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THE WALL IS DOWN, NOW WE BUILD MORE: THE EXCLUSIONARY EFFECTS OF GATED COMMUNITIES DEMAND STRICTER BURDENS UNDER THE FHA

ANGEL M. TRAUB*

Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because[1] *. . . it is a testament to our maturing concept of equality that . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.*[2]

INTRODUCTION

In 1967, these words were part of a federal district court's attempt to eradicate the discriminatory effects of the separate but equal doctrine.[3] The court's decision expressed the need for equality in America. One year later, Congress made a step in this direction by enacting the Federal Fair Housing Act (FHA).[4] The congressional purpose of the FHA is to provide fair housing

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1. United States v. Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974). In *United States v. Black Jack*, the court held a governmental agency to the same standard as any other defendant in a housing discrimination case under the FHA. The court held that an ordinance that has a racially discriminatory effect could only be justified by the defendant showing a compelling governmental interest. *Id.* at 1185, 1187. The quote "[e]ffect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations but more importantly, because . . ." argues that the effect of a defendant's pretextual business justifications for a discriminatory housing practice is more important than the motivation behind the practice. *Id.*

2. Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967). The court stated in full:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Id.

3. Plessy v. Ferguson, 163 U.S. 537 (1896).

4. 42 U.S.C. §§ 3601-19 (1999).

throughout the United States by prohibiting discrimination in the sale and rental of housing.[5]

Through the FHA, Congress has made a permanent effort to make housing available to all persons regardless of race, color, religion, sex, handicap, familial status, or national origin.[6] Since the FHA's enactment and subsequent amendments, landlords and real estate developers, once free to discriminate, have been limited in their ability to do so.

However, many individuals still feel the effects of discrimination due to a swell in new types of housing communities in America. As America grows, so too do her people's fortunes, status and fears. With this growth comes a change in ideals and a change in communities. One change has been the evolution of common interest developments (CID's)[7] over the last two decades.[8] This has had the effect of closing off once open neighborhoods and restricting the property owner's freedom through majority-run self-governance.[9]

Part I of this Comment examines the most controversial type of CID, gated communities, and the influences and motivations to

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5. 42 U.S.C. § 3601.

6. 42 U.S.C. § 3604(d).

7. Common interest developments are known by several different and conceptually interchangeable terms, i.e., common interest communities, planned unit developments (PUD's), residential community associations, homeowners' associations and condominium associations.

8. *See* Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 399 (1998) (commenting on the rise of interest in CID's and explaining the style of living as a form of privatization of public responsibilities); EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 5-8 (1997) [hereinafter GATED COMMUNITIES] (detailing an in-depth sociological and psychological study of the development of one form of CID, the gated community, and its effects on residents and non-residents of the communities). Upon publication, GATED COMMUNITIES estimated as many as 20,000 gated communities that include more than three million units in the United States. *Id.* at 7. By spring of 1997, the number was estimated at 30,000, with four million residents. John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1128-29 (1997). This estimate is expected to double by the year 2000. *Id.* There will be approximately 225,000 common interest communities in the year 2000. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994) [hereinafter PRIVATOPIA] (discussing the rise in community developments and their effects on privatizing government).

9. *See* Mary M. Ross, et al., *The Zoning Process: Private Land-Use Controls and Gated Communities, The Impact of Private Property Rights Legislation, and Other Recent Developments in the Law*, 28 URB. LAW. 801, 801-02 (1996) (discussing self-governance as an extreme form of land control and privatization that gives all authority to a majority community association). *See generally* PRIVATOPIA, *supra* note 8, at 29-55.

"fort up" behind its walls.[10] Part II discusses laws that foster and support the expansion of gated community agendum, and the discriminatory effect such laws have on non-residents.[11] Part III analyzes the constitutional and legislative restraints placed on a non-resident's cause of action against gated community restrictions. Taking into account the current lack of judicial intervention in this matter, Part IV proposes a solution, which requires a stricter showing of business reasons to overcome allegations of disparate impact in a FHA cause of action.[12]

I. THE CHOICE TO LIVE BY RESTRICTION

A. *CID Restrictions: Gated Communities*

Several types of CID's[13] exist with varying degrees of restrictions on residents and non-residents.[14] The restrictions on property use are considered an elemental component of CID's because of their ability to maintain the commonality of shared ownership.[15]

Ownership of housing in these communities requires mandatory membership in a housing association,[16] which is

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10. *See* GATED COMMUNITIES, *supra* note 8, at 30.

11. *See* David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 766-67 (1995) (describing how residential associations can serve as powerful tools for discrimination and segregation); GATED COMMUNITIES, *supra* note 8, at 154-55 (discussing the discriminatory effects gated communities may cause).

12. Federal Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1999).

13. McKenzie, *supra* note 8, at 399. Townhome associations are CID's with limited regulations beyond association dues to pay for common areas, utilities, upkeep, and recreational space. Condominium associations, on the other hand, have strict guidelines and regulations that can only be changed by a majority vote and are generally upheld by the courts as long as they meet the reasonableness test for rules enacted under the majority. Nahrstedt v. Lakeside Village Condominium Ass'n, Inc., 878 P.2d 1275, 1283 (Cal. 1994). Rules already in place, at the time of planned development and recorded in the deed, have a strong presumption of validity and do not have to meet the reasonableness test, as long as they are not arbitrary or in violation of public policy or a fundamental right. *Id.*

14. Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 181-82 (Fla. Ct. App. 1975).

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Id.

15. *Nahrstedt*, 878 P.2d at 1281.

16. *Id.*

responsible for developing and carrying out use restrictions.[17] The association elects a board of directors that can enforce all use restrictions that are included in the development's master deed.[18] Additionally, the association, by majority, can establish new rules that govern the use and occupancy of the property.[19]

The gated community is the most controversial type of CID. Gated communities are quickly becoming a prevalent American residential living system.[20] There are several types of gated communities, from the least restrictive, which permits the most access to outsiders, to the most restrictive, which allows the least amount of access.[21] This Comment focuses on the most restrictive type of gated community, which is surrounded by a gate or wall and has security guards monitor egress and regress at property entrances.[22] Such communities are expanding to encompass maintenance of the private roads, parks, schools, and stores within their walls, which were previously considered public domain.[23]

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17. *See Hidden Harbour Estates*, 309 So. 2d at 181-82 (holding that even a regulation that is somewhat "arbitrary," such as prohibiting the use of alcoholic beverages in a clubhouse, will be upheld because it is common that property owners in association-controlled developments will have some of their freedom curtailed by the majority decision). Condominium living is more restrictive than living outside the organization. *Id.* at 182.

18. Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 277-78 (1997).

19. *Hidden Harbour Estates*, 309 So. 2d at 182. Common interest development restrictions on property use limit owners' activities in the common areas and within the privacy of the home itself. *Id.*

20. *See generally* Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call"*, 30 VAL. U. L. REV. 509, 512-14 (1996) (discussing the rise of gated communities and their controversial nature because of their private governmental rule-making bodies). "More recently, particularly in the last thirty years, amidst the fear of spiraling crime and the dual developments of urban decay and urban gentrification, Americans have turned increasingly to the security and style of life offered by private communities, neighborhoods and living associations." *Id.* at 512.

21. Rebecca J. Schwartz, *Public Gated Residential Communities: The Rosemont, Illinois, Approach and its Constitutional Implications*, 29 URB. LAW 123, 123 n.5 (1997).

> 'Gated community' is used to describe several different scenarios. Some gated communities are truly access-restricted neighborhoods that maintain their own roads and can legally restrict access. Other communities have decorative entry gates that serve primarily as territorial markers rather than security measures. Still others place gates across public roads at entry points manned by private security guards but must allow access to anyone who wants it.

Id.

22. GATED COMMUNITIES, *supra* note 8, at 30. Gated communities are a trend toward the exercise of physical and social territory control. "Some walls are meant to keep people in, some to keep people out. Some are meant to mark territory and identity, others to exclude." *Id.*

23. EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA:

Many individuals are moving to subdivisions with gates and security guards,[24] primarily out of fear of crime.[25] Some residents believe that the walls around their town, in conjunction with security checkpoints and strict entrance requirements, will alleviate crime.[26]

B. *Societal Influences and Motivations to "Fort-up"*

Numerous rationales facilitate the move to barricaded living boundaries.[27] Dominating the transition to gated communities is the prevailing fear of increasing crime rates. This exigency is so consuming that people are willing to trade some of their own freedom for the safety and status the walls afford them.[28]

GATED AND WALLED COMMUNITIES IN THE UNITED STATES 1-2 (1995) (researching the evolution of gated communities, their typology, and their effect on society) [hereinafter WALLED COMMUNITIES]. Most of these gated communities exist in Florida and California, but are starting to pop up in other states as well. *Id.*

24. *See* GATED COMMUNITIES, *supra* note 8, at 1-2 (discussing the expansion in the types of individuals who are moving to gated communities). These walled enclaves are not just popular with retirees, movie moguls, and high-powered executives, as they once were. Many neighborhoods are installing fences and guards around existing subdivisions, while other new developments are being built with walls. Owens, *supra* note 8, at 1128.

25. *See generally* GATED COMMUNITIES, *supra* note 8, at 99-124 (discussing people's motivation to deter crime); Schwartz, *supra* note 21, at 124-25 (discussing levels of increased security and physical barriers because of the protection they provide through crime deterrence); Owens, *supra* note 8, at 1136 (discussing the rise in private policing because of growing crime rates); Rishikof & Wohl, *supra* note 20, at 512 (discussing individuals turning to private communities because of the growth in crime rates).

26. Sue Ellen Christian, *Tiny Rosemont Puts its Guard Up: Gated Enclaves Stir Controversy*, CHI. TRIB., June 23, 1995, at 1 (discussing Rosemont residents' fears and their belief that living behind walls may protect them from crime).

27. GATED COMMUNITIES, *supra* note 8, at 38. Gated communities can be divided into three general categories: lifestyle communities, prestige communities, and security zone communities. *Id.* Lifestyle communities began as retirement communities, but now also include golf and leisure communities. *Id.* at 39. These communities are marketed toward carefree living and active lifestyles. WALLED COMMUNITIES, *supra* note 23, at 9. Prestige, also called elite, communities are centered around a showing of social status. The individuals attracted to these communities rely on the exclusionary aspects of gates to differentiate themselves from the common public. *Id.* at 11. Security zone communities are one of the fastest growing gated communities. These communities are usually not developed, but erect gates on existing neighborhoods, primarily out of fear of crime. These communities do not have the same amenities or prestige as the preceding two classes. *Id.* at 14.

28. *See* Hidden Harbour Estates v. Norman, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975) (holding that even a regulation that is somewhat "arbitrary," such as prohibiting the use of alcoholic beverages in a clubhouse, will be upheld because it is common that property owners in association-controlled developments will have some of their freedom curtailed by the

Customarily, these communities are gated by the residents, not the developers.[29] Residents fence as many streets as possible surrounding the community in an attempt to block the path of criminal activity.[30] Average people in high crime areas have begun erecting fences around their developments in an effort to protect their homes and the lives within.[31] Wealthier individuals who reside in neighborhoods with low crime rates are erecting fences to protect personal property and property values.[32]

The community association's goal of crime prevention is achieved through the use of private police mechanisms.[33] Posted at the entrance to the community are private security guards who also patrol the streets in place of city police and neighborhood watch programs.[34]

Another overriding motivation for gated community living is the prestige such developments boast. Prestige is bolstered by the exclusivity of newly planned developments completely walled with either limited or no access to non-residents.[35] The communities have strict income, class and status requirements.[36] Prestige communities are the fastest-growing type of gated community because residents look at the gates as a symbol of distinction that "create and protect a secure place on the social ladder."[37]

The gates around prestige communities are also a mechanism used to protect property values,[38] while giving an air of exclusivity and affluence.[39] Prestige communities are considered by CID

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majority decision).

29. GATED COMMUNITIES, *supra* note 8, at 99.

30. *See id.* at 99-100 (discussing how a fear of crime has motivated residents "of all income levels" to gate their communities). Carri Karuhn, *No Lock Gated-Community Plan Meets Detractors in Hoffman Estates*, CHI. TRIB., Nov. 14, 1999, at A1 (discussing the ability of developers to charge up to 20 percent more for a home built in a gated community because of the sense of security and privacy that the gates give).

31. *See* Owens, *supra* note 8, at 1129 (discussing the motivations of common individuals who want to protect themselves from growing crime).

32. *See* Kennedy, *supra* note 11, at 766 (discussing wealthy individuals' motivations to move to gated communities in the context of the exclusion it creates).

33. *Id.*

34. Owens, *supra* note 8, at 1129. "The growth of the private security industry mirrors the explosion in gated communities: Since 1980, the number of security guards has risen 64% to 1.6 million, and it will reach 1.9 million by the year 2000. Currently, private officers outnumber public police officers three to one." *Id.*

35. *See* Schwartz, *supra* note 21, at n.5.

36. WALLED COMMUNITIES, *supra* note 23, at 2.

37. GATED COMMUNITIES, *supra* note 8, at 40-41.

38. *See* Sterk, *supra* note 18, at 322-24 (finding that discrimination against non-residents is a sustainable practice if those discriminated against are compensated).

39. *See generally* GATED COMMUNITIES, *supra* note 8, at 75-76.

theorists to be homogenous groups that are attempting to control and protect their way of life separate and distinct from the rest of the world.[40]

Gated communities are quickly growing because they provide a variety of benefits for residents.[41] However, in many instances, it is precisely these benefits that make it difficult for certain individuals to become residents. This exclusionary effect is perpetuated by laws currently not designed to protect non-residents.[42]

II. PROBLEMS WITH GATED COMMUNITIES THAT SUPPORT NON-RESIDENT EXCLUSION

While there are several motivations for the movement to gated communities, there are recurring problems associated with them.[43] A majority of the controversy arises between residents of the community and the association that governs.[44] However, there

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40. *Id.* at 41. "Beyond market value, resident owners may value the sense of community that comes with a stable neighborhood and may fear that renters . . . will interfere with that sense of community." Sterk, *supra* note 18, at 323.

41. WALLED COMMUNITIES, *supra* note 23, at 9. A third significant impetus that attracts people to gated communities is retirement. GATED COMMUNITIES, *supra* note 8, at 39. Most people, when they think of gated communities, think of retirement communities. *Id.* Most gated retirement communities started in Florida, but have moved to other warm climates as well. *Id.* at 39-40. Retirees prefer this type of living arrangement because it affords them with structure, recreation, and social activities. *Id.* at 39. Most retirees live in California, Texas, Arizona, and Florida because of the warmer climates. WALLED COMMUNITIES, *supra* note 23, at 9.

42. See discussion *infra* Part II(B) explaining several laws that perpetuate gated community exclusion.

43. PRIVATOPIA, *supra* note 8, at 9. One problem is that exclusive community developments were built with deed restrictions. *Id.* Homeowners' associations were created to enforce these restrictive covenants. *Id.* Problems with the covenants began to occur with racially restrictive covenants. *Id.* In 1948, the U.S. Supreme Court held that state courts could not enforce racially restrictive land use agreements between neighbors. Shelley v. Kraemer, 334 U.S. 1, 22 (1948). In *Shelley*, the United States Supreme Court stated:

> Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such [racially restrictive] agreements.

Id.

44. Residents and associations have litigated issues involving consensual contractual agreements, restrictive covenants, and harsh association regulations. Contractual relations between residents and associations have been known to restrict freedom. Kennedy, *supra* note 11, at 762-63. However, "not all those who encounter their respective provisions necessarily consent to them." Owens, *supra* note 8, at 1136. Contracts for CID's may be considered adhesion contracts that necessitate government intervention. McKenzie, *supra* note 8, at 400. *Shelley v. Kraemer*, 334 U.S. at 4-5, is an example of

are also burgeoning problems created by gated communities, which have been fairly free from judicial intervention.[45] Only in the past three years have legal scholars begun to explore the ramifications of gated communities on non-residents. Some of these problems include income requirements that create segregation, First and Fourth Amendment issues, and non-residents' loss of the benefits of public property.

A. Income Requirements and Wealth Classifications

Although economic barriers in housing development are not novel concepts, the addition of physical barriers is new.[46] Physical barriers are erected to exclude many groups of people from gated community developments.[47] This exclusion creates "a private world that shares little with its neighbors or the larger political

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litigation involving a restrictive covenant. In *Shelley*, the Court was faced with a restrictive covenant that said:

> [N]o part of said property or any portion thereof shall be, for said term of [f]ifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

Id. The Court held the covenant that restricted solely on the basis of race to be in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 23. For examples of cases involving harsh association regulations, see Nahrstedt v. Lakeside Village Condominium Ass'n, Inc., 878 P.2d 1275, 1290 (Cal. 1994) (upholding condominium association's "no pet" restriction because the restriction was presumptively reasonable, and plaintiff failed to prove that the restriction was arbitrary, or that it affected a fundamental right because there was no right conferred by state or constitutional law to keep pets); Board of Dir. of 175 East Delaware Place Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407, 411 (Ill. App. Ct. 1997) (holding that condominium association's rule that barred dogs was reasonable because recreational areas for dogs were scarce, there was a grandfather clause for existing dogs, and less restrictive measures to protect against the harm from dogs had failed in the past). *See also* Riss v. Angel, 934 P.2d 669, 677 (Wash. 1997) (en banc) (holding that a consent to construct a covenant that required "conformity and harmony of external design and general quality with the existing standards of the neighborhood" must be reasonable).

45. *See* WALLED COMMUNITIES *supra* note 23, at 3. "Scholarly work on gated communities is essentially non-existent." *Id.* *See also* Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n, 28 Cal. Rptr. 2d 451, 457 (Cal. Ct. App. 1994) (holding that the city did not have authority to abandon public streets for the benefit of a private community that wanted to erect gates to restrict use by non-residents).

46. *See* WALLED COMMUNITIES, *supra* note 23, at 2.

47. GATED COMMUNITIES, *supra* note 8, at 8. Gated communities differ from condo associations in that the developments control more than just private space. WALLED COMMUNITIES, *supra* note 23, at 2. "[T]hey privatize community space, not merely individual space. Many of these communities also privatize civic responsibilities such as police protection and communal services such as schools, recreation, and entertainment." *Id.*

system. This fragmentation undermines the very concept of . . . community life."[48]

Community associations and real estate developers keep individuals out by enacting strict prerequisites to buying property in gated communities. Prerequisites are promulgated by the association, either by deed or majority-enacted property restrictions.[49] Anyone who does not meet the requirements is excluded.

The most notable and common prerequisites are stringent income requirements. The potential owner must meet the income requirement before buying property in the gated community. Income requirements typically far exceed the amount of income necessary to afford the property.[50] Many communities also require substantial assets in excess of income requirements. In addition to inflated income requirements and asset portfolios, most gated communities require prescreening of potential owners by board members.

Consequently, through such established requirements, the communities are enforcing class restrictions based on arbitrary wealth requirements. At the same time, the community board, made up of property owners and developers, establish barriers for potential buyers.[51] Barriers arbitrarily exclude those who have the ability to afford the property, but do not fit the profile of what the

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48. WALLED COMMUNITIES, *supra* note 23, at 2.

49. *See, e.g.*, *East Delaware Place Homeowners Ass'n*, 679 N.E.2d at 409-10 (stating that "condominiums are creatures of statute and, thus, any action taken on behalf of the condominium must be authorized by statute"). *Id.* at 409. An example of such a statute indicates that the condominium board may: "adopt and amend rules and regulations covering the details of the operation and use of the property, after a meeting of the unit owners called for the specific purpose of discussing the proposed rules and regulations." 765 ILL. COMP. STAT. ANN. 605/18.4(h) (West 1994). The Illinois statute also allows the creation of "such other lawful provisions not inconsistent with the provisions of this Act as the owner or owners may deem desirable in order to promote and preserve the cooperative aspect of ownership of the property and to facilitate the proper administration thereof." 765 ILL. COMP. STAT. ANN. 605/4(i) (West 1994).

50. *See Quicken Mortgage.com* (last modified Dec. 1, 1999) <http://mortgage.quicken.com/help/affordcalchow.asp>. The mortgage industry uses one of two standard formulas that estimate how much an individual can afford to pay for her home: the housing-expense ratio and the debt-to-income-ratio. *Id.* The housing-expense ratio standard concludes that monthly house payments (including taxes and insurance) should not exceed 28% of gross monthly income. *Id.* The debt-to-income ratio determines an individual's total monthly home payment plus repayment on other loans or credit cards, which should not exceed 36% of gross monthly income. *Id.*

51. "The developer possesses nearly absolute control over the community," in the way of making laws and restrictions for residents and potential buyers. Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 286 (1976).

community is looking for.[52]

Gated communities "erode a sense of community and divide people by age, race and class."[53] Large families and minorities have traditionally been known to have exceedingly lower disposable incomes than the majority.[54] Therefore, wealth classifications have a greater negative effect on minorities and large families. The consequence is that through the implementation of inflated income restrictions, gated communities are succeeding in keeping out minorities and large families. This serves to segregate the gated community into its residents' own independently composed private neighborhood.[55]

More community planners should oppose inflated income requirements. Inflated income requirements create a barrier to diverse community development because of their segregating nature.[56] In addition to the income requirements, the privatization of communities takes advantage of several existing laws that support exclusion.

B. Privatization Affects the First Amendment, the Fourth Amendment, and Non-Residents' Use of Former Public Property

Gated communities take advantage of their private nature. By gating an entire community, including streets and parks, what was once public property becomes private. This privatization[57] of former public areas creates several problems.

The first problem is the First Amendment issue of freedom of speech.[58] Since the 1939 decision in *Hague v. CIO*,[59] the U. S.

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52. The "profile" means substantial asset portfolios, inflated income requirements, and arbitrary standards set for passing prescreening meetings.

53. Christian, *supra* note 26, at 1 (quoting an architect and other experts who oppose gated communities because of their disruptive effect on heterogeneous diverse communities).

54. *See generally* U.S. Department of Commerce, Bureau of the Census, 1990 CENSUS OF POPULATION AND HOUSING.

55. Christian, *supra* note 26, at 1.

56. Kennedy, *supra* note 11, at 771 (discussing how gated community exclusion may lead to racial steering).

57. *See* Ross, *supra* note 9, at 801 (discussing how "[p]rivatization involves the shift from government provision of functions and services to provision by the private sector."). This privatization blurs the line between a public and a private function. *Id.*

58. U.S. CONST. amend. I.

59. 307 U.S. 496, 515-16 (1939). In *Hague*, the United States Supreme Court stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id.

Supreme Court has consistently held that streets and parks are held "in trust" to the public for communication and assembly. Streets and parks have traditionally been open to the public for the exercise of free speech.[60] Not so in gated communities. With the privatization of gated communities, the streets and parks are no longer "in trust" for the public; they are privately owned. Therefore, the community can enact rules that exclude the exercise of free speech of non-residents on the streets and in the parks within the community walls.[61]

Second, the walls create barriers to non-residents' travel and use of the streets.[62] Streets once open to the public for use as thoroughfares are no longer available after the community installs gates surrounding the area. To have access to the streets, non-residents are subject to questioning by the community's private security. Non-residents of a gated community are sometimes "unfairly harassed or unjustifiably asked to leave [the community] because of their race or class."[63] This questioning poses the issue

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60. *See* Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills, 182 Cal. Rptr. 813, 854 (Cal. Ct. App. 1982) (holding that it was a state constitutional violation of free speech to exclude a newspaper from a gated community, where only resident-approved access was permitted, because another newspaper had been allowed); William G. Mulligan Found. v. Brooks, 711 A.2d 961, 967 (N.J. 1998) (holding that a gated community does not have to allow a non-resident to speak on the common ground of the property when property is for nondiscriminatory private use only).

61. *William G. Mulligan Found.*, 711 A.2d at 964. In discussing the right to free speech in a gated community where the association forbids outsiders, the New Jersey Supreme Court stated:

> In balancing the rights of speech and assembly upon private property and the extent to which such property owners can reasonably restrict those rights, the Court adopted a three-part test which requires consideration of 1) the nature, purpose, and primary use of such private property; 2) the extent and nature of the public's invitation to use that property; and 3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. Even when an owner of private property is constitutionally obligated to honor speech and assembly rights of others, the owner is entitled to fashion reasonable rules and regulations to control the time, mode, opportunity and site for the individual exercise of expressional rights on the property. In this regard, consideration must also be given to whether there exists convenient and feasible alternative means to individuals to engage in substantially the same expressional activity.

Id.

62. *See* Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n, 28 Cal. Rptr. 2d 451, 453 (Cal. Ct. App. 1994) (explaining the formation of Citizens Against Gated Enclaves (CAGE), a non-resident group opposed to gating a California subdivision because the citizens were being stopped from using public streets and sidewalks for commuting and jogging). *See also William G. Mulligan Found.*, 711 A.2d at 965 (describing property in a gated community that resembles public property, but cannot be used by non-residents).

63. Kennedy, *supra* note 11, at 771. Some gated communities even charge

of possible violations of the Fourth Amendment[64] right to be free from illegal search and seizure.[65]

Third, local ordinances may affect non-residents' use of former public property. Local ordinances govern the city's ability to abandon public streets that are no longer in use.[66] Many of these ordinances exist for the sole benefit of aiding communities in their efforts to gate up.[67] When a city abandons public streets, non-residents lose the use and benefit of once public property.[68]

Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n[69] was the first and only case to reach a state appellate court where non-residents successfully challenged the practices of a gated community on state or federal law grounds.[70] In *Citizens*

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non-residents a fee to enter the community. *Id.* (discussing Sea Pines Plantation, an exclusive gated community in Hilton Head, South Carolina that charges a $3 entry fee for pedestrian access to the property).

64. U.S. CONST. amend. IV.

65. *See* Owens, *supra* note 8, at 1142-49 (proposing making private security accountable to constitutional principles because of its public function by overturning *Burdeau v. McDowell*, 256 U.S. 465 (1921), which holds that the Fourth Amendment does not apply to private party searches); Schwartz, *supra* note 21, at 128-31 (discussing search and seizure implications of security-gated entrance to a Rosemont, Illinois housing community). Private security guards wear uniforms and badges, and carry guns. Therefore, they often resemble public police officers. However, the law treats them as private individuals who have no greater enforcement capacities than average citizens. Owens, *supra* note 8, at 1129. Because of the growth of police privatization, it is argued that the Fourth Amendment should apply to private security guards. *Id.* at 1144-45.

66. *See generally* City of Oakland v. Oakland Water Front Co., 124 P. 251, 253 (1912) (giving the state legislature permission to vacate a street and delegate that power to the city where the street had not been used by the public); *Cal. [Sts. & High.] Code* §§ 8300-8363 & 955-960.5 (West 1998) (outlining a municipality's ability to abandon public streets).

67. *See* Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n., 28 Cal. Rptr. 2d 451, 452 (Cal. Ct. App. 1994) (depicting an unsuccessful attempt by a community to erect gates solely for its own benefit, while ignoring the loss of use by non-residents).

68. *Id.* at 453. *See* Christian, *supra* note 26, at 1. "In Rosemont . . . the local government has gated the only two streets, which are public, leading into a public subdivision and posted village police officers at the checkpoints 24 hours a day, all paid with public funds." *Id.* There have been several complaints about the Rosemont situation, but as of yet there has been no noted case disputing the city's power to close off the streets. Oddly, the Rosemont barriers are still up, the public streets have been abandoned to the private association, and the auxiliary police at the gates are still employed and paid by the city of Rosemont, out of all Rosemont citizen's tax dollars. Telephone Interview with Supervisor, Rosemont Police Department (Oct. 5, 1999).

69. 28 Cal. Rptr. 2d 451, 452 (Cal. Ct. App. 1994).

70. Both *Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills*, 182 Cal. Rptr. 813 (Cal. Ct. App. 1982), and *William G. Mulligan Found. v. Brooks*, 711 A.2d 961, 967 (N.J. 1998), addressed constitutional free speech issues in gated communities.

Against Gated Enclaves, the California Court of Appeals decided whether the city of Los Angeles could withdraw a street from public use to benefit private homeowners.[71] The Whitley Heights homeowners erected gates operating "in a manner so as to exclude members of the public from streets in violation of the vehicle code."[72] Non-residents of the community argued that they were being excluded from using streets and thoroughfares for recreation and travel purposes.[73] The court held that the city could authorize closing a street if the street was no longer needed for traffic, but could not close it for any other purpose.[74] The court held that the public streets could not be abandoned because they were still in use by the citizens of Whitley Heights.[75]

Citizens Against Gated Enclaves illustrates how homeowners' associations attempt to have streets abandoned so they can erect gates to restrict access to the public. However, as the case demonstrates, the state must meet the burden of showing that a street is no longer needed before it can successfully withdraw the street from public use.[76] Despite the holding in *Citizens Against Gated Enclaves*, many cities have been successful in meeting this burden for the purpose of gating communities.

By abandoning public streets, the cities have had a hand in excluding non-residents.[77] After blocking both the entrance and exits of the community with gates, security or street closures, the community has, in a sense, succeeded in segregating itself from the diversity of the surrounding neighborhood.

Non-residents affected by a gated community's exclusion are limited in their opportunities to seek redress. There are two ways to access the judicial system for grievances against gated communities. The first is with a constitutional cause of action; the second is with a statutory cause of action. As we will see, neither is currently adequate to deal effectively with the problem of

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71. *Citizens Against Gated Enclaves*, 28 Cal. Rptr. 2d at 452.

72. *Id.*

73. *Id.*

74. *Id.* at 455. In dictum, the court expressed the public policy reason for the holding:

> Although we understand the deep and abiding concern of the City and appellant with crime prevention and historic preservation, we doubt the Legislature wants to permit a return to feudal times with each suburb being a fiefdom to which other citizens of the State are denied their fundamental right of access to use public streets within those areas.

Id. at 457.

75. *Id.*

76. *Citizens Against Gated Enclaves*, 28 Cal. Rptr. 2d at 454.

77. *See generally* Christian, *supra* note 26, at 1. For example, in Rosemont a public street was closed to through traffic in order to gate the only single-family residential subdivision in town. *Id.* The city also pays the wages of security personnel at the entry. *Id.* Here, Rosemont has had a hand in the exclusion of non-residents of the community in two ways. *Id.*

exclusion.

III. A NON-RESIDENT CAUSE OF ACTION AGAINST GATED COMMUNITY EXCLUSION

Exclusion practiced by gated communities creates a discriminatory effect on non-residents.[78] There are two options open to non-residents who attempt to redress the discrimination. The first of these two approaches is the constitutional cause of action. However, the constitutional cause of action has its limitations because of burdens a plaintiff must overcome.[79] When a non-resident is unable to adequately protect herself within current constitutional frameworks, she has available a statutory cause of action under the FHA.[80] The FHA protects certain classes of persons against discrimination in housing. Similar to the constitutional cause of action, the FHA also has requirements that must be met before a person can successfully maintain a cause of action against a gated community.

A. *The Constitutional Cause of Action*

In the past four years, legal scholars have begun to analyze the constitutional implications of gated communities. Gated communities create two constitutional issues: 1) Fourth Amendment[81] issues of unconstitutional search and seizure at guarded entrances,[82] and 2) Fourteenth Amendment Equal Protection violations[83] arising from exclusionary practices.[84] Even

78. See discussion *supra* Part II(A) and discussion *infra* Part III(B)(3) for an explanation of the discriminatory effects that strict income requirements have on potential buyers, most notably minorities and large families.

79. See discussion *infra* Part III(A) for an explanation of the state action requirements for a constitutional cause of action.

80. 42 U.S.C. § 3604 (1999).

81. U.S. CONST. amend. IV. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

82. *See* Owens, *supra* note 8, at 1129. As the gated community phenomenon grows, so too will constitutional implications. It is yet to be determined if illegal search and seizure issues of the Fourth Amendment will apply to private security hired to provide policing functions normally left to city officers. *Id.* at 1130. *See also* Schwartz, *supra* note 21, at 126 (discussing several of the implications that arise from constitutional violations of the Fourth Amendment at gated community checkpoints and arguing for applying the Fourth Amendment to these private actors because they are taking on a governmental function of policing).

83. U.S. CONST. amend. XIV. The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

with recent scholarly work on the subject, none of these issues has actually been litigated.[85]

Recently, the privatization of land-use controls has taken over former governmental responsibilities of law-making and policing.[86] This system of private governance has been considered "the most extreme form of private land-use control,"[87] because gated community associations take over the provision of many services once provided for by the government.[88] Gated community activities are presumptively private, and many CID theorists believe that the government should not interfere.[89] However, when gated communities discriminate against non-residents, the issue is no longer private; it becomes a public policy issue. This public-private dichotomy blurs the lines of what is and is not a governmental responsibility.[90]

In order for a non-resident to maintain a constitutional cause of action for gated community exclusion, the community must be a

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> State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

84. See discussion *infra* Part II(A) for an explanation of how wealth classifications are exclusionary.

85. *See* Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills, 182 Cal. Rptr. 813, 844 (Cal. Ct. App. 1982) (stating that limiting the free speech of a non-resident newspaper was dependent on permitting another newspaper company on the property). *See also* William G. Mulligan Found. v. Brooks, 711 A.2d 961, 966 (N.J. 1998) (allowing the exclusion of a non-resident's right to free speech on private gated community property). *See* Owens, *supra* note 8, at 1129 (discussing the need for constitutional inquiry into Fourth Amendment illegal search and seizure issues).

86. *See id.*; McKenzie, *supra* note 8, at 399.

87. Ross, *supra* note 9, at 801-02 (describing the problems when gated subdivisions, where deed restrictions and covenants control property use, and services are provided through a private homeowners' association, are "the most extreme form of private land-use control").

88. *Id.*

89. McKenzie, *supra* note 8, at 402 (explaining but not agreeing with the theory that "[t]here is something essentially 'private' about decisions to construct, sell, purchase, and operate CIDs. Government should presumptively remain uninvolved in the contractual relationships [of CID's]").

90. *See id.* at 403. There are three dimensions to the public-private dichotomy: agency, access and interest.

> A thing may be relatively public on one dimension and relatively private on another . . . So, to be fully 'public' something would be governmental. Open to all, and of concern to all. To be fully private, a thing would be non-governmental, closed and of no concern to any, but one or a few.

Id. See also Rishikof & Wohl, *supra* note 20, at 528 (citing Reichman, *supra* note 51, at 255-56). There are many largely public aspects or "governmental" features of community associations. But most believe that "these entities are nevertheless of a 'private' nature, because they are based on private initiative, private money, private property and private law concepts." *Id.*

state actor.[91] The courts have found that private parties meet the state action requirement only on very limited bases.[92]

The Ninth Circuit Court of Appeals has been the only federal appellate court to hold that a private landlord met the Fourteenth Amendment's state action requirement, which allowed the plaintiff to survive a motion to dismiss.[93] In *Halet v. Wend Investment Co.*,[94] one count of the plaintiff's cause of action was against a private landlord for racial discrimination under the Equal Protection Clause.[95] The plaintiff alleged that: the landlord leased the apartment complex land from the County; the County leased the land for the benefit of providing public housing; the County had control and oversaw all plan development, uses and purposes of the apartment, and the rent charged; and the landlord paid a percentage of rent to the County.[96]

Citing *Burton v. Wilmington Parking Authority*,[97] the court reversed the district court's dismissal of the action.[98] The Court of Appeals held that there were sufficient facts to demonstrate the government's "position of interdependence" and "joint participa[tion]" with the landlord, which led to a finding that there was a "significant relationship" that made the private party a state actor.[99]

Gated community developments are part of a planned development project sited on a parcel of private land, not owned by the government.[100] The government is not involved in the control

91. *See generally* WILLIAM COHEN AND JONATHAN D. VARAT, CONSTITUTIONAL LAW CASES AND MATERIALS 1127-28 (10th ed. 1998). To be considered a state actor a party must meet one of three requirements: 1) government qua government, where a governmental entity is acting as itself, i.e. state as state; 2) the party is a subdivision of government acting; or 3) a private party is acting in lieu of government, under one of three theories. *Id.* The three theories are: 1) public function, where a private party is performing a function that is traditionally performed only by the government 2) entanglement, where a private party is so entangled with the government that it can be treated as the government, also called the "symbiotic relationship" test (*see* Kennedy, *supra* note 11, at 785) or 3) encourage and foster, where the government must encourage or foster the discrimination, by allowing it to continue or requiring the private party to do an act. COHEN & VARAT, *supra*, at 1127-28.

92. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 720 (1961) (holding a coffee shop owner to be a state actor because the government owned the building his shop was in, and was presumptively aware of the owner's practices when he discriminated against black patrons).

93. Halet v. Wend Inv. Co., 672 F.2d 1305, 1310 (9th Cir. 1982).

94. *Id.*

95. *Id.* at 1309.

96. *Id.* at 1310.

97. 365 U.S. 715, 720 (1961).

98. *Id.*

99. *Halet*, 672 F.2d at 1310.

100. WALLED COMMUNITIES, *supra* note 23, at 5.

of the project beyond common zoning and licensing requirements. Therefore, gated communities are sufficiently distinguishable from the facts in *Halet*, in which the court found that there was a "significant relationship" between the government and a private party. Courts are unlikely to find that gated residential communities under private ownership are state actors because of their private nature. Without meeting the "significant relationship" test, an Equal Protection claim against a gated community will fail to meet the state action requirement needed to sustain the cause of action.[101]

The current constitutional requirements are unable to address the exclusionary impact that gated communities have on non-residents.[102] For the government to control non-resident discrimination, there must be an ability to hold private communities accountable for their actions.[103] The constitutional cause of action will not be sufficient to lessen a gated community's discriminatory effects on non-residents. Therefore, a legislative theory is the only option that remains to govern gated community restrictions.[104]

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101. *Compare Wilmington Parking Auth.*, 365 U.S. at 720 (finding a significant relationship is needed for a private party to meet the state action requirement for a constitutional cause of action).

102. There is a further barrier to Equal Protection analysis of gated communities when exclusion is based primarily upon income requirements. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, (1973), the U. S. Supreme Court held that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24. The Court has held that income is not a suspect class that is afforded strict scrutiny by the courts in an equal protection constitutional cause of action. *Id.*

In *Rodriguez*, the Court dealt with the issue of a Texas school system financing legislation that discriminated against poor persons, indigent persons, and those persons residing in poorer school districts. *Id.* at 19-20. The cause of action was a violation under the Equal Protection Clause of the Fourteenth Amendment. The court did not find that income level was a suspect class that required strict scrutiny by the courts. *Id.* at 25-26.

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28. Therefore, gated community exclusion falls short of maintaining a cause of action when analyzed under the Equal Protection Clause.

103. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Id.*

104. *See* Kennedy, *supra* note 11, at 778 (stating that there are social consequences from the fact that most residential policies are never subject to judicial review).

B. The Statutory Cause of Action under the FHA

Congress enacted the FHA[105] to alleviate discrimination in the sale and rental of housing.[106] To prove a claim of housing discrimination under Title VIII, the plaintiff can advance one of two theories: disparate treatment or disparate impact.[107]

1. A Prima Facie Case of Disparate Treatment Requires Intent to Discriminate Against a Protected Class

Disparate treatment can be proved by showing that a housing practice was motivated by a racially discriminatory purpose,[108] with evidence of either direct or indirect intentional discrimination.[109] There is a four-part requirement for showing a prima facie case of disparate treatment. First, the plaintiff must show that she is a member of a protected class. Next, the plaintiff must show that she was qualified to buy. The plaintiff must then prove that she was denied or refused sale, and lastly, that the housing remained available.[110]

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105. 42 U.S.C. §§ 3601-3619 (1999). The Federal Fair Housing Act (FHA) prohibits discrimination in the sale and rental of housing based upon seven statutorily protected classes. *Id.* Section 3604(a)-(d) denotes what type of conduct is specifically prohibited:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(a)-(d) (1999).

106. 42 U.S.C. § 3601.

107. Kormoczy v. Secretary of HUD, 53 F.3d 821, 823-24 (7th Cir. 1995) (describing the difference between disparate treatment and disparate impact as causes of action for housing discrimination under the FHA).

108. *Id. Cf.* Betsey v. Turtle Creek Ass'n, 736 F.2d 983, 986 (4th Cir. 1984) (finding that disparate treatment need not be shown if there is an alternative showing of a disproportionate impact on minorities in the total group to which the discriminatory rental practice was applied).

109. *Kormoczy*, 53 F.3d at 824.

110. *See* Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980) (requiring four factors for a prima facie case of discrimination);

A non-resident of a gated community must meet the protected member status to have a cause of action for discriminatory housing practices. In *Boyd v. Lefrak Organization*,[111] the Second Circuit Court of Appeals refused to accept a theory that income was the functional equivalent of race, relying on its interpretation of the 1971 U.S. Supreme Court decision in *James v. Valtierra*.[112] The issue in *Boyd* concerned eligibility rates for the rental of housing that was based on income levels of prospective renters. The court did not find the correlation between income and race to be sufficient to prove discriminatory treatment of a protected class.[113] Therefore, the court held that a private landlord did not have a duty to accept low-income tenants because there was no proof that the neutral income requirements were aimed at excluding racial minorities.[114]

Disparate treatment would be a difficult theory on which to base a discrimination cause of action for a non-resident of a gated community. Gated community requirements have the effect of discriminating based on income level, and low-income level is not one of the seven protected classes covered by the FHA.[115] Sellers retain their ability to discriminate against individuals who do not fall within one of the protected classifications. This discrimination

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Wharton v. Knefel, 562 F.2d 550, 553-54 (8th Cir. 1977) (requiring that all four elements be met in order to meet the plaintiff's prima facie case of disparate treatment); Robinson v. 12 Lofts Realty, Inc. 610 F.2d 1032, 1038 (2d Cir. 1979) (finding that a prima facie case of racial discrimination could not be defeated by hypothetical business reasons). *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (originating the four-part test for a prima facie case of discriminatory treatment in employment discrimination Title VII cases).

111. 509 F.2d 1110, 1113 (2d Cir. 1975).

112. 402 U.S. 137, 142 (1971). In *Valtierra*, the U. S. Supreme Court decided the constitutionality of a state statute that made provisions for community referenda for the building of low-income housing. *Id.* at 144-45. The Court decided that there is no fundamental right to housing. *Id.* The dissent in *Valtierra* argues that the state statute constitutes invidious discrimination by singling out low-income individuals to bear its burden. *Id.* The *Boyd* dissent agrees, arguing that the majority's reliance on *Valtierra* is misplaced because it was decided on constitutional grounds and not based on income discrimination. *Boyd*, 509 F.2d at 1116-17.

113. *Boyd*, 509 F.2d at 1113. The Second Circuit Court of Appeals stated:

> The fact that differentiation in eligibility rates for defendants' apartments is correlated with race proves merely that minorities tend to be poorer than is the general population. In order to utilize this correlation to establish a violation of the Fair Housing Act on the part of a private landlord, plaintiffs would have to show that there existed some demonstrable prejudicial treatment of minorities over and above that which is the inevitable result of disparity in income.

Id.

114. *Id.*

115. 42 U.S.C. § 3604(d) (1999). The seven protected classes are: race, color, religion, sex, handicap, familial status, and national origin. *Id.*

is justified by a desire to protect property values as well as the character of particular neighborhoods.[116] This has left questions open for the courts when an individual is kept out of a particular type of housing based on a non-protected distinction.

The reasoning used by the court in *Boyd* to support the holding that income could not show a sufficient correlation to racial discrimination to support a fair housing claim[117] was rejected by the Second Circuit Court of Appeals in 1988. In *Huntington Branch, NAACP v. Huntington*,[118] the court discounted the *Boyd* holding because it had refused to apply the disparate impact analysis. The Second Circuit stated that it will apply the disparate impact analysis when a plaintiff challenges a facially neutral rule.[119]

2. A Prima Facie Case of Disparate Impact

The disparate impact test is an easier burden for a non-resident's cause of action against a gated community's terms, policies, or privileges[120] because it does not require a showing of the defendant's intent to discriminate.[121] A plaintiff may prove

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116. *See* Sterk, *supra* note 18, at 322-24 (discussing in part how residents feel discrimination against non-residents of their community is warranted where it maintains the market value of their property and the character of their neighborhood).

117. *Boyd*, 509 F.2d at 1115-18. The majority's requirement that there be direct evidence of racial discrimination in order to establish a FHA claim was vehemently argued against by the dissent. *Id.* at 1115. Justice Mansfield argued that basing a FHA violation on a requirement of direct evidence of racially discriminatory motive or intent was incorrect. *Id.* "This case should be governed by the principle . . . that, where a facially neutral practice has a serious and substantial de facto discriminatory impact, it prima facie violates a statutory prohibition against racial discrimination unless the alleged violator can show that the practice is necessary for non-racial reasons." *Id.*

118. 844 F.2d 926, 934 (2d Cir. 1988).

119. *Id.* at 935. "Often [facially neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied." *Id.* The court argues that if the intent was required for a showing of discrimination under the FHA it would "strip the statute of all impact on de facto segregation." *Id.* at 934.

120. 42 U.S.C. § 3604(b) (1999).

121. *See* Mountain Side Mobile v. Secretary of HUD, 56 F.3d 1243, 1251 (10th Cir. 1995) (stating that without a deliberate motive to discriminate, a policy "may in operation be functionally equivalent to intentional discrimination"); Pfaff v. U.S. Dep't Hous., 88 F.3d 739, 745-46 (9th Cir. 1996) (adhering to the law in other jurisdictions, which does not require intent for a prima facie case of disparate impact); U.S. v. Badgett, 976 F.2d 1176, 1178-79 (8th Cir. 1992) (holding intent requirement only necessary in a disparate treatment cause of action, not in a disparate impact cause of action); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-48 (3d Cir. 1977) (holding no showing of intent required for a disparate impact cause of action); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 934-35 (2d Cir. 1988) (arguing that requiring direct intent to discriminate would defeat the purpose of the FHA),

disparate impact by showing that a policy or practice that is outwardly neutral, or neutral on its face, has a discriminatory effect on an individual in a protected class, because of its disproportionate adverse impact on that class member.[122]

In *Pfaff v. U.S. Department of Housing*, the Ninth Circuit Court of Appeals articulated a two-part test for a prima facie case of disparate impact.[123] First, the plaintiff must identify an outwardly neutral housing policy or restriction. Second, the plaintiff must demonstrate a significant or adverse impact on a particular protected class produced by the facially neutral policy or restriction.[124]

In *Pfaff*, the landlord had an occupancy restriction on a rental unit that could only accommodate a family of four because of the units size.[125] The policy was outwardly neutral because the decision was not based on familial status, but on space limitations.[126] However, even though the policy was outwardly neutral, the Ninth Circuit held that the restriction disproportionately impacted families with children.[127] Therefore,

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aff'd in part 488 U.S. 15 (1988) (per curiam).

122. *See Mountain Side Mobile*, 56 F.3d at 1252 (adopting the analysis that "disparate impact claims are based on policies and practices that are without a discriminatory motive but are functionally equivalent to intentional discrimination"); *Pfaff*, 88 F.3d at 745 (explaining that discriminatory effect "describes conduct that actually or predictably result[s] in discrimination" and is shown by an adverse or disproportionate impact on a protected group); Betsey v. Turtle Creek Ass'n, 736 F.2d 983, 986 (4th Cir. 1984) (holding that a landlord's housing practice may violate Title VIII either by being motivated by racial discrimination or because it is shown to have a disproportionate impact on minorities). *See also* U.S. v. Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (holding that a plaintiff need not show that the action resulting in racial discrimination was racially motivated in order to prove a prima facie case of housing discrimination).

123. *Pfaff*, 88 F.3d at 745 (adopting analysis from an analogous context in *Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986); in *Palmer*, the court used the two-part disparate impact test to analyze a claim of age discrimination in employment). *Cf.* Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (articulating a different test for disparate impact that has not been as pervasive as *Pfaff*). The four critical factors are: 1) How strong is the plaintiff's showing of discriminatory effect; 2) Is there some evidence of discriminatory intent; 3) What is the defendant's interest in taking the action complained of; and 4) Does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely restrain the defendant from interfering with individual property owners who wish to provide such housing). *Id.* *But cf. Huntington Branch, NAACP*, 844 F.2d at 935-36 (refusing to adopt the *Arlington Heights* test for a prima facie case of disparate treatment because the factors are to be considered in a final determination on the merits, not in the prima facie requirement).

124. *Pfaff*, 88 F.3d at 745.

125. *Id.* at 742.

126. *Id.*

127. *Id.* at 745.

even if a policy is facially neutral,[128] in that it purports to treat all individuals the same, the policy can still be a violation of the FHA by its disparate impact on protected classes.[129]

3. *Income Requirements and Disproportionate Impact*

This Comment has suggested that the income requirements instituted by gated communities are exclusionary based on wealth classifications.[130] However, wealth is not one of the protected classes.[131] The disparate impact analysis covers the disproportionate impact that income requirements have on protected classes.

Income requirements for home-buying are established by two standard mortgage lending practices, which estimate that housing payments should not exceed 28-36% of an individual's gross monthly income.[132] Income requirements for buying property in a gated community go far beyond this standard calculation. Associations are looking to profile potential buyers in an effort to maintain the homogeneous character of their neighborhoods.

Developers also charge up to 20% more for property in a gated community.[133] In one particular proposed Illinois community, developers estimated selling homes for a base price of $250,000.[134] The median price for homes in the area is $179,000, which is 30% less. In Illinois, the U. S. Census for 1990 shows that Whites, with a high school degree or more, earn 20-30% more than Blacks and Hispanics.[135]

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128. U.S. v. Yonkers Board of Education, 624 F. Supp. 1276, 1371-72 (S.D.N.Y. 1985) (finding that even though the decision as to where to site subsidized housing is facially neutral, an inference of discriminatory effect can be established circumstantially from repeated acts of opposition to the housing).

129. *Id.*; Fair Housing Council of Orange County v. Ayres, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (holding that a landlord may establish reasonable policies as to the requirements necessary to rent an apartment, however, the requirements must not be discriminatory to a protected class member in its terms or conditions).

130. See discussion *supra* Part II(A) for an explanation of the exclusionary effects of wealth classifications on non-residents of gated communities.

131. *See* 42 U.S.C. § 3604(d) (1999); discussion *supra* Part III(B)(1) (stating that wealth is not one of the protected classes under the FHA).

132. *See Quicken Mortgage.com* (last modified Dec. 1, 1999) <http://mortgage.quicken.com/ help/affordcalchow.asp>.

133. *See* Karuhn, *supra* note 30, at A1.

134. *See id.*

135. U.S. Department of Commerce, Bureau of the Census, 1990 CENSUS OF POPULATION AND HOUSING.

AGE	WHITE (M)	HISPANIC (M)	BLACK (M)
25-29	$31,115	$27,145	$27,341
30-34	$40,388	$34,799	$29,471
35-44	$49,502	$42,193	$35,866
45-54	$59,989	47,281	$41,187

Charging 20% more for housing in an area where a particular race earns 20-30% more than minorities can extinguish the ability of minorities to afford the property. Additionally, setting the income requirements even higher than the standard mortgage calculations virtually ensures a homogeneous community. Consequently, creating prerequisites to establish a particular class of residency has a disproportionate effect on minorities.[136]

Under the FHA, the disproportionate effect inflated income requirements have on protected classes should be analyzed under a disparate impact theory.[137] After a non-resident plaintiff meets the burden of proving a prima facie case of disparate impact, the burden shifts and provides the defendant with an opportunity to show "some legitimate non-discriminatory reason" for the policy.[138] A defendant must present legitimate business reasons[139] why the facially neutral practice or policy is in effect.

55-64	$58,656	$48,910	$37,653

AGE	WHITE (F)	HISPANIC (F)	BLACK (F)
25-29	$23,814	$21,655	$21,562
30-34	$28,271	$25,392	$25,740
35-44	$29,730	$26,988	$28,282
45-54	$28,179	$29,546	$27,186
55-64	$27,231	$25,320	$25,528

136. Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1290-91 (7th Cir. 1977). However, the use of national statistics would not be the appropriate measure for local housing statistics in a showing of disparate impact. Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1253 (10th Cir. 1995). Local housing statistics would be necessary in an actual cause of action. *Id.* They are used here merely for example purposes.

137. Even if the courts do not find that such statistics sufficiently show a significant impact on minorities to meet the prima facie requirements, there are two types of discriminatory effects caused by a facially neutral policy. One is when a policy has a greater adverse impact on one racial group over another, as shown above. The second is the harmful effect the policy or practice has on the surrounding community. If the policy has the effect of perpetuating segregation, it will be considered invidious under the FHA regardless of the impact on particular racial groups. Pfaff v. U.S. Dep't Hous., 88 F.3d 739, 746 (9th Cir. 1996); Huntington Branch, NAACP v. Huntington, 844 F.2d. 926, 937 (2d. Cir. 1988). The outside community that surrounds a gated community that has a large concentration of minorities will be harmed by the segregating effect of gated communities. *Huntington*, 844 F.2d. at 938.

138. *Huntington*, 844 F.2d. at 936 (arguing that the second step in the burden-shifting requirement weighs the discriminatory effect against the defendant's business justifications). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (applying the first use of the burden-shifting test in a discrimination cause of action for employment discrimination actions).

139. *See Pfaff*, 88 F.3d at 749 (preserving the economic value of property was held to be a legitimate business reason for an occupancy restriction even though it was shown that it had a discriminatory effect on families).

IV. THE NEED FOR A STRICTER BUSINESS REASONS STANDARD TO REBUT A PRIMA FACIE CASE OF DISPARATE TREATMENT IN GATED COMMUNITIES

A non-resident of a gated community is unable to maintain a constitutional cause of action due to lack of state action requirements.[140] For a non-resident to maintain a cause of action for the discriminatory effects of gated communities, the defendant must be required to make a more rigorous showing of legitimate business reasons under the FHA cause of action.

A. *Three Business Justification Tests*

1. *Reasonableness Test*

There is disagreement among the federal appellate courts over which test should be used for rebutting a prima facie case of disparate impact. The courts have used one of three different tests. The least restrictive test was set forth in 1996 in *Pfaff v. United States Department of Housing and Urban Development.*[141] In *Pfaff*, the Ninth Circuit Court of Appeals expressly refused to apply the test used by the administrative agency in charge of fair housing disputes.[142] Instead, the court articulated a less restrictive "reasonableness" standard that the defendant must meet to rebut a prima facie case of disparate impact.[143] The *Pfaff* court found the landlord's occupancy restrictions "certainly reasonable to seek to preserve the value of one's property" and sufficient to satisfy the burden.[144]

According to the Eighth Circuit Court of Appeals in *United States v. Badgett*, a landlord or property owner need only prove that a policy or restriction was implemented for a legitimate business reason and that the policy or restriction was reasonable.[145]

140. See *supra* Part III(A) for an explanation of the lack of state action requirements for a private entity to successfully maintain a constitutional cause of action.

141. 88 F.3d at 749.

142. *Id.* at 748. The court refused to apply the *Mountain Side* test. *Id.* at 747. It reasoned that the "Mountain Side standard is broad, general, and prospective in application." *Id.* at 748. The court further explained that it is in its discretion to disregard deference to an agency's (HUD's) opinion where the standard used is broad, general, and prospective. *Id.*

143. *Id.* at 749.

144. *Id.*

145. *See also* United States v. Badgett, 976 F.2d 1176, 1180 (8th Cir. 1992) (requiring a "reasonable" business reason to rebut a prima facie case of disparate impact).

2. Business Necessity Test

In *Mountain Side Mobile Estates v. HUD*[146] a second test was applied. The Tenth Circuit Court of Appeals set forth a test that requires a more stringent standard than the *Pfaff* test.[147] In *Mountain Side*, the mobile home park management implemented policies that restricted occupancy to three people per home. The plaintiff challenged the restriction as discriminatory based on familial status.[148]

In administrative proceedings, the Department of Housing and Urban Development (HUD) determined that a defendant must show a compelling business need for a discriminatory practice.[149] However, the Tenth Circuit Court of Appeals eliminated the "compelling" element.[150] The court determined that the defendant must show that the policy or restriction was a legitimate "business necessity."[151] To meet this burden, the defendant is required to prove that the discriminatory practice or policy had a manifest relationship to the housing in question, and that it was a non-pretextual genuine business need.[152] The court held that occupancy restrictions maintained for residents' and guests' quality of life were legitimate, non-pretextual business justifications sufficient to meet the burden.[153]

3. Least Restrictive Means Test

The Second Circuit Court of Appeals articulated the third, and strictest, test for the defendant's burden in *Huntington Branch, NAACP v. Huntington*.[154] The court required that the defendant present bona fide and legitimate justifications for its policy or practice.[155] Additionally, the court required that the defendant demonstrate there were no less discriminatory alternatives available.[156]

In *Huntington*, the town refused to amend an ordinance that restricted multifamily housing. The effect of the ordinance was

146. 56 F.3d 1243, 1254 (10th Cir. 1995).
147. *Pfaff*, 88 F.3d at 747.
148. *Mountain Side Mobile*, 56 F.3d at 1246, 1247.
149. *Id.* at 1254.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Mountain Side Mobile*, 56 F.3d at 1257.
154. Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988).
155. *Id.* at 939.
156. *Id. See* Betsey v. Turtle Creek Ass'n, 736 F.2d 983, 988 (4th Cir. 1984) (requiring a defendant to show the absence of any acceptable alternative that will accomplish the same business goal with less discrimination before the defendant can rely on the business necessity justification to rebut a plaintiff's prima facie case).

that it disallowed the construction of low income housing in a white neighborhood. The town's several business justifications for the practice concerned traffic issues, health hazards, inconsistency with housing assistance plans and zoning plans, inadequate play areas, inadequate sewage systems, and undersized units.[157] The court held all the justifications to be entirely insubstantial, weak or inadequate to meet the burden.[158] The court also held that there were less restrictive means available to the defendant than refusing to allow construction of the housing.[159]

Thus, in order to rebut a prima facie case of discrimination in the Second Circuit, a defendant must establish that there are legitimate business reasons for its policies and that there are no less discriminatory means available.

The above cases demonstrate the circuits' disagreement as to the level of strictness that should be applied to the business justification test. The tests range from requiring reasonable business reasons, to legitimate business necessities, to bona fide legitimate business justifications with no less restrictive means available.[160] To deter gated community associations and developers from enacting overly restrictive and discriminatory income requirements, there needs to be a cohesive test the courts can apply when a defendant attempts to rebut a prima facie case of discrimination.

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157. *Huntington*, 844 F.2d at 940.

158. *Id.*

159. *See id.* at 940-41.

160. Under both the *Pfaff* test and the *Mountain Side* test, after the defendant proffers his business justifications, the burden shifts back to the plaintiff. *Pfaff,* 88 F.3d at 747; *Mountain Side Mobile*, 56 F.3d at 1254. The plaintiff has the opportunity to show that even though the defendant claims a legitimate non-discriminatory reason for the practice, it will not be sufficient to avoid liability. *Pfaff,* 88 F.3d at 747; *Mountain Side Mobile*, 56 F.3d at 1254. The plaintiff does this by showing proof that the business reason was merely pretextual or that there were alternative methods that were less restrictive to achieve the defendant's business purpose. *Mountain Side Mobile*, 56 F.2d at 1254. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (giving the plaintiff in an employment discrimination case under Title VII the opportunity to show that the defendant's reasons were merely pretextual by showing "the presumptively valid reasons for [plaintiff's] rejection were in fact a cover up for a . . . discriminatory decision"). *McDonnell Douglas*, 411 U.S. at 805. *McDonnell Douglas* was the first case to require a three-part burden-shifting test for discrimination cases. *Id.* at 802. The *Mountain Side* test requires a more stringent standard than the *McDonnell Douglas* test. *Mountain Side Mobile*, 56 F.2d at 1252. *See also* McHaney v. Spears, 526 F. Supp. 566, 572 (W.D. Tenn. 1981) (finding that a defendant-seller's requirement that his son build the house as part of terms for sale was mere pretext, wholly lacking in justification). *Compare Huntington*, 844 F.2d at 935. Under the *Huntington* test the defendant, not the plaintiff, is the one who must show that there are no less discriminatory means available. *Id.* The burden shifts to the plaintiff only to show that the defendant has not met his burden. *Id.*

B. *Merging Business Tests to Create a Stricter Burden on Gated Communities*

For a more stringent showing of business need, the three business tests articulated by the courts must be merged to create a higher burden for the defendant. Second, the courts should not accept business justifications based wholly on protecting property value.

The reasonableness standard from *Pfaff* may be a sufficient standard when applying it to legitimate occupancy restrictions to maintain the value of a landlord's property.[161] However, it is too lenient a standard when applying it to discrimination that harms a community because it has the effect of perpetuating segregation.[162] As a threshold issue, the courts should require a defendant to establish that a practice is reasonable before it can satisfy the legitimate business reason test.

The *Mountain Side* test, which requires a business necessity instead of merely legitimate business reasons, is a stricter standard that the courts should apply.[163] All gated community policies that have a discriminatory impact on a protected class should manifest a rational relationship to the housing and have legitimate non-pretextual justifications.[164] However, beyond this requirement, the gated community defendant should be required to show that the practice or policy that has a significant discriminatory impact is a necessity for conducting business.

Additionally, the *Huntington* test[165] should be applied. Gated community defendants,[166] not the plaintiffs,[167] should be required to show that there were no other less discriminatory alternatives available to them than the practice they implemented. For example, the defendant should be required to show that the income and asset requirements implemented by the community are not inflated to grossly outweigh mortgage affordability calculations. A community's goal of using profiling and prescreening techniques to segregate itself from individuals who could afford the property is based on impermissible factors, such as race.[168] The defendant should be required to show that the

161. *Pfaff*, 88 F.3d at 749.
162. *Huntington*, 844 F.2d. at 937.
163. 56 F.3d at 1254.
164. *Id.* at 1257.
165. *Huntington*, 844 F.2d. at 939
166. *Id.*; Betsey v. Turtle Creek Ass'n, 736 F.2d 983, 988 (4th Cir. 1984).
167. *Mountain Side Mobile*, 56 F.2d at 1254.
168. McHaney v. Spears, 526 F. Supp. 566, 572 (W.D. Tenn. 1981) (finding that none of defendant's three business justifications were sufficient to rebut plaintiffs' prima facie case of discrimination because the defendant's absence of a counteroffer to plaintiffs' offer to buy the property showed that defendant did not want to sell to plaintiffs on any terms because of their race, and no other reason).

higher price charged for gated community housing is determined by costs of gates and security, and other amenities the community provides its residents, not by a desire to keep out particular potential buyers.

The courts have accepted different business reasons as sufficient to meet the defendant's burden.[169] Protecting property value, alone, should not be considered sufficient under any of the three tests articulated and used by the courts.[170] Courts should "carefully scrutinize" reasons given as justifications for discriminatory gated community practices.[171]

Further, a defendant should not be able to justify a discriminatory practice by showing that he has sold property to minority individuals in the past. Prior nondiscriminatory conduct is not a defense to evidence that speaks of racial exclusion.[172]

CONCLUSION

Gated communities perpetuate exclusionary effects on non-residents through the use of laws that support their policies and practices. Policies such as strict income requirements may not show intent to discriminate against minorities. However, they do have a disproportionate effect on minorities by excluding them

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169. *See Mountain Side Mobile*, 56 F.3d at 1256 (finding sewer capacity issues and quality of life to be sufficient business justifications for an occupancy restriction that the defendant could use to rebut plaintiff's prima facie case); *Pfaff*, 88 F.3d at 749 (holding that the preservation of the economic value of property was a legitimate business reason for an occupancy restriction that was sufficient to rebut the plaintiff's prima facie case of discrimination in the Ninth Circuit); United States v. Badgett, 976 F.2d 1176, 1180 (8th Cir. 1992) (stating that a maximum occupancy policy that was enacted due to parking limitations was not a sufficient business justification that the defendant could use to rebut a prima facie case of discrimination); Williams v. Matthews Co., 499 F.2d 819, 828 (8th Cir. 1974) (finding the defendant's alleged desire to insure the orderly growth and development of the subdivision was not a sufficient business justification); Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1286 (7th Cir. 1977) (holding that legitimate desires to protect property values and the integrity of the village's zoning plan were not sufficient business justifications to rebut plaintiff's case); *Huntington*, 844 F.2d at 940 (finding that seven detailed business justifications, including traffic issues, health hazards, inconsistency with housing assistance plans and zoning plans, inadequate play areas, and undersized units, were sufficient to support a town's refusal to rezone for private multi-family housing).

170. *See Arlington Heights*, 558 F.2d at 1286 (deciding that a legitimate desire to protect property values is not sufficient to rebut a plaintiff's prima facie case of discrimination); Boyd v. Lefrak Org., 509 F.2d 1110, 1116 (2d Cir. 1975) (stating that "[r]acial discrimination cannot, of course, be condoned because it is accomplished through a sophisticated or indirect method . . . . Nor should it be excused on the theory that it is the product of thoughtlessness rather than willfulness. In either event, the harmful effect is the same."). *Id.*

171. *McHaney*, 526 F. Supp. at 572.

172. *Id.* at 573.

from the community. They also have a disparate impact on surrounding communities when a segregating effect is created.

An individual who has been harmed by gated community practices is not able to maintain a constitutional cause of action because of state action requirements. However, under a disparate impact theory, an excluded individual can maintain a statutory cause of action under the FHA.

Implementation of the proposed standards will hinder a gated community defendant from continuing business practices that have tinges of racism.[173] If the defendant is not able to articulate acceptable business necessities for a challenged practice, and cannot show that the practice was the least restrictive means to achieve his purpose, he will not be able to rebut an excluded non-resident's prima facie case of discrimination.

> One of the truths we hold to be self-evident is that a government that tells its citizens what they may say will soon be dictating what they may think. But in a country that puts such a high premium on freedom, we cannot allow ourselves to be the captives of orthodox, culturally imposed thinking patterns. Indeed, I can conceive no imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind.[174]

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173. *Id.*

174. Aguilar v. Avis Rent A Car Syst., Inc., 980 P.2d 846, 895 (Cal. 1999) (Brown, J., dissenting).