area. Subsequent Ford grants indicate the foundation's endorsement of N.C.D.H.'s policy decision, and while it can thus be said that Ford has an interest in this area¹¹⁵ the Foundation clearly has not been the initiator of developments here.

A similar pattern is seen in the Field Foundation's support of Suburban Action. Field viewed Suburban Action as a "single idea" organization, which it funded because it agreed with the idea. It was Suburban Action, however, that developed a program and came forward to request funding; the foundation's role was passive.

Foundation involvement in exclusionary zoning has thus been a two-step process: first a grantee has determined that exclusionary zoning is an important issue and then the foundations, having been presented with the idea, have decided they agreed. The process is an important one for it is through this channel that funds have been directed to major social problems; it is also the process which determines which interest groups within the underlying community receive additional representation in the courts or before the federal bureaucracy.

The criteria which the foundations used in deciding to foster this new area of endeavor are, however, rather vague. No foundation apparently attempted to poll spokesmen for the underlying community—inner city residents—to determine whether they felt expenditures to open the suburbs would be a valuable investment. Ultimately, program officers relied on their professional judgment, informed by their "general knowledge,"¹¹⁶ what they "read in the papers,"¹¹⁷ people they see,¹¹⁸ and—clearly this is the main factor for most—a long-standing familiarity with the needs of minorities.¹¹⁹

Other criteria were also used, of course, but these went more to the quality of the work the grantee could

be expected to perform, rather than to assess the desirability of the subject matter area in which they would work. Thus Ford's emphasis was on "hard programming" i.e. programs in which the results produced could be readily seen. This emphasis led Ford to turn down Suburban Action's initial grant request: S.A.'s public relations emphasis would not permit later judgment as to whether it had achieved the goals it had set.¹²⁰ The Field Foundation, however, gave greater weight to the "track record" of Davidoff and Gold and funded Suburban Action because it knew they were "able."

The foundation's failure to examine community support for the issue prior to funding and their complete reliance on the initiatives of the national-level civil rights groups in getting into this area leads to the conclusion that the foundations have not viewed their role as being one of identifying the felt needs of the inner-city poor and insuring, through their programming, that each of these needs is proportionately represented at the national level. Community needs will be represented only to the extent that reputable civil rights activists develop programs to serve them and are able to persuade funding organizations that these needs—rather than those represented by other activists—should be satisfied.

Thus, although their dollars purchase representation, the foundations are not committed to the principal of one man, one vote in determining how their funds should be spent to help those within the inner city. As a result, certain interests in the community may well go under represented: there is not, for instance, a parallel institution to the Center for National Policy Review to speak for clients like the National Tenants Organization, a poor people's group which opposes dispersal of inner-city residents to the suburbs.

Although various foundations have earmarked funds to benefit racial minorities and the poor as a whole and thus might be charged with the duty of fair representation, there appears to be little support for this model of democratic programming. First, owing to the vast number of private foundations it is apparent that an extremely broad spectrum of interests is already being supported. Second, smaller foundations, the New York Foundation is an example, simply lack the resources to investigate community sentiment for proposed new programs. Most important, however, is the widely held opinion that foundations have the responsibility to sponsor innovation, to raise community consciousness rather than merely follow it, to fund activities which, because untried, lack broad support, but which, if successful on a small scale, will gain such support from the community, the government, or other sources in the future.¹²¹

This latter view is compelling. Insulated from share-holders and voters, the private foundation is the unique institution in American society which can channel resources into areas too controversial or untested to receive funds from private industry and the government. To restrict foundations to supporting only

projects for minority groups in those areas which have already attracted the public's attention, would be to eliminate a major source of new ideas for treating the ills of American society, a loss which cannot be afforded.

A second justification may be posited for foundation support of open suburbs groups. It can be argued that the primary client which these groups serve is the Constitution itself and that their efforts in the open suburbs field are but the particularized expression of a more fundamental commitment to constitutional principals, especially that of racial equality. The Lawyers' Committee, for example, in its literature proclaims its purpose to be "creating public confidence in the law," because

"The foundation of our political system is citizen confidence in the integrity and effectiveness of the law,"

and

"Constitutional rights that go unenforced are not rights at all but myths."

Lawrence Sager at the A.C.L.U. has stated that he is primarily interested in zoning cases because they provide a context for extending the ambit of the Equal Protection clause, and the A.C.L.U. itself has traditionally defined its client as the Bill of Rights and particularly the First Amendment.

From this perspective, the role of the national civil rights and housing groups can be viewed as one of concretizing or actualizing broad constitutional guarantees through a three-step process of characterization, persuasion, and institutional modification. In the initial phase the groups characterize various aspects of American society in constitutional terms: exclusionary land-use restrictions, for example, are characterized as denials of equal protection, or due process, etc. The second step is the process of litigating, lobbying, and educating in order to persuade courts, legislators, and/or the population at large of the appropriateness of this characterization. This leads to the third stage: legal or political action which modifies social institutions to conform them to newly recognized constitutional dictates.

The foundations by supporting the civil rights and housing groups are thus supporting the realization of constitutional ideals, or, stated differently, the third-party beneficiary of foundation financing is the Constitution, itself. The foundations' choice to fund the open suburbs movement, as opposed to another campaign, is incidental in this context, because *any* civil rights campaign advances constitutional ideals and thus all are fundamentally equal in merit. Foundation support for civil rights activity *in general* is proper because the Constitution is a document of universal application and by serving it, the foundations and their grantees do a service to the nation as a whole.

The idea of a Constitution is to announce and embody long-term values to which society is willing to defer when those values conflict with the interests of the moment. Arguably, there must exist a group of persons who are able to take that more long-term view and who can thereby act as the advocate of those long-term

values. Today, private foundations are enabling the national organizations described above to play this role.

Federal government funding of such activity might be preferable to foundation support. Historically, however, Washington has been slow in identifying and supporting new programs to enhance constitutional rights; private groups which must rely on foundation funding have invariably led the way. Also, legal programs funded by the federal government have been less than immune to political interference. At least until a more independent structure is established, the contribution of non-governmental sources should not be undermined. Moreover, political bodies, namely courts and legislatures, operate as a check on foundation activity aimed at implementing constitutional guarantees: neither the foundations nor their grantees make law or ultimately decide which constitutional values are advanced—courts and legislatures do.

If the advancement of constitutional guarantees is to continue apace, the foundations must maintain their policy of supporting new programs to accomplish this goal if they appear feasible. Community support for a particular program becomes largely irrelevant, as long as the Constitution is served.

In addition to relying on the national civil rights organizations to identify new areas of endeavor (and, of foundation support), the foundations have also relied on the organizations to police the quality of their own work. For the most part review of a grantee's work is of a very general nature. Leslie Dunbar, Executive Director of the Field Foundation, stated that he measures the "substance" of what an organization is doing, "the main thrust" of its activities; he does not measure output or do "productivity accounting." During the course of a grant (as opposed to the time of re-funding) his foundation exercises almost no control:

it would be very wrong on our part to require a grantee to submit in advance its plans or personnel choices and would particularly intolerable in the area of the movement for social change.¹²²

Dunbar does expect to know what an organization is doing, but usually gets this information through informal discussions with the grantee, not by formal investigations: "When you need formal controls, then this shows the relationship is foundering"; the grantee at this point has lost the confidence of the sponsor and is not likely to be re-funded.

The situation is similar at the New York Foundation, which in its grants to N.C.D.H. sees itself as purchasing increased equal housing opportunity generally: it does not try to determine that organization's priorities or strategy, leaving to its complete discretion the mix of litigation, administrative lobbying, and research/publication it will turn out. The test for re-funding a grantee which goes to the quality of its performance is "continued ability to carry on its program," again a very broad standard.¹²³

The foundations do not view their support of individual grantees as a long term arrangement. At the

end of their one-to-three-year period of funding, however, most grantees, like the Lawyers' Committee, the Legal Defense Fund, and N.C.D.H. turn to other new foundations and to the foundations already funding them for support. Although Robert Chandler at the Ford Foundation has urged his grantees to develop non-foundation support by building a dues-paying membership or by soliciting private industry, the example of the Lawyers' Committee suggests that to remain viable, national civil rights organization will continue to require help from the foundations: the Lawyers' Committee, has both a membership and corporate support and must still rely on foundation grants for forty-three per cent of its budget.

The future participation of the national civil rights groups in the open suburbs movement is thus closely tied to continued foundation support. The commitment of a number of foundations,¹²⁴ especially Ford,¹²⁵ to the general area of equal housing opportunity, however, is a long-range one and at this point the funding organizations appear to view opening the suburbs as an integral part of any equal housing opportunity program. Although it is not possible to predict how long foundation interest in the area will last, such interest has apparently not yet reached its peak: Ford and the Norman Foundations, to name two, are both looking for additional programs to sponsor in the equal housing area. Thus funding for anti-exclusionary zoning efforts is all but certain for the near future. (Prospects for long-range support will be discussed in the concluding section of this article.)

II. The Reactors: Institutional Response to the Movement

The goal of the open suburbs movement is to change the behavior of major institutional forces in American society which in the past have contributed to the polarization of the inner cities and the suburbs. The discussion below will examine four such powers, the suburbs themselves, the home builders, private industry generally, and the federal government, and will describe their response to the open suburbs movement.

A. The Suburbs

In 1968, the Kerner Commission warned that this nation was rapidly becoming two separate nations: one poor and black, the other affluent and white. This movement has accelerated since that report was published. The 1970 census indicates that 71.1% of the nation's capitol city is black; 6.3% of that city's suburbs are black. Today 46.5% of the population of the city of Baltimore is black; 6% of that city's suburban population is black (down from 7% in 1960). Today 38.3% of the population of Cleveland is black; 3.4% of its suburban population is black. These figures are representative of the situation in all of our metropolitan areas: Detroit, Philadelphia, Chicago, Saint Louis, San Francisco-Oakland, Pittsburgh, etc. Census breakdowns along socio-economic lines, not yet available, will

probably show even greater disparities between the central cities and the suburbs.¹²⁶

The real meaning of this shift is now becoming apparent. Suddenly, the suburb—the Outer City—is being recognized as the new and expanding center of American life. As the *New York Times* put it: “Suburbs . . . are no longer mere orbital satellites. They are no longer *sub.*”¹²⁷ The Outer City, a conglomeration of small municipalities, interlinked by vast federally-funded road networks, rival and more often surpass the old core cities in jobs, population, investment, stores, political power. The suburbs are now the home of 40% of the nation, 12 million more people than those who reside in the inner city.

The Outer City is on the verge of announcing its declaration of independence from the Inner City. Experience indicates that a large percentage of Outer City residents enter the Inner City infrequently, if at all. The words of the Kerner Commission take on even more ominous implications in the light of this development: Not only is a vast sector of society unable to afford housing in this new city, but a “let-them-eat-cake” attitude is forming in the Outer City. The *Times* quotes a city manager in California: “Social problems in the city? People here would say, ‘Sympathy, yes. But willingness to help? That’s their tough luck.’”

Without fail the suburbs have resisted efforts aimed at altering their zoning patterns to permit construction of low- and moderate-income housing. When sued to change their zoning laws many have turned to prestigious—and high priced—legal counsel. For example, Oyster Bay, currently under attack by the N.A.A.C.P. for its exclusionary land use practices, has retained the 150-man Wall Street firm of Simpson, Thatcher and Bartlett to protect its zoning laws.¹²⁸ When New Canaan, Connecticut, found its zoning ordinances challenged by Suburban Action it went to the major New Haven firm of Tyler, Cooper, Grant Bowerman & Keefe.¹²⁹

Albert Bader, the senior partner at Simpson, Thatcher working on the Oyster Bay suit said that there was substantial opposition from younger attorneys in the firm to taking the case. However, the senior partners felt that Oyster Bay deserved the best legal counsel it could afford to purchase.

Tyler, Cooper has frequently represented racial minority clients in civil rights cases. But according to William Murphy, a senior partner at Tyler, Cooper, there was no objection from within the firm to representing New Canaan against the poor and racial minority plaintiffs.

Though communities whose zoning laws are under attack often turn to major law firms for assistance their town counsels are their first line of defense. Town counsels have been kept informed of exclusionary zoning developments by the monthly *Municipal Law Journal* and by various conferences sponsored by the National Institute of Municipal Law Officers.¹³⁰ N.I.M.L.O. has a standing committee on zoning which is responsible for seeing that N.I.M.L.O. members are informed of new zoning law developments. However, to date N.I.M.L.O. has taken no direct action to protect

exclusionary zoning laws. It has acted merely to keep its members informed of new court decisions in the area.

The National Association of Real Estate Boards which reflects suburban attitudes, on the other hand has taken an active position to prevent outside interference to local zoning laws.¹³¹ N.A.R.E.B. is actively lobbying against the legislative proposals to open the suburbs. N.A.R.E.B. also gives local realtors and local governments advice on how to protect zoning laws from legal attack, though it has not entered any cases itself.

There are a few instances in which suburban governments in a metropolitan area or in a state have cooperated to some extent with the central city to increase the amount of low-cost housing in the suburbs. In a few other cases the urban legislators have managed to push through state-wide zoning changes. But even these, though appealing on paper, have not accounted for more than a few hundred low-cost suburban housing units.¹³²

Most touted of these programs is the “Dayton Plan.” This was a unanimous agreement in September 1970, by the representatives of the 32 Dayton suburbs in the Miami Valley Regional Planning Area to accept and indeed to help fund housing for low-income families in the Dayton metropolitan area. While Dale Bertsch, Miami-Valley Regional Planning Commission director, was able to coax out this agreement in principle from the suburban communities, he has been unable to gain acceptance of specific proposals for placing housing in particular communities.¹³³ Indeed, in the past few months several communities have withdrawn from the Plan or given notice of their intention to withdraw in the near future. Apparently once it is clear that the low-income housing will be next door instead of across town, opposition becomes vocal and effective.

The same appears to be true in New York and Massachusetts. New York state passed the Urban Development Corporation Act in 1968 which gave Edward Logue as President of the UDC the power to override local zoning laws and build low-cost UDC housing in the suburbs. Even with strong and consistent backing by Governor Rockefeller, Logue, a consummate politician himself, has been unwilling to exert this zoning override power except in one or two unusual circumstances. Logue fears that his powers will be cut back by conservative suburban and upstate legislators if he uses them aggressively to open the suburbs. Indeed, in 1971 a bill passed the state legislature doing just this; Logue’s powers were saved by a Rockefeller veto.¹³⁴

The Massachusetts “anti-snob zoning” law which requires suburbs to allow a certain percentage of their land to be developed for low-cost housing has likewise rarely been taken advantage of by developers. Moreover, according to S. Stephen Rosenfeld, Executive Director of the Boston Lawyers’ Committee for Civil Rights Under Law, the constitutionality of the law itself is under attack by threatened suburbanites.¹³⁵

The Fairfax County, Virginia zoning law, drafted and lobbied through the County legislature by John Ferren,

a partner at the Washington, D.C. law firm of Hogan and Hartson, requires that all new housing developments in Fairfax County have a low-cost component. However, suits brought by six developers against the validity of the zoning law led to a Fairfax County Circuit Court ruling that the new zoning law was invalid.¹³⁶ The Court relied mainly on the ground that the law went beyond the zoning authority delegated to Fairfax County by the State of Virginia.

Ad hoc agreements by suburbs to accept subsidized housing have occasionally been worked out. In 1971 Mayor Daley of Chicago was able to use his political clout to persuade suburban Cook County to accept 150 units of subsidized housing for low-income families.¹³⁷

These examples, which comprise virtually all of the regional and state attempts to open the suburbs to low-cost housing show that even where strongly worded open suburbs legislation is passed, extensive implementation is unlikely to follow because of suburban opposition in the form of law suits and in the form of threats to area politicians to minimize integration or lose their jobs.

There is one exception to this pattern of failure to gain suburban acceptance of economic integration. The "New Town" developers, both in the suburban and exurban new towns, are meeting with success in their efforts to create racially and economically integrated communities. This may stem from the ability of the developers to persuade the new town's residents that they can trust the developers to maintain an attractive and safe community. It also may stem from the fact that people are sold homes in new towns such as Columbia, Md. after the plan for economic and racial integration has been explained to them. Middle class whites may also be willing to accept integration in the case of new towns because they receive the "compensation" of attractive amenities not found in other communities.

While new towns do not provide a viable solution to the suburban crisis in themselves because they are so few in number, they do offer a model which open suburbs activists might follow in the future by developing with regional planning agencies detailed fair share plans for suburban integration. Individual suburbs may be more amenable to opening their doors to a limited, pre-determined number of inner-city poor than they have been to providing indeterminate amounts of housing to the poor as a class.

B. The Home Builders

Home builders have split in their reaction to the open suburbs movement. This split has been based on local ties of the homebuilders and perceived opportunities for profit or loss growing from the open suburbs movement. Small, local suburban builders who are used to building luxury housing are generally opposed to changes in exclusionary land use laws. They fear an invasion from large, well-funded builders from the central cities and do not wish to strain their relations with local zoning boards and city governments. John Ferren, the head of

the "Community Services Department" of the Washington Law Firm of Hogan and Hartson, said that he has met uniform opposition from Fairfax County land developers to the new county zoning law which he drafted, helped push through the county government, and is now defending in court.¹³⁸ Even though the new zoning law held out new development profits by allowing higher density building, the local developers uniformly oppose it and several have brought a suit to have it voided.¹³⁹ Apparently the Fairfax County builders have taken this action because the new zoning law threatens their luxury home market and offers the apartment and tract developers from Washington, D.C., and other nearby counties an entering wedge into the Fairfax County home building market.

On the other hand, large scale home builders have become actively involved with the civil rights groups opposing exclusionary zoning. Neil Gold of Suburban Action said that a number of New York City and Hartford, Connecticut, builders are committed to backing Suburban Action's law suits in the New York and Hartford suburbs and to building 70,000 units of high-density housing—much of it for low and moderate income families. Suburban Action offers its expertise in opening the suburbs and in obtaining HUD 235 and 236 housing subsidy money in exchange for the builders' promise to build low income housing in a joint venture with Suburban Action. Sometimes the builders also agree to help fund Suburban Action's anti-zoning litigation. On April 2 of this year, Suburban Action announced one such venture in conjunction with the Mack Corporation, one of New Jersey's largest developers, to build an economically and racially integrated development for 2,000 families in central New Jersey; when completed it will be the largest project to include subsidized housing in any New York suburb.

Developers have joined with poor people as plaintiffs in many of the zoning suits argued in federal courts on Equal Protection grounds.¹⁴⁰ In these suits both developers and the poor have generally been represented by public interest lawyers.¹⁴¹

Developers have also retained private counsel in a number of suits which have been argued on due process grounds. Most of these cases have not involved the building of low-cost housing, but rather middle income or luxury apartments or small lot size family homes. Nevertheless, these cases have often set precedents which are helpful to the open suburbs advocates. In Pennsylvania, for example, developers represented by hired private counsel have won a series of cases before the Pennsylvania Supreme Court. The decisions on these cases set forth the rule that a municipality must normally permit every type of land-use somewhere within its boundaries.¹⁴³

The National Association of Home Builders (N.A.H.B.), the national lobbying and research organization of developers, has sided with the large developers and the civil rights groups on the question of exclusionary zoning. Spurred to action by Leon Weiner, the largest builder of federally subsidized housing in the country, a member of the Kaiser Commission, and a

former President of N.A.H.B., N.A.H.B. has taken some strong action to end exclusionary zoning. According to John Couture of N.A.H.B., the National Association of Home Builders has established a \$25,000 fund earmarked exclusively for grants to local home builders who wish to bring anti-exclusionary zoning suits. N.A.H.B. has begun to look for a major zoning case which it can bring and is willing to spend "substantial" amounts of money—far in excess of \$25,000—if it can find a suit which is likely to make it to the Supreme Court and be a "*Brown v. Board of Education* of the zoning field." N.A.H.B. joined with a number of civil rights organizations to file an amicus curiae brief in the *Valtierra* case. N.A.H.B. is also attempting to influence its 60,000 local members and 500 regional associations to become interested in building housing for low-income families. It sends them materials, conducts workshops on 235 and 236 housing and runs an information service on how to achieve lower zoning in local communities.

But N.A.H.B.'s influence on its local members is limited. John Couture said that he had worked hard to convince the home builders in Fairfax County, Virginia, to support the liberalized zoning law prepared by John Ferren. He was unable to overcome their opposition to the law.

Thus home-builders are a divided group. Many local builders choose to side with their localities—because they live there, because they do not want competition from outside builders who would invade their territory once high-density building becomes possible, because they have close ties with the power structure in the communities where they work, and perhaps because they are unaware of the potential profitability of high-density building. Large, area-wide builders and central city apartment developers do not have these local ties and are anxious to build high-density housing in the suburbs. They are willing, at least for the present, to ally themselves with civil rights groups in order to pry open the pot of gold which waits for high-density developers in the suburbs.

C. Private Industry

The movement of jobs in private industry from downtown urban areas to suburban locales has exacerbated the plight of the inner city poor by making increasing numbers of job opportunities inaccessible to this group. The trend has been a significant one: from 1963 to 1967 New York City lost over 4,000 manufacturing plants while its suburbs gained over 4,000; San Francisco lost over 700 plants while its suburbs gained over 850; Chicago lost over 750 while its suburbs gained over 700. The pattern is similar in Hartford, Indianapolis, Boston, Detroit, St. Louis, Newark, Cleveland, Philadelphia, Providence, Minneapolis-St. Paul, and almost all other major metropolitan areas. Over the last four years, the trend seems to have accelerated.¹⁴⁴

Historically, the corporations locating in suburban areas have not concerned themselves with the inaccessibility of their facilities to the urban poor or with the lack of alternative low- and moderate-income housing

opportunities close-by their plants. These conditions, however, were one of the key factors which initially stimulated interest by civil rights and housing groups in suburban integration. The pioneers of the open suburbs movement—i.e. those who first articulated the goal of ending suburban exclusionary practices in the late 1960's¹⁴⁵—all viewed the shift of large numbers of jobs to areas beyond the reach of the urban poor as an issue of paramount concern and one which called for efforts to increase minority opportunities in suburban communities.

While it is difficult to trace the causal link precisely, subsequent actions by the open suburbs groups appear to be having at least a modest impact on corporate thinking. A soon-to-be-published survey by the American Jewish Committee indicates that a large minority of corporate planners now examine suburban communities' attitudes towards housing as part of their site selection process. As examples of at least slight movement within business circles, the Public Affairs Research Office of Western Electric recently prepared a report for management urging that greater weight be given to the accessibility of new facilities to low- and middle-income workers, and R.C.A.'s Director of Urban and Community Relations recently indicated that the exclusivity of suburban communities has received at least some attention at his firm, when he delivered a strongly worded speech before the Danforth Foundation Regional Housing Policy Conference.¹⁴⁶

One aspect of the open suburbs groups' activities has clearly had an impact, namely the development of the argument that suburban relocations affect the employment opportunities of blacks more adversely than those of whites and are therefore discriminatory under Title VII of the 1964 Civil Rights Act. All corporate personnel interviewed for this article were familiar with this argument. One corporation, R.C.A., cancelled a planned relocation as a result of Suburban Action's filing a complaint with the Equal Employment Opportunity Council based on this argument. A second complaint filed by that group against General Telephone and Telegraph is now pending at the E.E.O.C. and the government's determination of this case will surely have a very broad effect, given the awareness by other corporate personnel of the issues involved.

Other factors in addition to the open suburbs movement's actions have affected corporate attitudes, however. According to a number of participants in the open suburbs movement—Robert Chandler at the Ford Foundation and Alex Greendale at the American Jewish Committee, in particular—suburban industries are encountering considerable problems with regard to their labor force. When the Ford Motor Company located a major factory in Mahwah, N.J., Greendale points out, it thought a large blue-collar labor force would be on hand; it was not and Ford was required to organize car pools to bring in workers from center city areas, often more than an hour away. This has led to high absenteeism and Ford is quite unhappy with the result. Robert Chandler

also pointed to the difficulties of recruiting a suburban labor force generally and the high absentee rate which extensive commuting apparently engenders among blue collar employees.

It is clear from the above discussion that corporate managers are becoming sensitized to the issue of suburban exclusion and as a result, if open suburbs activists continue to put pressure on them fewer plant sites in restrictive communities will be selected in the future. However, the vacant land corporations need for expansion is located mostly in the suburbs. Thus, corporations may eventually be "persuaded" to use their leverage—their plants produce considerable tax revenue for the host community—to bring presently exclusionary suburbs to alter their zoning patterns in favor of low-income groups. This is the objective of the movement in this area. Because the legal theory behind it has been developed and applied only recently, it is too soon to gauge its impact.

D. The Federal Government

Historically, the federal government can be charged with a large measure of responsibility for the emergence of exclusionary suburbs, and the charge has been detailed in a 1967 pamphlet by N.C.D.H., *How the Federal Government Builds Ghettos*:

... the Federal Housing Administration, through its insuring and underwriting programs, and the Federal highway agencies through their road-building activities, jointly underwrote and made possible the growth of the lily-white suburbs. Negroes who were able to afford suburban housing were restricted to all-Negro subdivisions; the mass of low-income Negroes and other minorities, the urban poor, were left to pile up in the central cities.

FHA and the Veterans Administration together have financed more than \$120 billion-worth of new housing since World War II. Less than two per cent of it has been available to nonwhite families, and much of that on a strictly segregated basis.

Government action in recent years to overcome the results of its past policies, while promising in theory, has been largely ineffective in fact, and one major thrust of the open suburbs movement has been to push the government to act with increasing firmness and scope to end residential racial and economic segregation.

The movement has gradually escalated its attack. In 1966, N.C.D.H. submitted a Bill of Particulars to the White House against HUD and other federal agencies. Among its charges were the following:

Charge 1

The programs and operations of the Department of Housing and Urban Development (HUD) in the area of civil rights and equal opportunity are not based on a policy of affirmative action designed to bring about desegregation of the racially impacted ghettos and to affirmatively advance patterns of racial and economic integration.

Charge 4

The Department of Housing and Urban Development continues to approve the construction of public housing projects on sites and in areas which reinforce and perpetuate segregated living patterns.

Charge 6

Urban renewal programs throughout the United States have consistently violated the rights of Negro Americans and other minorities by forcing their continuous upheaval and relocation in racially segregated areas to accommodate local community prejudices.

Charge 11

The Department of Housing and Urban Development continues to approve grants and loans to municipalities where equality of opportunity in housing has been denied by law to Negroes, Mexican-Americans, or other racial and ethnic minorities.

Charge 13

Federal administrative agencies participating, directly or indirectly, in mortgage or home financing programs continue to contravene the national goals of the Administration by restricting the housing opportunities of Negro Americans and other minority families. These agencies, including the Home Loan Bank Board, Federal Reserve Board, Federal Deposit Insurance Corporation, Federal Savings and Loan Corporation, and the Office of the Comptroller of Currency, have failed to promote among their member lending and financing institutions affirmative programs to eliminate discriminatory policies and practices.

The next step was the N.C.D.H. pamphlet discussed above, an informational, publicity effort attempting to stir support within the government and among outside groups for effective government housing desegregation action.¹⁴⁷ The third and crucial step was initiating suits against HUD and municipal housing authorities—*Shannon* and *Gautreaux*—to require that public housing programs affirmatively foster dispersion of racial minorities into non-ghetto areas. The final action has been the establishment of organizations like the Center for National Policy Review and the nascent League of Women Voters' monitoring system, whose specific mission is to follow federal agency action on a day-to-day basis to insure that announced policies and existing laws favoring desegregation are complied with.¹⁴⁸ These efforts have pushed the government to give increasing attention, if not support, to programs fostering residential integration in general, and suburban housing for minorities in particular.

In the last year efforts of the civil rights and housing groups comprising the open suburbs movement have combined with sympathetic forces within the Nixon Administration to make the federal government a potentially significant power in the challenge to

exclusionary land use practices. To date Congress has been inactive in this field, although several bills which would curtail suburban exclusion are now in committee and one may gain passage this year.¹⁴⁹ As a result two agencies of the executive branch, the Departments of Housing and Urban Development (HUD) and Justice, have been responsible for all recent federal government level action against restrictive suburbs.¹⁵⁰

The present programs of these two departments are the product of compromise between open suburbs activists (armed with court orders and case law) and certain HUD and Justice Department officials on the one hand, and high-level Nixon Administration policy-makers on the other. HUD's only current effort to encourage the building of low-cost housing in the suburbs is the propagation of the Project Selection Criteria, which give housing subsidy priority to proposed projects on suburban rather than ghetto sites. These criteria were adopted after two civil rights victories, *Shannon v. HUD* (brought by Ned Wolf of the Lawyers' Committee) and *Gautreaux v. Chicago Housing Authority* (brought by their A.C.L.U. lawyer Al Polikoff), prompted Arthur Gang, HUD General Counsel for litigation, to recommend the adoption of such criteria by his department. During this same period however—1970 to 1971—HUD Secretary Romney had adopted an even stronger program to foster suburban integration, the "New Communities" program which would have cut off all HUD grants to municipalities which refused to permit subsidized housing in all-white areas. After violent opposition developed to this program in Michigan, however, President Nixon ordered it abandoned, leaving the Project Selection Criteria as HUD's only tool for integrating the suburbs.¹⁵¹ Thus HUD's present stance is the result of pressure by open suburbs activists both within and outside of HUD to develop strong HUD programs, but pressure which has been withstood by high-level Nixon Administration planners and given outlet in only a limited fashion.

The situation at the Justice Department is similar. Here the national civil rights groups again spurred the government to action by bringing the *Lackawanna*¹⁵² and *Black Jack*¹⁵³ suits which publicized two instances of racial discrimination in housing and forced Justice to take a stand with regard to its enforcement responsibilities under the 1968 Fair Housing Act, which provides,

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.¹⁵⁴

In the case of *Black Jack*, Arthur Gang of HUD and Frank Schwelb head of the Justice Department's Housing Section actively lobbied within the Administration for six months after the A.C.L.U. had filed its suit before the Administration agreed to bring its own *Black Jack* suit, showing again how advocates both in and outside of the federal agencies combined to induce government action.

The decision to file the *Black Jack* suit, however, was part of a larger Nixon Administration policy decision to adopt a strategy of restraint with regard to exclusionary suburbs which the President described in his June 11, 1971 Statement on Equal Housing Opportunity, a few days after the Justice Department announced its filing of *Black Jack*. The core of the President's policy is the following often cited passage:

We will not seek to impose economic integration upon an existing local jurisdiction; at the same time, we will not countenance any use of economic measures as a subterfuge for racial discrimination.¹⁵⁵

HUD's Programs Affecting Open Suburbs

HUD's major programs with potential for increasing suburban integration are those providing for housing subsidies for low and moderate income families—one for home ownership assistance and one for home rental assistance. Both are known by their section numbers in the National Housing Act,¹⁵⁶ 235 and 236, respectively. These programs subsidize the cost of money so that the charge to tenants or home purchasers (rent or mortgage payments) is determined on the basis of a one per cent interest rate mortgage; the difference between this one per cent rate and the actual cost of the mortgage is paid monthly by the government directly to the mortgage lender.

These programs have been extremely popular with developers, lenders and low-income families, with the result that subsidized housing starts have risen from about 50,000 units per year on the average during the Kennedy and Johnson Administrations to an annual average of more than 400,000 units during the Nixon administration. The HUD Secretary, Romney, has predicted a 700,000-start level for 1972.¹⁵⁷ However, to date little subsidized housing has been built in affluent suburbs.¹⁵⁸ Moreover, most of the housing built with these subsidies has not been integrated.

Pressured by the *Shannon* and *Gautreaux* decisions HUD is attempting to increase the supply of suburban subsidized housing through the 235 and 236 programs by means of a priority system for approval of proposed 235 and 236 projects, known as Project Selection Criteria.¹⁵⁹ These criteria give highest ratings to those projects which are (1) outside areas of minority concentration, (2) located in areas containing little or no subsidized housing, having good recreational, educational and health facilities, and which are reasonably convenient to job sites; and (3) are located in areas free from adverse environmental conditions such as excessive pollution, noise, or traffic.¹⁶⁰ A proposed project on a suburban site would usually merit a superior rating by all

of these standards and thus would be approved ahead of one in a less attractive urban location. The Project Selection Criteria thus create an incentive for builders of 235 and 236 housing to develop suburban sites since this will mean more likely approval for their project.¹⁶¹ Since properly zoned suburban sites are scarce, however,¹⁶² one by-product of HUD's priority approval system will be an increase in pressure from local builders to get zoning changes from suburban communities.

What the long-range effect of HUD's Project Selection Criteria will be, however, is unclear. Certain Criteria might be used, depending on how they are interpreted at the local level, to bar subsidized housing in suburban locales rather than to encourage it. One criterion, for example, bars construction in "ecologically valuable areas," which might be deemed to include restrictive suburbs seeking to protect their open spaces and low population density. To protect against such a result, one open suburbs group—the League of Women Voters—is establishing a monitoring system to collect data on HUD's approval and rejection policy in order to insure that regional offices throughout the country are interpreting the new standards uniformly and in such a way as to foster suburban inclusion of low-income groups.¹⁶³

Open suburbs activist Glenda Sloane is optimistic about the results the Criteria can achieve, noting there is a great shortage of HUD funds for 235 and 236 housing compared to the number of developers who want to participate in the program. The result should be, she feels, that only projects on the choicest—i.e. suburban—sites will be likely to get funded. Richard C. Van Dusen, HUD Under-Secretary agrees: "The housing programs are heavily oversubscribed. Builders want to qualify."¹⁶⁴ In his statement to the United States Commission on Civil Rights,¹⁶⁵ Secretary Romney pointed out that similar criteria—then in their proposed form, but already informally in use at the F.H.A.—were having a significant impact on F.H.A. assisted housing programs in a number of cities, including Baltimore, San Diego, San Antonio, Washington, D.C., Pittsburgh, and Jacksonville. He expressed his expectation that similar results—an increase in suburban starts—would come from the use of such criteria in the 235 and 236 programs.¹⁶⁶

HUD itself does no litigation in the exclusionary zoning area: all litigation is conducted for it by the Justice Department, the "Civil Division" representing HUD when it is defendant, as in the *Shannon* case²⁰ and the "Civil Rights Division," Housing Section prosecuting suits under the Fair Housing Act of 1968¹⁶⁷ against discriminatory practices in the housing area. In these latter suits, the "U.S." rather than HUD serves as plaintiff.¹⁶⁸

Of those complaints which it receives, HUD recommends to the Justice Department only those in which developers allege that their projects have been blocked because of racial discrimination. Arthur Gang, HUD General Counsel for Litigation, remarked that HUD receives many requests for support from developers whose plans are stymied by zoning regulations. However, once they are told of the need to assert racially discriminatory conduct on the part of zoning officials,

few are heard from again. If allegations of racial discrimination are made—there have been four or five such complaints in the last year or so—Gang's office will send the suit to Justice with the recommendation that it be pursued to trial. This is the way in which the Black Jack, Missouri suit was initiated. Similarly, HUD would file amicus briefs on behalf of plaintiffs only in cases where racial discrimination was at issue.

Justice Department Actions Against Exclusionary Suburbs

Frank Schwelb, head of the Civil Rights Division's Housing Section of the Justice Department stated that the activities of his office in moving against exclusionary communities were limited both by the President's announced position against forced economic integration of the suburbs and also by statute: section 3613 of the 1968 Fair Housing Act authorizes the Justice Department to act only against any "pattern or practice" of discrimination in the housing area,¹⁶⁹ meaning racial discrimination. As implemented, these directives have meant that the Department will not bring suit against exclusionary suburbs merely because they have no minority residents—it will not attack the *status* of exclusivity. The mere absence of minorities, stated Schwelb, might easily be attributable to causes other than racial discrimination.

Thus, before commencing litigation the Department requires an act by the municipality strongly suggesting that racial discrimination is behind exclusionary measures. Schwelb used the term an "actual display" of discriminatory conduct. In the two suits which the Department has brought in the zoning area, *Lackawanna* and *Black Jack*, such displays were found in Lackawanna's attempt to zone the proposed low-income project site as a park and in its mayor's refusal to sign a necessary sewer authorization, while in *Black Jack*, the "display" was that town's hasty incorporation and up-zoning of the Parkview Heights Apartments site to bar the proposed project.

Schwelb noted that an argument could be made that zoning restrictions are "inherently" discriminatory but that his office would not pursue cases on this theory. Similarly, where the President stated that the Administration would oppose the use of zoning as a "subterfuge for racial discrimination,"¹⁷⁰ it could be argued, said Schwelb, that this requires action against bans on apartment construction: since the great proportion of minority group members cannot afford to purchase homes and could move into exclusionary communities only if apartments were available, a ban on apartments is, arguably, a "subterfuge" for a ban on minorities. Again, however, Schwelb's office does not plan to sue to end these restrictions.

One reason for this stance is Schwelb's feeling that "judges like deeds" and that with a specific act by town officials as focus, other evidence showing a history or background of racial tension is much more effective than it would be if presented in a suit which merely attacked

a long-standing regulation which had not been challenged in recent years.¹⁷¹ In the *Black Jack* situation, for example, there is considerable evidence of discrimination in the private, non-subsidized housing market which is 98% white, 2% black. This evidence of past discrimination allows the argument, said Schwelb, that the community's present action banning construction of a multiple family townhouse development, if it will freeze present patterns, is unconstitutionally discriminatory.

Schwelb also feels that his office's position is dictated by present case law—which he feels has established the reasonably objective test of purposeful racial discrimination as the standard by which municipal housing actions will be judged by the court.

The Housing Department has virtually unlimited access to the F.B.I.'s investigative resources in conducting litigation. As a result, even where zoning actions appear neutral on their face, the Department is able to look behind them and develop evidence of racially discriminatory intent. In the *Black Jack* case, for instance, the excluded subdivision was marketed as an integrated project, making proof that it was barred for racial reasons difficult. The F.B.I.'s large-scale investigation, however, developed extensive evidence that opponents of the project used racially directed scare-tactics to arouse community sentiment against the project.¹⁷²

Interestingly, some open suburbs activists have expressed concern about the ability of the Justice Department to make discovery in such depth. Their thinking is that since the Justice Department can prove the racial motivation behind seemingly racially neutral laws by direct testimony, courts will demand this type of showing in all cases challenging ordinances which are racially neutral on their face and will become unwilling to infer racial motivation from statistical proofs. Thus the level of proof presented by the Justice Department will raise the standard by which courts will measure proof of discrimination, and more importantly, will raise it to a level which the civil rights groups and private litigators, lacking the nearly unlimited investigative resources of the F.B.I., will be unable to meet.

Schwelb feels, however, that his job is to prove his cases as strongly as he can and takes the recognition of the quality of his proof as a compliment. He also noted that when the United States accuses a community of racial discrimination, this makes the headlines and all efforts must be made to see that the charge sticks.

Justice receives from six to ten complaints each year (including those referred by HUD) of racially discriminatory zoning practices. Presently it is investigating five situations in which municipalities have used or threatened to use their zoning powers to exclude subsidized housing projects which would ultimately house minorities.

For the most part, the Housing Department is complaint oriented, although its lawyers do frequently go into cities and speak with community fair housing groups in an effort to identify possible situations for

litigation. Presently the 22-attorney Department has given a high priority to finding new zoning suits. In the past the office has concentrated on private discrimination by realtors and developers and has handled few zoning cases involving discrimination by public bodies, an imbalance Schwelb hopes to correct.

Thus, the executive branch has confined its attack to situations in which patent racial discrimination by suburban zoners can be shown and has avoided suits against communities whose restrictions have had the effect of excluding the poor and racial minorities but which were initially passed for arguably non-discriminatory reasons.

Increasing the Federal Government's Impact

The Nixon Administration has set out clear ground rules for federal government involvement in the open suburbs area which seem intended to avoid direct confrontation with the great majority of suburban communities. Nonetheless, various Administration programs undoubtedly will have significant impact. HUD administrators hope that many of the § 235 and § 236 housing starts projected for 1972 will be on suburban sites and Justice Department litigation efforts may net other important victories comparable to *Lackawanna*.

Much will depend, however, on the ability of civil rights and housing groups to keep pressure on the federal agencies. HUD's implementation of the Project Selection Criteria (and indeed of all HUD programs) will have to be closely monitored, as the League of Women Voters intends to do, to insure that the Justice Department litigation machinery has been programmed to respond where zoning laws are visibly used to further discrimination. An increasing number of complaints will have to be filed with Justice and HUD so that the federal resources now available to combat suburban land-use restrictions are used to their fullest extent and so that Justice's notion of when economic regulations are, in fact a "subterfuge" for racial discrimination can be expanded. Moreover, continued and innovative litigation by the open suburbs movement will force the executive branch to redefine the duties imposed upon it by existing legislation.

Steve Browning, Richard Bellman, Glenda Sloan and James Harvey (see discussion of the individual civil rights organizations, above) have particularly singled out the federal government as the target of their efforts and see it as an extremely important force in opening the suburbs, but one which must be activated and channeled largely by external stimuli. Since these stimuli already exist and are likely to increase in number and since many within the federal agencies are eager to respond to them, the federal government's role is almost certain to expand in the future.

III. Limits, Problems and Suggestions: Effecting Social Changes

Though civil rights organizations have begun to make some progress in opening the suburbs to low-cost

housing it is unclear whether they will be able to make major changes in the present pattern of exclusivity. A number of factors, political, judicial and financial have operated and continue to operate to limit the success of the open suburbs movement. This section will identify and describe these limitations and will suggest ways in which they might be overcome or accommodated.

Many of the impediments to opening the suburbs are the same as those faced by civil rights advocates in other areas such as welfare reform and de facto school segregation. Many of the suggestions made here are applicable not only to the movement to open the suburbs but also to other civil rights campaigns.

A. Political Restraints

All minority movements for social change, almost by definition, will encounter strong political opposition on the part of majority interests. As indicated in earlier sections of this article, however, the open suburbs movement has been marked by a particularly pronounced lack of countervailing grass roots pressure both within and outside the inner city to off-set this opposition. This has resulted in the apparent failure of the handful of state and local plans, such as the Dayton Plan, the Massachusetts Anti-Snob Zoning Law, the new Fairfax County, Virginia zoning law and the New York State Urban Development Corporation, to effectuate the changes in housing patterns which they seemed to promise. Once passed these legislative measures have met with bitter local opposition which has prevented them from being used to introduce more than a tiny amount of low-cost housing into the suburbs. These pieces of legislation all suffered from insufficient state or regional governmental backing to override local opposition. An example of this lack of support was dramatically illustrated in mid-April, 1972, when the New York Assembly voted by a two to one margin to end the New York Urban Development Corporation's zoning override power.¹⁷³

The lack of success to date suggests that to secure the passage of regional, state, and national open suburbs legislation and to insure the effective implementation of such legislation a large and powerful political coalition will have to be established to counter suburban power. Five overlapping groups might form this coalition—the poor who wish to have access to suburban living; the central city well-to-do who want to shift the burden of supporting services for the poor to the suburbs; the liberal politicians and liberal public opinion leaders; the profit motivated high-density home builders who wish to develop the suburbs; and the suburbanites motivated by philosophical beliefs who wish to share the amenities of the suburbs with the poor. Efforts by open suburbs activists to develop these distinct groups into an open suburbs coalition have been very limited. Suburban Action has assigned its two community organizers to this task—one each to the inner cities of New York and Newark. James Harvey of the Housing Opportunities

Counsel is attempting to rouse black support in Washington, D.C. William Morris, chief of the NAACP's Housing Program is trying to build interest in suburban housing by speaking to local NAACP chapters throughout the country, but the Association's entire Housing Program staff consists of only two activists, Morris and his assistant. The League of Women Voters, too, is starting a campaign to influence local Leagues both in the central cities and in the suburbs to support the movement. The National Association of Home Builders is a vocal supporter of the open suburbs movement but little has been done to solidify its local members behind opening the suburbs. But these actions, in toto, are minor.

Unless increased efforts are made to increase the political support among this potential constituency, it is unlikely that sufficient political power will be generated to force out meaningful open suburbs legislation.

There has not yet been national legislation to override local zoning laws. Only the relatively weak incentive to zoning change supplied by the HUD subsidized housing Project Selection Criteria and the G.S.A. government building site selection criteria have been advanced by the federal government. Even with the increased legislative lobbying by civil rights groups, suggested above as feasible, it seems unlikely that federal legislation will be passed until there is a much stronger grass roots open suburbs movement. If national legislation is eventually passed, however, it may be more effective than state or regional legislation because it will tend to be more resistant to local suburban pressures to modify or negate it.

There are three main ways to build an open suburbs constituency: through local organizing, through public relations, and through court victories. The current local organizing activities are discussed above in Sections I and II. Court victories have the advantage over public relations of providing a moral basis for coalescing support. A court victory stamps the movement with legitimacy and at the same time raises its visibility.

The movement might be able to decrease suburban opposition by concentrating its legislative proposals on "moderate" plans for suburban economic integration rather than pushing for the goal of complete metropolitan wide economic integration. This approach might lead to some legislative gains while the movement continues to press for more radical gains in the courts.

There are several ways to increase the amount of low-income housing available in the suburbs which will gain more suburban support than a proposal to require every suburb to accept housing for a "fair share" of the metropolitan area poor. Suburbanites would not feel so threatened by a program to increase the funding of new towns committed—from conception—to economic integration. Another proposal could be to provide suburban housing for the low- and moderate-income families who already work in suburban communities—the sanitation workers, policemen, and domestics. John Ferren said he was able to get through the Fairfax County, Va. legislature a zoning law which is responsive

to the needs of present county low-income workers, while a zoning law based on the premise of taking a proportionate share of the Washington, D.C. metropolitan area low-income families would never have passed. Alexander Greendale to the American Jewish Committee and Robert Chandler of the Ford Foundation also believe that the open suburbs movement will get more low-cost housing units built by legislative action if they concentrate on meeting the existing needs of present suburban employees. Still a third proposal could be to concentrate on building housing for the low-income elderly in the suburbs.

These three proposals would be less threatening to suburbanites than a proposal to completely end local zoning powers. They would respond to existing, clear, and easily demonstrable needs. They would provide housing for people the suburbanites already are familiar with and do not fear as a class, the way they fear the young urban poor in general.

There are two major problems with attempting to build a suburban constituency by seeking only moderate legislative gains. First, some open suburbs activists want complete economic and racial integration of every suburb. This goal will not be achieved by moderate legislative proposals. Second, moderate legislative progress toward economic and racial integration of the suburbs may make the courts less willing to end exclusionary zoning because it will be clear that the legislature is working to decrease these restrictions. Once the legislature has begun to correct a major civil rights problem courts are very hesitant to force the legislature to move faster.¹⁷⁴

It seems unlikely that legislation will soon end the "exclusiveness" of the suburbs. For the near future the open suburbs activists would seem best advised to concentrate on building their constituency and winning court victories. They might also attempt to make moderate legislative advances. Major legislative gains in the near future appear unlikely.

B. Judicial Limitations

There are also many factors inhibiting the effectiveness of judicial action against exclusionary zoning. Perhaps chief among these is the doctrinal barrier to an expansive interpretation of the Equal Protection Clause of the Fourteenth Amendment currently being built by United States Supreme decisions. The 1971 case of *James v. Valtierra*¹⁷⁵ indicates that the Court is moving toward the position that wealth is not a suspect classification¹⁷⁶ and that therefore discrimination based on this criteria will not be declared constitutionally impermissible. The 1972 case of *Lindsey v. Normet* indicates that housing will not be considered a fundamental interest by the court¹⁷⁷ and thus discrimination which denies access to housing will not be given special judicial scrutiny and protection. Though both these cases can be distinguished from an exclusionary zoning fact situation,¹⁷⁸ they at the very least indicate that it is unlikely that there will be a *Brown v. Board of Education* of the zoning field while the Burger court sits.

The reluctance of the Supreme Court to strike down land use barriers can be attributed in part to the general popularity of zoning laws. It is the belief of some experienced civil rights litigators that courts will generally not move very far ahead of public opinion. Jack Greenberg, Director of the NAACP Legal Defense Fund, said that he has often seen the Supreme Court refuse to rule on an unpopular civil rights issue which the Court feels is too much in advance of public opinion. Greenberg said that the Court employs many techniques to avoid such decisions, including refusal of certiorari, rulings based on nonconstitutional grounds, and very narrow holdings. If Greenberg's thesis is correct, then it is unlikely that there will soon be a sweeping landmark decision against exclusionary zoning.

Remedial and jurisdictional problems are also substantial, even if the civil rights litigators are able to win on doctrinal questions. Housing needs are best viewed from a planning perspective on a metropolitan-wide basis. Job proximity, tax base, availability of water and sewage facilities, transportation and other such considerations of the metropolitan area as a whole ought to be considered by a judge before he orders a change in current zoning restrictions. Yet some of the largest metropolitan areas include more than one U.S. district court jurisdiction and more than one state, thus restricting the scope of a court's orders to a part of the metropolitan area. Such jurisdictional restraints prevent courts from most effectively dealing with exclusionary zoning.

The courts' power to impose meaningful remedies is also in doubt. The District Court's *SASSO*¹⁷⁹ opinion suggested that communities have an affirmative duty to house their poor. But, the Supreme Courts' *Valtierra* opinion appears to clearly reject that concept.¹⁸⁰ Thus, even if zoning restrictions are lifted, the poor will have to rely on voluntary (not court ordered) building of subsidized housing. Such a program of government subsidized building is unlikely if the suburbs strongly object to the introduction of such housing. Thus, even if the open suburbs organizations win their battle to change zoning laws they will not have achieved their desired goal of introducing low-cost housing into those suburbs unless they receive government subsidization to build the housing. Their chances of obtaining government subsidization may well decrease as the opposition of suburban communities grows. So, it appears probable that at least some suburbanite support for their movement will be necessary before the open suburbs advocates can hope for large scale building of low-cost housing in the suburbs.

These judicial limitations may be at least partially overcome by employing several strategies. First as the United States Supreme Court takes a conservative turn, more emphasis could be placed on winning state court victories. The civil rights litigators are already moving in this direction, and early successes in the New Jersey Courts suggest that this strategy is correct. Secondly, in the federal courts suits against administrative agencies may well be more promising for the civil rights litigators

than suits based on Constitutional arguments. The question of what course the civil rights advocates would be best advised to follow on federal Constitutional arguments is more difficult. In the area of Constitutional litigation in the exclusionary zoning field there has been an interface between doctrinal advance by the lower federal courts¹⁸¹ and retreat from doctrinal underpinnings by the Supreme Court as evidenced by such cases as *Valtierra* and *Lindsey*. Confronted with this interface Constitutional litigators can draw either of two conclusions: either (1) they should move very carefully in advancing Equal Protection arguments, relying heavily, perhaps exclusively, on a showing of racially discriminatory intent; or (2) they should move quickly to develop new law in lower federal and state courts while there is still the momentum of such cases as *SASSO*, *Lackawanna*, *Crow v. Brown*,¹⁸² and *Serrano v. Priest*.¹⁸³ The latter strategy will be successful only as long as the Supreme Court does not render an adverse decision which directly reverses these lower court precedents. So far the Court has refused to accept certiorari for any zoning suit since 1928. Most recently it refused to accept certiorari of the *Lackawanna* decision.¹⁸⁴ This may indicate that many of the Justices prefer not to directly squelch the zoning law being developed by the lower federal courts.

The first, more conservative, course of action might avoid undesirable precedents; however, the litigators themselves tend to favor the second course of action—to press for rapid Constitutional doctrine advance—for several reasons. These include: (1) the realization by each litigator that if he doesn't push for the development of new doctrine other litigators will, (2) the desire of each litigator to be the first to persuade a court to make new law in the exclusionary zoning area and (3) the feeling of responsibility to attempt to win zoning variances for clients who otherwise will not be able to find decent housing.

If the aggressive course of action is to be followed in any event, then the civil rights groups would probably benefit if they increased their efforts to disperse information to local attorneys in order to stimulate more suits. Zoning authorities and housing construction are both extremely decentralized phenomenon and for this reason, strong local involvement in court action is desirable. The diversity of problems and procedures which exist can best be appreciated and exploited from a firm local base. Continuity of effort is extremely important and can be achieved in this way. Moreover, it is very important to have a detailed record in exclusionary zoning litigation. Such a record requires the services of local attorneys to do lengthy discovery.

Today, however, legal resources for reform in this area are highly centralized, not least of all because the legal theories upon which the litigation is based have been developed only recently and experience in their use is quite rare. Local involvement is minimal because of the lack of knowledge on the local level.

The result is that potential cases are wasted. Moreover when cases are brought, there is not enough follow-through on them, either because of reliance on outside counsel or because of underestimation of time and cost.

Again, the centralized resources which do exist are not always able to pick and choose the most promising plaintiffs, theories, and places; therefore the development of the law is slow and optimal co-ordination impossible. The efforts of the League of Woman Voters and of the Lawyers' Committee to develop and distribute litigation handbooks for exclusionary zoning cases are, therefore, extremely important; other national groups should follow their example and help to disseminate expertise to increasing numbers of local groups.

Finally, another way to increase the effectiveness of litigation is to develop new viable lines of attack. Lawrence Sager, then a professor at the U.C.L.A. Law School, is generally credited with developing the theory of the applicability of Equal Protection Doctrine to exclusionary zoning.¹⁸⁵ Fred Bosselman, a Chicago attorney, developed the E.E.O.C. remedy theory. Bosselman and Frank Michaelman, a professor at the Harvard Law School, developed the theory that right to travel doctrine is applicable to exclusionary zoning laws.¹⁸⁶ Peter Weiner first articulated the theory that exclusionary practices infringe the right to vote of those who are excluded. These lawyers and others may be able to develop new doctrinal approaches for attacking exclusionary zoning.

C. Funding

Currently the civil rights organizations which are attempting to overturn exclusionary zoning laws must rely on foundations for most of their funds. This raises the questions of accountability discussed above in Section I. It also raises the question of whether there are alternative sources of funds potentially available to take the place of foundation funds. The question of alternative funding is very important to the future of the open suburbs movement in light of the fact that all of the foundations currently funding the "movement" expressed the belief that they would not continue to fund it indefinitely. The foundation officers said that they expected the civil rights organizations to find alternative sources of funding within the next couple of years.

Sponsorship by non-foundation sources will serve another important function in addition to keeping the movement alive: it will enhance the movement's legitimacy and political power. Diverse sponsorship of the movement will signal to state and national legislators that opening the suburbs is backed by a broad coalition of forces in addition to the urban poor and they will be encouraged to vote favorably on open suburbs legislation. Similarly, the foundations themselves may well be more likely to prolong their backing of the movement if they see proof that others have found the movement worthy of support. In addition, as open suburbs replaces busing as the major civil rights issue, those sponsoring open suburbs activists will almost certainly come under fire. The foundations will be less likely to withdraw their support at this time if they are not the sole target of the opposition's anger and if they have a number of strong allies.

Five potential non-foundation sources of financial support are presently available to open suburbs groups: home builders, the federal government, middle-class city dwellers, private industry, and labor.

Home builders have already begun to aid the movement. As pointed out above, the National Association of Home Builders has established an anti-zoning litigation fund and Suburban Action is bringing several suits along with, and partially funded by, builders. A strong alliance between the civil rights groups and builders, however, would not be without problems. The builders as a class do not have a long-run commitment to provide low-cost housing in the suburbs; they are moved mainly by a desire to make money and once the suburbs are opened to high density housing, there is no guarantee that the high density housing which is built will be for low-income families. Indeed, in Pennsylvania where builders won a series of cases to overturn restrictive zoning laws all of the new high density building has been middle or upper middle class unsubsidized housing. So far most of the zoning suits brought by civil rights litigators have sought only a zoning change for a specific parcel on which a builder has already been committed to place low-cost subsidized housing. In contrast, area-wide remedies such as that imposed in the *Madison* decision, provide no assurance that a significant portion of the land ordered rezoned for high density residential development will ultimately receive housing for low-income families. Indeed, given the current costs of constructing housing, builders can build for low-income families only where they can obtain government subsidies which allow them to make as great or greater profit than they would building housing for more affluent customers.

There are at least three dangers to the civil rights groups if they depend heavily on home builders for financing. First, the builders may insist that the litigation and lobbying arguments be shaped to obtain changes in zoning laws which will permit high density building in the suburbs without requiring that the new multi-unit buildings accommodate low-income families. Builders would like due process arguments to become the main focus of the civil rights litigators, for due process arguments are grounded on the right of the individual land owner to build whatever he wishes on his land, so long as it does not create injury to the public health, safety, or general welfare. Equal Protection arguments, on the other hand, rely on the recognition of the right of access to the suburbs by people who do not currently live there.¹⁸⁷ If courts responded to due process arguments, the builders would have maximum freedom to develop the suburbs in whatever way is most profitable for them—this might not include building of low-cost housing.

Second, once a suburb is opened, the builders pursuing the suit will have no incentive to continue funding the civil rights organization which has brought it. Thus, at the very moment when civil rights organizations will want to capitalize on the momentum of favorable legislative or judicial decisions to see that the

new higher density housing is in substantial part low-income housing, their funds will be cut off

Third, if the civil rights groups come to rely heavily on the funds of home builders they may well become suspect in the eyes of judges, legislators, and government administrators. The moral force of the civil rights organizations' efforts will be sullied by the profit incentive of the builders.

These three considerations will likely deter the civil rights groups from relying on builders for any more than a fraction of their funds. While these groups should solicit builders' support to broaden their funding base, if they are to maintain their leverage with home builders and gain construction of low-cost housing they will have to guard against becoming mere tools of this interest group and will have to protect their independence by seeking funds from other sources—including the foundations—as well.

A second substitute for foundation support—federal government funding—must also be rejected during the tenure of the current Administration, unless such funding is, again, but a fraction of an organization's total support, as is the case at the Lawyers' Committee. Recent developments in Camden, N.J. demonstrate that federally supported programs supported solely by federal government funds which seek to open the suburbs would run into considerable resistance from within the Administration—if they could get funded at all. In Camden, Vice President Agnew intervened on behalf of the city to attempt to halt a challenge to an urban renewal project brought by OEO-funded Camden Regional Legal Services. Agnew's efforts included calling David Dugan, Director of C.R.L.S. to his Washington office to try to persuade him to drop the suit and when Dugan refused, seeking to have funds to the Camden office cut off. Agnew's actions indicate the difficulty of pursuing a politically unpopular course such as opening the suburbs, with federal funds. The situation points up the important role the foundations play in insulating at least to some degree the open suburbs advocates they support—and others who work on behalf of minorities—from governmental interference.

Another potential source of funds lies in cultivating the support of the middle and upper class city dwellers. As a group they would be benefitted by a dispersion of the central-city poor into the suburbs, because they would no longer have to pay for services the city now provides those poor who would move. Little, however has been done to recruit the political and financial support of the urban well-to-do. That support seems potentially within reach of the open suburbs movement.

Open suburbs advocates might also enlist the support of corporations, a group which Robert Chandler of the Ford Foundation feels will soon be ready to offer such help, because of the work force recruitment problems and high absenteeism now facing many businesses which are located far from low- and moderate-income housing.

Finally, an alliance might be built with labor unions which represent predominantly low-income workers. They might make proximity of low-cost housing to new plant sites a collective bargaining question. In addition, unions of companies already in the suburbs might pay

the costs of litigation to open communities so the workers they represent can live there, following the lead of the United Auto Workers' coalition with N.C.D.H. in the Mahwah, N.J. suit.

These funding issues, together with the problems of popular support and the establishment of open suburbs principles in the courts will ultimately determine the staying power of the movement. If the movement cannot pass these critical tests of legitimacy in the next few years, it may well suffer an early death. Foundations cannot be expected to continue support of a cause which has failed to take root, when so many other efforts are begging for funds. Recently the movement seems to have become somewhat sensitive to these issues: the League of Women Voters is now attempting to build grass roots support, albeit in the suburbs and not in the ghetto; open suburbs litigators are expanding litigation efforts and developing new theories to support them; Suburban Action and N.C.D.H. have sought out and received some modest financial support from non-foundation sources. It is too soon to say whether these efforts are the leading edge of a new trend within the movement or mere anomalies; it is clear, however, that if the collective activities of a handful of lawyers and organizations are to flower into an enduring, mass movement, such efforts will have to proliferate dramatically in the future.

Appendix A

Between November 1, 1971 and April 1, 1972 the authors conducted interviews with the following:

Open Suburbs Activists and Their Allies

Harold Applebaum, American Jewish Committee, Long Island, N.Y. Chapter
Richard Bellman, National Committee Against Discrimination in Housing
Fred Bosselman, Ross, Hardies, O'Keefe, Babcock, and Parsons, Chicago, Ill.
Steven Browning, Special Projects Unit, Lawyers Committee for Civil Rights under Law
John Couture, Department of State and Local Governmental Relations and Urban Government Affairs, National Association of Home Builders
Paul Davidoff, Suburban Action Institute
Michael Davidson, N.A.A.C.P. Legal Defense and Education Fund
John Ferran, Hogan and Hartson, Washington, D.C.
Herbert Franklin, National Urban Coalition
Neil Gold, Suburban Action Institute
Jack Greenberg, N.A.A.C.P. Legal Defense and Education Fund
Alex Greendale, American Jewish Committee (National Office)
James Harvey, Housing Opportunities Council of Metropolitan, Washington

James Meyerson, N.A.A.C.P.
Judy Morris, League of Women Voters
William Morris, N.A.A.C.P.
Lawrence Sager, American Civil Liberties Union
John Shapiro, N.A.A.C.P. Legal Defense and Education Fund
Glenda Sloan, Center for National Policy Review
William Taylor, Director, Center for National Policy Review

The Foundations -

John Simon, Taconic Foundation
Robert Chandler, Ford Foundation
Leslie Dunbar, Field Foundation
Harold Friedberg, New York Foundation
Ruth Teitlebaum, Norman Foundation

The Opposition

Albert Bader, Simpson, Thatcher, and Bartlett, New York
Joe Lee, Tyler, Cooper, Grant, Bowerman and Keefe, New Haven, Conn.
Bill Marschalk, National Association of Real Estate Boards
William Murphy, Tyler, Cooper, Grant, Bowerman and Keefe, New Haven, Conn.
Charles Rhyne, National Institute of Municipal Law Officers

The Federal Government

Ron Black, HUD Deputy Director for Hartford, Conn. Area
Arthur Gang, General Counsel for Litigation, Department of Housing and Urban Development
Lawrence Perl, Director of Program Development and Evaluation, Equal Housing Opportunity Section, Department of Housing and Urban Development
Solomon Robinson, Equal Opportunity Section, Department of Housing and Urban Development
Frank Schwelb, Director Housing Section, Civil Rights Division, Department of Justice
Martin Slate, Equal Employment Opportunity Council

The Corporations

Sue Leone, Western Electric Company
Pat Racy, Quaker Oats Corporation

1. See: National Committee Against Discrimination in Housing, *Jobs and Housing* (March, 1972).
2. e.g. commenting on proposed HUD rule markings, such as the Project Selection Criteria, discussed *infra*, see TAN. 159.
3. N.C.D.H. is currently coordinating an attack on residential segregation in the San Francisco area under a HUD contract.
4. Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F.2d 291 (9th Cir. 1970).
5. 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd* 425 F.2d 1037 (10th Cir. 1970).
6. 318 F. Supp. 669 (W.D. N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971).
7. Citizens' Committee for Faraday Wood v. Lindsay, Civ. No. 71 Civ. 2297 (E.D.N.Y. filed May 24, 1971).
8. Brookhaven Housing Coalition v. Kunzig, F Supp. (E.D.N.Y. 1971).
9. see 36 Fed. Reg. 21059, (1971) for present proposed G.S.A. site selection rules.
10. United Auto Workers v. Township of Mahwah, N.J., Civ. No. A2592-70 (Bergan County, N.J., filed Sept. 29, 1971). This suit is brought in conjunction with the United Auto Workers.
11. see *The Battle of the Suburbs*, Newsweek, Nov. 15, 1971, at 61.
12. L. & P. Davidoff and N. Gold, *Opening the Suburbs*, N.Y. Times, Nov. 7, 1971 (Magazine) at 40.
13. Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11 (1971).
14. see Section on Strategy, TAN 80.
15. Urban League of Essex County v. Township of Mahwah, N.J., Civ. No. L-17112-71 P.W., (Bergan County Sup. Ct.), filed Feb. 17, 1972. This suit is separate from that of N.C.D.H.
16. see TAN 93 for more discussion of this argument.
17. The A.C.L.U. also engages in publicity and educational efforts, as well as some legislative lobbying. By far the most important part of its program, however, is litigation.
18. e.g. the abolition of the death penalty and the right to abortion. see N.Y. Times, Feb. 12, 1972 at 1, col. 4.
19. see Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969).
20. Civ. No. 71 C 15 (E.D.Mo.1971). Black Jack, a community outside St. Louis, when faced with the prospects of a low-income housing project within its borders rapidly incorporated and passed a fiscal zoning law which forbid the building of the low-income project.
21. 296 F. Supp. 901-907 (N.D. Ill. 1969), enforced in 304 F. Supp. 736, *aff'd*, 436 F.2d 306 (7th Cir. 1970 cert. denied, 402 U.S. 922 (1971)). Polikoff is now working for "Businessmen for the Public Interest", Chicago, Illinois.
22. The nature and importance of tax exemptions for the national civil rights organizations is discussed below, see TANs 65-68.
23. Members of the Lawyers' Committee are not necessarily dues payers, but rather are generally involved in actual Lawyers'

Committee litigation.

24. The Lawyers' Committee receives grants from the New World, Carnegie, and New York Foundations, among others.

25. 436 F.2d 809 (3rd Cir. 1970).

26. In the mid-1950's it became a distinct entity in an attempt to qualify for tax-free status as a non-profit corporation. At that time, the boards of directors of the Inc. Fund and the N.A.A.C.P. proper were interlocking; today, however, the boards are totally independent and, in fact, the N.A.A.C.P. now has a new, internal litigation staff. One reason for the separation was the Inc. Fund's desire to be free from restraints imposed on its actions by local N.A.A.C.P. chapters which sometimes found the Fund's cases to be too politically controversial. The Legal Defense Fund's financial support, too, is in no way connected to the N.A.A.C.P.

27. 448 F.2d 319 (2d Cir. 1971).

28. 417 F.2d 321 (6th Cir. 1969).

29. 294 F. Supp. 433 (N.D. Cal. 1971).

30. Clarke School Urban Renewal Project Area Committee v. Romney, Civ. No. 63-10-70-P (D. Ala, 1971).

31. Morris filed comments favoring HUD's Project Selection Criteria, for example.

32. A major effort, in fact, was made in Oyster Bay, where Morris felt he had some success in changing opinions though the support he developed was "silent".

33. Fair Housing Development Fund Corp. v. Town of Oyster Bay, Civ. No. 71-6-3d8 (E.D.N.Y., filed Jan. 8, 1972).

34. F. Supp. (E.D.Mich. 1971).

35. see *Comments on HUD Project Selection Criteria*, Docket U.S. R-71-119, submitted by the Leadership Conference.

36. The Leadership Conference also has a Task Forces on Employment, the Regulatory Agencies, and Intra-Governmental Coordination (focusing on the Office of Management and Budget).

37. e.g. HUD Project Selection Criterion, 37 Fed. Reg. 203 (1972).

38. Ford is the mainstay of the Center, but it has also received a \$20,000 grant from Mrs. Edgar B. Stern.

39. HUD Affirmative Marketing Regulations 37 Fed. Reg. (Oct. 2, 1971).

40. see TAN 100.

41. *The National Voter*, vol. 12, no. 6, p. 17 at 17 (Jan./Feb. 1972).

42. The Dayton Plan is an area-wide "fair-share" plan implemented by communities in the Dayton, Ohio metropolitan area. For full discussion of the plan, see TAN 132.

43. This is a two-year grant for a total of \$25,000. The Foundation indicated to the League that one of the major reasons for the grant was that the League program's emphasis on grass-roots action within suburbia was unique and did not duplicate the work of any other organization active in the field. The League is also seeking funds from the New World, Field, and Stern Foundations, which through their support of other open suburbs groups, have shown an interest in this area.

44. see n. 37 *supra*.

45. Local Leagues operating under metropolitan areawide "inter-League organizations" will collect these data. The Center for National Policy Review, under contract to the League will prepare a handbook detailing for monitoring units the specific type of information it should collect for the project. For a discussion of why such monitoring activities are needed, see *TAN* 159.

46. Morris interview, March 10, 1972.

47. Despite the official position adopted by the H.J.C. sharp differences of opinion exist within the organization. Thus its Oyster Bay Chapter is attempting to block the Nassau County Chapter from filing an *amicus* brief in the *Oyster Bay* suit.

48. Interestingly, the A.J.C.'s emphasis on depolarization has led it to urge the suit be brought on due process grounds (alleging improper exercise of state police power by town zoning officials, see 81 Yale L.J. 61-65) rather than on equal protection theory (as favored by the N.A.A.C.P.) which would emphasize the racial aspects of the case. The A.J.C.'s *amicus* brief will raise due process issues. (The N.A.A.C.P. has not planned to use the due process argument, it should be noted, for tactical reasons—such arguments have been effective only in state courts to date—rather than because it feels it is politically important to raise the racial aspects of the case).

49. see n. 19 *supra*.

50. Published in 1969.

51. Published in 1968.

52. N.A.A.C.P. *Housing Bulletin* (July, 1969).

53. But see *TANS* 1-48.

54. 334 U.S. 1 (1948).

55. 347 U.S. 483 (1954).

56. see 2 Nat. J. 2252 (Oct. 17, 1970).

57. see *TANs* 10, 20, 33.

58. see *TAN* 147.

59. see *TAN* 125.

60. see J. Gardner, *Excellence* 21, 29 (1961). Gardner discusses the paradox that our society at once embraces both the principle that every man is entitled to equal opportunity for social and economic advancement and the principle that distinctions based on wealth are normal and even desirable as incentives.

61. see *TAN* 11.

62. see *TAN* 78.

63. see 3 Nat. J. 2438 (Dec. 11, 1971).

64. § 501(c)(3) of the Internal Revenue Code of 1954 bars tax exempt status to an organization "a substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."

65. see generally Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 *Geo. Wash. L.R.* 1114 (1970).

66. Leslie Dunbar at the Field Foundation, Robert Chandler at the Ford Foundation, and Bernard Friedberg at the New York Foundation all made this point, as did Bill Taylor at the Center for National Policy Review, Bill Morris at the N.A.A.C.P. (referring to the tax exempt Housing Program at the N.A.A.C.P., not, of course, the parent organization's lobbying activities) and

Richard Bellman at N.C.D.H. Thus the ban on legislation oriented activity is a well-established rule of the game.

67. see *TAN* 113.

68. Two organizations, the NAACP and the ACLU have, however, conducted major legislative lobbying campaigns and still continued to receive substantial foundation funding by creating quasi-independent programs—e.g. their litigation departments, or the NAACP's Housing Program—each of which is a distinct separately funded organizational entity and has been granted tax-exempt status by IRS.

69. Reg. § 53.4945-2(a) which specifically provides that the term "legislation" (here used in the context of what activities a foundation may not fund) does not include actions by executive judicial or administrative bodies.

One interpreter of these requirements has stated they would allow lobbying before local zoning boards:

What of foundation work with school boards, zoning boards, and similar bodies? Though I know of no published authority on the point, it has generally been thought that the effect of the quoted regulation under Section 501(c)(3) is to draw the outside line at the actions of city and town councils—leaving all lower level governmental units beyond the legislative area. One would hope that the Regulations under Section 4945 will take that position.

Troyer, *Private Foundations, New Restrictions* 29 N.Y.U. Inst. Fed. Tax 1909,1918 (1971).

70. I.R.C. of 1954, § 4945(e) (specifically covering non-"public" charities, but presumably applicable to publicly supported charities, as well.)

71. see n. 66 *supra*.

72. *Id.*

73. Nonetheless many in the movement, e.g. Bill Taylor and Herb Franklin, feel that change will take place only through federal legislative action.

74. Example (1). M, a private foundation, makes a general purpose grant to N, an organization described in section 509(a)(1). As an insubstantial portion of its activities, N makes some attempts to influence the State legislature with regard to changes in the mental health laws. The use of the grant is not earmarked by M to be used in a manner which would violate section 4945(d). In addition, M does not retain power over the choice by N of the activity or recipient to which the grant is to be devoted. Even if the grant is subsequently devoted by N to its legislative activities, the grant by M is not a taxable expenditure under section 4945(d).

Example (2). X, a private foundation, makes a grant to Y University for the purpose of conducting research on the potential environmental effects of certain pesticides. X does not earmark the grant for any purpose which would violate section 4945(d) and does not retain power to cause Y to engage in any activity described in section 4945(d)(1), (2), or (5) or to select any recipient to which the grant may be devoted. Y uses most of the funds for the research project; however, on its own volition, Y expends a portion of the grant funds to send a representative to testify at congressional hearings on a specific bill proposing certain pesticide control measures. The portion of the grant funds expended with respect to the congressional hearings is not treated as a taxable expenditure by X under section 4945(d). Proposed Reg. § 53.4945-2(a)(4), I.R.C. 1954

(Note: Most the national civil rights and housing groups would be "509(a)(1)" organizations for the purpose of these examples).

75. see n. 149 *infra*.

76. see *TAN* 147.

77. *see TAN* 152-155.

78. *To The Legislature: A Blueprint for Housing in N.J., A Special Message by William T. Cahill, Governor of N. J.* (Dec. 7, 1970) (on file at the office of the Yale Review of Law and Social Action).

79. 305 F. Supp. 205 (E.D. Pa. 1969).

80. Note, *Equal Protection and Exclusionary Zoning After Valtierra and Dandridge*, 81 Yale L.J. 61 (1971).

81. *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super 11. (1971)

82. *e.g. Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291 (9th Civ. 1970).

83. *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967).

84. *e.g. Brookhaven Housing Coalition v. Kunzig*, Civil No. (E.D.N.Y., 1971).

85. *Accion Hispana, Inc. v. New Canaan, Ct.*, Civil No. B-312 (Dist. of Ct., June 14, 1971).

86. *see* 81 Yale L.J. 61 (1971).

87. 117 N.J. Super. 11 (1971).

88. *Id.*

89. *Id.*

90. *see e.g. TAN* 15 & 20.

91. *see* 332 F. Supp. 382 (N.D. Ga. 1971).

92. Based on Title VII of the 1964 Civil Rights Act 42 U.S.C. § 2000(e).

93. Based on the G.S.A. Regs. § 101-18.102 et seq.; 36 Fed. Reg. 21059 (Nov. 1971).

94. 392 U.S. 409 (1968).

95. 417 F.2d 32 (6th Cir. 1969).

96. Docket # 13571 (N.D. Ga. 1972).

97. F. Supp. (S.D.N.J. 1972).

98. *James v. Valtierra* 402 U.S. 137 (1971) Amicus Curiae Brief of the Urban Coalition et al.

99. James Harvey, Mike Davidson, Fred Bosselman and Richard Bellman all expressed this view when interviewed.

100. For example, following a presentation he made on *Gautreaux* Al Polikoff enlisted the help of Herb Franklin and Bill Taylor of the Center of National Policy Review to continue to assist him in preparation of the case. Ned Wolf, the litigator for *Shannon*, also recruited major assistance for that suit at a conference meeting.

101. *see e.g.* Brief for the National Coalition et al. as Amicus Curiae, *James v. Valtierra*, 402 U.S. 137 (1971). The Clearing House has also been used as a vehicle for persuading open suburbs advocates to pursue a certain course of action or inaction. The Urban Coalition has some control over the focus of the national civil rights groups by planning the agenda for the Exclusionary Land Use Clearing House meetings. Herb Franklin of the Urban Coalition is seriously considering changing the Clearing House into a forum to discuss all aspects of land

planning. This might mean an end to the close coordination of antiexclusionary zoning groups. It might also encourage the national civil rights groups to deemphasize the open suburbs component of their activities.

102. *e.g.* the Glen Cove Chapter of the N.A.A.C.P. (responsible for initiating the Oyster Bay suit), and the Metropolitan Washington Planning and Housing Association. It is difficult to characterize the impact of these numerous and diverse community groups on suburban exclusionary practices, however one generalization is possible, namely that, community groups have been exerting a considerable amount of pressure on suburban localities throughout the country through litigation, (c.f. *Crow v. Brown*, 322 F. Supp. 382, 1971) attempts at direct negotiation to alter zoning patterns, and to some degree, through the sponsorship of subsidized housing in suburban areas.

Developments in the Washington, D.C. area indicate the variety of efforts which local groups have made. Troy Chapman of the suburban Montgomery County Housing Authority is seeking federal funds to permit residents of low-income housing projects in the county to purchase their homes. The People's Organization for Montgomery County, a division of the Washington Urban League, is attempting to bring together sponsors for several large-scale developments on land currently owned by black families in the county. The Housing Opportunity Council, as part of its local efforts, plans discrimination suits against the Virginia and Maryland real estate boards for their failure to license black realtors. Finally, John Ferren, a partner in the downtown Washington firm of Hogan and Hartson, drafted and successfully engineered the passage of a zoning regulation in Fairfax County requiring developers to include a percentage of low-cost housing in all new subdivisions. The law has been challenged by local builders and Ferren is serving as counsel for the county in its defense.

Funding for local groups comes from a variety of sources—membership contributions, donations by private individuals, federal, state and local governments, civic, labor, and religious institutions, and foundations. In contrast to the national groups, where funding from the latter source predominates, no single type of donor stands out as the primary support for local efforts, a result, no doubt, of the very wide range of groups receiving funds.

103. *e.g.* those in Camden and Trenton, N.J., in San Jose, California, and New Lebanon, N.H.

104. *e.g.* the Interreligious Center for Urban Affairs (sponsor of the Parkview Heights Homes in Black Jack, Missouri) and the Episcopal Church in Lackawanna.

105. *e.g.* Fred Bosselman and Richard Babcock of Chicago who have written on the exclusionary zoning problem; the attorneys who brought *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971); John Ferren, partner at the Washington, D.C. law firm of Hogan & Hartson, who engineered the Fair Tax County subdivision law.

106. *see* note 102 *supra*.

107. *see TANs* 1-48 *supra*.

108. N.A.A.C.P. *Housing Bulletin* (July 1969).

109. Letter from William Morris to Mr. Andrew Rollins, Kansas City Branch, N.A.A.C.P., Feb. 22, 1972.

110. *Id.*

111. One of Suburban Action's community workers—i.e. community organizers—works in New York City the other in Newark, N.J.

112. Thus it chose to contract with the Leadership Conference, and not the National Tenants' Organization or the National Welfare Rights Organization, two poor peoples groups which oppose dispersal of the poor to the suburbs and the spending of federal housing funds outside of central city areas.

113. These include related cases like *Valtierra, supra*, brought by San Jose, Cal. Legal Services, *Moody v. Bangor Township, supra*, and a current antiexclusionary zoning case by Trenton, N.J. Legal services.

114. e.g. The Lawyer's Committee budget has the following headings: Salaries and Benefits, Travel and Meetings, Office Expenses, Litigation Expenses, and General Operating Expenses.

115. Robert Chandler of Ford says that now the feeling at the foundation is strong that this battle "should be waged." Ford continues, however, not to earmark grants specifically for this purpose and thus the amount of emphasis it will be given remains in the hands of the grantee.

116. Chandler's phrase.

117. Also used by Chandler.

118. Harold Friedberg's (New York Foundation) term, referring to leaders of local community groups who visited his office seeking funds. He did not conduct a poll of them on the open suburbs issue, however.

119. Chandler, for instance, recalled a study conducted several years ago by Survey Research Center in Michigan which examined the attitudes of blacks towards neighborhood integration. Eighty-five percent preferred a racially mixed neighborhood, not because of a desire for integration, as such, but because of the amenities—high quality schools, absence of crime, etc.—which mixed neighborhoods provide.

Studies such as this become part of Chandler's background knowledge and inform his decision-making.

120. N.C.D.H.'s emphasis on litigation, administrative lobbying and assistance to housing developers, however, was viewed more favorably and grants were given.

121. As Dana S. Creel, President of the Rockefeller Brothers Fund, has observed, the role of the private foundation is to direct funds, in a substantial measure at least, toward new and innovative programs not subject to a wide or popular base of philanthropic support. Creel, *Problems Posed for Larger Foundations, Tax Problems of Non-Profit Organizations* 181, 186 (G. Webster & W. Lehrfeld eds. 1970).

122. Dunbar interview.

123. While most grantees are thus left pretty much on their own during the course of the grant period and are subject to only a general review prior to re-funding, the grantees make a major effort to keep their sponsors abreast of what they are doing. Dunbar at the Field Foundation noted that Suburban Action's reporting was "voluminous" and James Harvey of the Housing Opportunity Council said he tried to send to Ford some kind of a report every few weeks. Most such reports are not specially prepared for this, but consist of publications of the Council (newsletters comments, and the like).

124. Field, Stern, Norman, N.Y., Wallace-Elgabar, New World, Carnegie.

125. Chandler, specifically noted Ford's intention to remain in the housing area for an extended period.

126. The New York Times, May 30, 1971 at col. 2 and 34 col. 3.

127. *Id.*

128. Fair Housing Development Fund v. Oyster Bay, Civil No. 71 C-328 (E.D.N.Y., Filed Jan. 8, 1972).

129. Accion Hispana v. Town of New Canaan, Civil No. B-312 D. of CT. filed June 14, 1971).

130. see Report of Committee on Zoning and Planning, 34 NIMLO Municipal Law Rev. 390 (1971); monthly edition of Municipal Law J.

131. The 1972 NAREB policy statement says:

We oppose pending legislative efforts to use the power of federal money to influence the states to develop statewide land use policies which would limit the power of local governments to zone the use of land within their corporate limits.

While we recognize the right of the federal and state governments to involve themselves in the land use of areas of actual critical environmental concern, we reject as wholly unwarranted and unnecessary the contemplated limitation of local zoning power in determining the residential, commercial, and industrial development of the land as reflected in legislation under consideration in the Congress.

We also call upon the Department of Housing and Urban Development to rescind existing regulations limiting the authority of local governments to determine the location of federally-assisted projects within their areas of jurisdiction.

National Association of Real Estate Boards, Statement of Policy 1972 at 6.

132. see Testimony of Professor David Trubek Before the United States Civil Rights Commission (June 15, 1971) (on file at the Yale Review of Law and Social Action).

133. see L. Craig, *The Dayton Area's 'Fair Share' Housing Plan Enters the Implementation Phase*, City, Jan./Feb. 1972 at 50.

134. see New York State Urban Development Corporation Act, *N.Y. Unconsol. Law* § 625 (McKinney 1968).

135. The Boston Lawyers' Committee is representing a developer who attempted to invoke the law. see: *Oldham v. Ross*, Complaint on file with the Boston Lawyers Committee for Civil Rights Under Law. For the Massachusetts law see *Mass. Gen. Laws* ch. 408 § 2023 (1969).

136. *DeGross Enterprises v. The Board of County Supervisors of Fairfax County, Va.*, Circuit Court of Fairfax County Docket No. 25609 (1972).

137. W. Lilley III, *Housing Report: Courts Lead Revolutionary Trend Toward Desegregation of Residential Areas*, 3 National J. 2336, 2344 (Nov. 27, 1971).

138. see *Fairfax County Code Zoning Amendment 156: Fairfax County Code* § 30-1.8.8.3 and § 30-1.8.8.4; *DeGross Enterprises v. The Board of County Supervisors of Fairfax County, Va.*, Circuit Court of Fairfax County Docket No. 28609 (1972).

139. *Id.*

140. e.g. *Dailey v. City of Canton*, 425 F.2d 1037 (10th Cir. 1970); *Kennedy Park Homes Ass'n. v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

141. see text at notes 1-55 *supra*.

142. e.g. *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970); *National Land and Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

143. see Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge* 81 Yale L.J. 61, 66 (1971).

144. see Darnton, *Big Business Draws Service Industries to Suburban Areas*, N.Y. Times, Feb. 22, 1971, at 1 col. 5; and 19,

col. 1; Reeves, *Loss of Major Companies in City Conceded by Patton*, *N.Y. Times*, Feb. 5, 1971 at 33, col. 8.

145. see *TAN* 1-55 *supra*.

146. "The Role of Business and Industry in Housing", prepared for the Conference on Developing and Implementing a Regional Housing Policy, sponsored by the Danforth Foundation, St. Louis, Mo. Nov. 5, 1971.

147. Browning interview—National Lawyers Committee.

148. Sloane interview—Center for National Policy Review.

149. For in-depth discussion of bills now pending before Congress, or likely to be proposed, see Lilly, *Housing Report, Administration and Congress Follow Courts in Promoting Residential Integration*, 3 *National Journal* 2431, 2437 (1971). Lilly writes, with regard to the two bills most likely to be implemented:

... The bill most likely to pass is one (S.2333) sponsored by Sen. Sparkman, D.Ala. chairman of the Senate Banking, Housing and Urban Affairs Committee. It requires that any community that wishes to receive HUD's urban development money prepare a comprehensive community development plan, including provision for low and moderate-income housing, that would be subject to HUD's approval. For a report on the Sparkman bill see 3 *Nat. J. No.* 27 p. 1393.

* * *

Sparkman's idea is likely to be incorporated in the HUD Department's general authorization renewal which must be enacted in 1972.

The House version of the authorization bill may well include a more sweeping desegregation provision, authored by Rep. Ashley.

Ashley's plan would require HUD to allocate all of its housing subsidies to newly created metropolitan-wide agencies. The agencies would have power to specify where housing should be built, and what the nature and cost of the housing should be. Local plans would be subject to HUD approval.

The Ashley plan also would give communities that accept federally subsidized housing cash bonuses—up to \$3,000 per unit spread over 10 years—to offset the cost of increased municipal services. The National Association of Home Builders vigorously opposes Ashley's scheme. (For reports on the origins and development of Ashley's proposal, see 3 *Nat. J. No.* 2, p. 59; and 3 *Nat. J. No.* 30, p. 1535).

(Proposals by Senators Jackson, Ribicoff, Mondale and Brooke are also described in the article, but given slim likelihood of passage).

150. Indirect pressure on suburbs from the Equal Employment Opportunity Commission may also be forth coming.

151. For detailed discussion of the "open communities" program and Romney's support for it which almost cost his job, see Lilly, *Housing Report*, 3 *Nation J.* 2434 (1971). The article also points out Romney's and under Secretary Van Dusen's strong endorsement of open suburbs.

152. see n. 6 *supra*.

153. *U.S. v. City of Black Jack*, Civ. No. 716-372(A) (E.D. Mo. 1971).

154. 42 U.S.C. § 3613.

155. *Federal Policies Relative to Equal Housing Opportunity, Statement by the President*, 7 *Weekly Compilation of Presidential Documents*, 892 (Jan. 14, 1971).

156. 12 U.S.C. N § 17512, 17512-1.

157. see 3 *National Journal* 2431, 2433, (Nov. 11, 1971). Recently the 235 and 236 housing programs have been subject to increasing criticism for (1) their failure to increase racial integration, (2) the shoddy workmanship which characterizes a large number of 235/236 projects, (3) poor management of these projects and (4) because a large percentage of the federal funds spent for these projects goes to middle man profits and not to help the poor. (See *N.Y. Times*, Jan. 24, 1972, p. 1, column 5, regarding point (4)). Corrective measures are planned. HUD's new Project Selection Criteria (37 *Fed. Reg.* 203, Jan. 7, 1972) discussed *infra*, will increase racial integration, while Secretary Romney has emphasized that HUD's future emphasis with regard to these programs will be for quality rather than quantity. (see *N.Y. Times*, March 26, 1972, sec. 1, p. 48, col. 1).

158. Interviews with HUD officials. See Appendix A.

159. 37 *Fed. Reg.* 203 (Jan. 7, 1972).

160. *Id.*

161. This policy, also means, however, that fewer starts will be made in the inner city and for this reason, groups like the National Tenants Organization, the National Welfare Rights Organization, and the Architects' Renewal Committee for Harlem, which feel that federal funds should be used in ghetto areas first, have opposed the criteria. See *N.Y. Times*, Mar. 11, 1972; Lilly, *Housing Report*, 2 *National Journal* 2251, 2252; see generally comments submitted to HUD on the Proposed Project Selection Criteria, Docket No. R-71-119, on file at HUD Rules Docket Clerk's Office.

162. see State of Connecticut, Office of State Planning Comment on Proposed Project Selection Criteria, Docket No. R 71-119, submitted Nov. 1, 1971, as an example, which notes that in Connecticut, "the housing types allowed under Section 236 are seldom allowed without special exception and special exceptions are at best difficult to obtain even for quality, unsubsidized rental housing."

163. For a more complete treatment of the League's monitoring program, see *TAN* 41.

164. see Lilly, *Housing Report*, 3 *National Journal* 2433 (1971).

165. June 15, 1971.

166. Recently, HUD has tried a second approach to foster the development of suburban low- and moderate-income housing. This has been to encourage the voluntary establishment of metropolitan "fair share" plans. Romney himself has actively campaigned for this approach in the Washington, D.C. area and has offered substantial "bonuses" of federal dollars to regions that develop them; HUD regional offices in Atlanta and Buffalo have been particularly active in this area.

167. 42 U.S.C. § 3613.

168. David O. Maxwell, HUD General Counsel since November 1970, described the details of the relationship between HUD and Justice in a recent article in *HUD Challenge*, HUD's in-house magazine:

Once we are notified of a suit, we inform the Assistant Secretary and Regional Office concerned. The former provides comments and the latter prepares a draft litigation report with pertinent facts. The General Counsel's office then prepares a final litigation report which we send to the Department of Justice. This report contains the facts, the law, and recommended action. The Department of Justice decides on an appropriate course of action and prepares a brief, if necessary, for the U.S. Attorney who actually handles the case.

The relationship between our office and the Department of Justice is roughly analogous to that of British lawyers; our job being that of the solicitor and Justice's that of the barrister who actually handles the case in court. Naturally, during the

trial, our lawyers act as advisers to the U.S. Attorney who is trying the case.

Maxwell, *The Law Firm at HUD, HUD Challenge*, March, 1972 at 4.

169. 42 U.S.C. § 3613.

170. President Nixon's June 11, 1971 Statement on Equal Housing Opportunity.

171. A suit of the latter variety would seem to be the N.A.A.C.P.'s suit against the town of Oyster Bay, N.Y.

172. Schwelb cited other investigations in which evidence of community sentiment was found in comments by numerous individuals to a cleaning store operator and where the racial character of one activist's opposition to a housing project could be proven from testimony of his *baby-sitter* that he would not permit his children to watch integrated television programs.

173. *see Urban Development Agency Curbs Voted in Albany*, N.Y. Times, Apr. 13, 1972 at 32, col. 3.

174. *see* 81 Yale L.J. 61, 76 (1971).

175. 402 U.S. 137 (1971).

176. *see* 81 Yale L.J. 61 (1971).

177. 40 L.W. 4184 (Feb. 22, 1972).

178. *see* 81 Yale L.J. 61 (1971).

179. Civil No. 51590 (N.D. Ca., July 30, 1970).

180. But *see* 81 Yale L.J. 61, 83 (1971).

181. *Id.* at 61.

182. 332 F. Supp. 382 (N.D. Ga., 1971).

183. 5 Cal. 3d 584, 487 P.2d 1271, 96 Cal. Rptr. 601 (1971). That decision held that education is a fundamental interest and wealth is a suspect classification.

184. 401 U.S. 1010 (1971).

185. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969).

186. Amicus Curiae brief of the National Urban Coalition, et al. for James v. Valtierra, 402 U.S. 137 (1971) at p. 46.

187. *see* 81 Yale L.J. 61 (1971) for comment on this line of cases.