“SOCIAL ENGINEERING”: NOTES ON THE LAW AND POLITICAL ECONOMY OF INTEGRATION

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INTRODUCTION

On the occasion of the Fiftieth Anniversary of the Fair Housing Act,1 progress towards the Act’s goals of non-discrimination and integration is uneven. On both fronts, the last fifty years have seen some progress, but by several accounts more progress has been made on the anti-discrimination front than in advancing integration. The last fifty years have also given us a wealth of knowledge about the types of policy and planning devices—such as mobility voucher programs and inclusionary zoning—that might help achieve the goal of integration and ample data about the harms of segregation versus integration’s benefits.2 But what remains elusive is the political economy—understanding what will persuade, encourage, and compel governments

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2 See, e.g., infra notes 51–54 and accompanying text (describing mobility interventions).
and communities to adopt integration-advancing remedies, and how these policies might endure. The persistence of segregation seems overdetermined: the political, market, and legal incentives point largely away from integration. Segregation, though constructed and sustained by traceable government and institutional decisions, is often cast as a natural and inevitable product of geography; indeed, obscuring the mechanisms that created and sustained segregation seems part of the plan. The attempt to reverse course and move towards integration inevitably seems forced and top-down, disruptive of natural arrangements, market mechanisms, and individual choice. Even supporters of integration remedies often cast existing efforts largely as failures.

This Article shifts the question of how to achieve integration away from the technocratic questions of planning and policy devices, however important, to the equally important questions of political economy—how to move a legal and political infrastructure that is engineered for segregation towards integration. No doubt this question is not fully answerable in a short Article and perhaps at all. Yet, it might be possible to gather some of what is already known about the dynamics of social change towards integration, build on that knowledge, and find openings in current law, politics, and social movements for charting a future course of action. The spirit of the Article is against the prevailing narrative of despair in fair housing, examining (1) where top-down litigation might have contributed to enduring housing reform; (2) local governments that reject the incentives towards exclusion to adopt inclusionary legal and regulatory infrastructures and regulation; and (3) where communities are organizing for bottom-up legal and regulatory reforms outside of courts.

Part I begins by assessing the barriers to achieving racial and ethnic integration, specifically the longstanding political resistance to integration remedies. Part II turns to the limits and promise of

3 See David Freund, Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America, in THE NEW SUBURBAN HISTORY (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (detailing origins of federal government subsidization of the suburbs and attendant marketing of these interventions as race-neutral and the products of private choices and investments).

4 See, e.g., SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 3 (2004) (“Housing . . . is the realm in which we have experienced the fewest integration gains.”).
institutional reform litigation. Part III considers the incentives localities might have to promote integration rather than externalize through segregation-producing practices. And Part IV assesses the once and future politics of advancing integration in communities.

I. SEGREGATION’S ENDURING INFRASTRUCTURE

Since the passage of the Fair Housing Act (FHA) in 1968 there has been progress toward goals of integration, but the gains are more limited and halting than one might hope. Non-discrimination is advanced through the Act’s prohibitions on various forms of discrimination and its public-private enforcement regime. The FHA’s goals of integration are furthered both through its anti-discrimination provisions and its affirmative requirements that government and publicly-funded entities take steps to advance fair housing. Since the passage of the Act, incidences of housing discrimination as measured by testing have gone down. There is evidence, too, of positive changes in attitudes about fair housing laws, and professed acceptance of anti-discrimination goals. By several measures there has been more progress in combating discrimination than in achieving integration. On the positive side, there is greater Black-white integration of communities today than in 1968, the percentage of Americans living in “shared” neighborhoods is growing steadily, and there has been a decline in the

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6 See 42 U.S.C. § 3608(e)(5) (2018) (requiring the Department of Housing and Urban Development to administer its programs and activities "in a manner affirmatively to further the policies of [the Fair Housing Act]"); § 3608(d) (2018) (requiring the same of federal grantees).


9 One definition of integration is a neighborhood in which a community of color accounts for at least 20% of the census tract population and the census tract is at least 20% white. See
number of hypersegregated areas. While some researchers have cast those improvements as marking the end of segregation as a key feature of the American landscape, other researchers have less positively characterized progress towards integration as "stalled." High segregation persists in metropolitan areas with older housing stocks and those with "large African American populations characterized by low levels of income and education relative to whites," as well as in those jurisdictions displaying anti-Black sentiment and restrictive zoning. In addition, there is little evidence of progress towards integration in areas that were deemed "hypersegregated" in 2010. The trend for Latinos over the past fifty years is not towards integration, and hypersegregation for Latinos emerged beginning in 2000 in two large metropolitan


11 See GLAESER & VIGDOR, supra note 8 (declaring this data to show "the end of the segregated century").


13 Massey, *The Legacy of the 1968 Fair Housing Act*, supra note 8, at 8–9. In part, the different conclusions come from divergent assessments of similar data, but they also stem from the multiple ways of measuring integration. Professor William H. Frey characterizes segregation as "prevalent," but argues that there are trends towards its decline as measured by the fact that the average white household lives in a neighborhood that is much more diverse than was the case in 1980. See William H. Frey, *A Snapshot of Race in America's Neighborhoods*, BROOKINGS INST. (June 11, 2015), https://www.brookings.edu/blog/the-avenue/2015/06/11/a-snapshot-of-race-in-americas-neighborhoods [https://perma.cc/2QGC-M3JZ]; see also WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA (2018).

14 See Massey & Tannen, supra note 10.
areas. Professor Patrick Sharkey’s book-length examination of the plight of the segregated urban poor (predominantly Black) after generations of cumulative disadvantage, pessimistically pronounces the end of “progress toward racial equality.”

Also dispiriting are deeper analyses of racial preferences that move beyond professed attitudes, and show the enduring nature of racial stigma and aversion to residing near Blacks. Research shows a clear hierarchy of racial preferences, with whites at the top and Blacks at the bottom. While all groups profess a desire to live in “integrated” neighborhoods, the definition of integration is startlingly different for particular groups. While growing numbers of whites are willing to live near racial minorities as compared to the numbers in 1968, most whites prefer to live in predominantly white neighborhoods. Blacks and Latinos express preferences for neighborhoods that are more integrated than whites are willing to tolerate. Integration is hampered by individual choices and preferences, shaped by racial stereotyping and aversion to living near particular groups—in effect, a set of hierarchical preferences in which those with dark skin are clearly at the bottom.

These mixed assessments of the success of fair housing interventions arrive alongside new evidence of the importance of place: racial and economic segregation and concentrated poverty have deleterious effects on social and economic mobility. Most recently, Professor Raj Chetty and his colleagues added to understandings of the long-term effects for poor families when they move from higher poverty to lower poverty neighborhoods, finding that those children who move

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17 See generally CAMILLE ZUBRINKSY CHARLES, WON’T YOU BE MY NEIGHBOR?: RACE, CLASS, AND RESIDENCE IN LOS ANGELES (2006).

18 See id. at 3.


20 See id.
to lower poverty neighborhoods before the age of thirteen are more likely to attend college and have substantially higher incomes than those who remain in higher poverty neighborhoods. Another study by Professor Chetty and his colleagues extends beyond individual families, showing that regions with higher levels of social and economic mobility tend to have a range of characteristics including lower levels of racial and economic residential segregation.

Meanwhile, integration remedies are under attack in some quarters. The current administration has sought to reverse Obama Administration efforts to fulfill the FHA’s statutory mandate that federal funds advance integration instead of segregation.23 When the Obama Administration promulgated a rule delineating the FHA’s coverage of disparate impact discrimination, regulated entities challenged the rule as exceeding the bounds of the statute. While the Supreme Court rejected some of these efforts by making clear that the FHA allowed discrimination claims based on unjustified disparate impact,24 the current administration has opposed disparate impact and threatened to rescind or substantially revise the rule,25 all while legal

21 See generally Raj Chetty et al., The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment, 106 AM. ECON. REV. 855 (2016) (finding negative or neutral effects for children who moved after the age of thirteen, and for adults).


challenges to the implementation of the rule continue. Opponents, including the current Department of Housing and Urban Development (HUD) Secretary, have attacked federal integration efforts as a form of “failed socialism” and “social engineering,” choosing to ignore that the FHA and its implementing regulations are geared towards reversing the very “engineering” of segregation by government.

The invocation of “social engineering” reveals the mode of discourse that has long frustrated attempts at integration. It is a discourse in which the attempt to remedy segregation seems unnatural or coerced—the product of state action—while the role of government in enabling or maintaining that segregation is hidden. As housing scholars have long noted, this conscious forgetting is a key part of the story of fair housing. Federal spending, transportation policy, construction of mortgage and insurance programs, federal tax incentives, public housing, and urban renewal policies created suburbs, in the postwar period, as predominantly middle class and white, and central cities as primarily poor and Black. This reality was understood by the key drafters of the FHA. And yet, commentators observe that this


29 See David M. P. Freund, Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America, in THE NEW SUBURBAN HISTORY 11, 13–17, 20–23 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (detailing FHA policies that excluded Blacks from mortgage programs and marketed as a product of the free market).
history and its enduring effects seem continually forgotten. The failure to remedy is linked to the forgetting. The forgetting is made possible by a countervailing myth of state neutrality in the face of private or market choices. Indeed, as Professor David Freund’s research has shown, early on, the federal government helped “market” the suburbs as the product of market imperative, and with that, provided a seemingly neutral narrative of privatized wealth creation as a more palatable justification for segregation than racial aversion. Zoning, planning, and spending decisions seem neutral, hiding their exclusionary effect. However, the legal infrastructure that helps sustain spatial exclusion is not, in fact, neutral.

This idea of integration remedies as imposed “social engineering” is thematic in political resistance to these remedies. An example is found in HUD secretary George Romney’s early efforts to promote integration in the suburbs in the Nixon Administration through an “Open Communities” program that would have linked funding for HUD programs to a community’s acceptance of affordable housing. Suburban communities objected fiercely and Nixon himself put an end to Romney’s efforts. This stands as an example of local resistance to top-down regulatory approaches that appear to force integration.


31 See Richard Rothstein, The Making of Ferguson: Public Policies at the Root of its Troubles, Econ. Pol’y Inst. (Oct. 15, 2014), https://www.epi.org/publication/making-ferguson [https://perma.cc/CS7Q-WT7A] (“When we blame private prejudice, suburban snobbishness, and black poverty for contemporary segregation, we not only whitewash our own history but avoid considering whether new policies might instead promote an integrated community. . . . Remedies are unlikely if we fail to recognize these policies and how their effects have endured.”).

32 See Freund, supra note 29, at 12 (“[T]he state helped popularize the myth that its policies did not facilitate suburban growth . . . insist[ing] that ‘free market forces’ . . . were responsible for [growing inequality].”)

33 As Professor Gerald Frug has noted in this context: “[t]here is no way for the law to be neutral on whether we promote the values of openness or isolation. Legal rules shape the nature of our cities and metropolitan areas whether we like it or not.” Gerald Frug, The Legal Technology of Exclusion in Metropolitan America, in The New Suburban History 205, 219 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

And today, even as there might be professed acceptance of the goal of integration, communities can be resistant to the specific remedies needed to achieve it, which require alteration of the prevailing geographic and land use arrangements.35 A recent example is the stalling of California’s efforts to encourage more affordable housing development in ways that might have lessened racial exclusion.36 For those who benefit from a status quo in which wealth and access to opportunities (such as schools) are determined by geography, the temptation is to effectively “hoard” the public structure on which this opportunity is constructed as if it were a private good.37

Given current political, social, and legal realities, it is easier to understand how segregation is maintained than it is to build a narrative of how to promote integration. From a design or technocratic perspective, academic commentators and policy analysts have documented the critical policy devices that might promote integration—by addressing the source of income- and identity-based discrimination, designing mobility programs, addressing displacement in gentrifying communities, and creating a socioeconomic and racial mix through density and inclusionary zoning. Just as important is an understanding of the dynamics of change that might cause communities and government actors to adopt these strategies. In the Parts that follow, I examine what we have learned about the key legal, regulatory, and

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35 See, e.g., Thomas J. Sugrue, Opinion, It’s Not Dixie’s Fault, WASH. POST (July 17, 2015), https://www.washingtonpost.com/opinions/its-not-dixies-fault/2015/07/17/7bf77a2e-2bd6-11e5-b33-395c05608059_story.html?noredirect=on&utm_term=.1831380b8ab3 [https://perma.cc/67PN-U53U] (describing suburbanites in Democratic counties in the north, such as Detroit and Westchester, that “fought the construction of affordable housing in their neighborhoods, trying to keep out ‘undesirables’ who might threaten their children and undermine their property values”).


37 See, e.g., Richard V. Reeves, Opinion, ‘Exclusionary Zoning’ is Opportunity Hoarding by Upper Middle Class, BROOKINGS INST. (May 24, 2017), https://www.brookings.edu/opinions/exclusionary-zoning-is-opportunity-hoarding-by-upper-middle-class [https://perma.cc/ZYA8-XQYH] (arguing that “[e]xclusionary zoning is a form of ‘opportunity hoarding’ by the upper middle class, a market distortion restricting access to a scarce good (in this case, land), that restricts opportunities (such as good schools) to other children.”). The concept of “opportunity hoarding” originated with sociologist Charles Tilly. See CHARLES TILLY, DURABLE INEQUALITY (1998).
political leverage points, and locate potential areas of promise in the face of skepticism about integration goals and strategies.

II. LITIGATION’S UNSUNG LEGACY

Law and social change literature is careful not to overstate the ability of lawsuits to generate social change, and accounts in the legal literature of fair housing tend to fall into this pattern of skepticism about the power of institutional reform litigation. For several commentators, the United States v. Yonkers Board of Education case, involving litigation to desegregate a suburban county’s housing and school systems, stands as a cautionary tale of what can go wrong when the judicial system attempts to impose remedies on a hostile community. The litigation dragged on for years, with city officials and community members resisting the court-ordered remedy even in the face of fines and contempt orders. A leading commentator in 2003 assessed the litigation and the case to be largely a failure—a judicial attempt to force a remedy on a community implicitly characterized by the judicial system as “racist.” By this account, litigation and its remedies were too blunt and simple to regulate complex housing markets and unmoor communities’ attachment to “norms” about how neighborhoods “should form and develop” and how diverse they should be. Evidence of limited social integration between Black low-income residents and whites, even after the imposition of an integration remedy, is invoked as support for this pessimistic assessment of judicially-imposed remedies.

There are compelling reasons for this pessimistic take on the role of litigation in achieving integration. Institutional reform litigation is slow and costly. Without attention to how best to structure a remedy and

38 See United States v. Yonkers Bd. of Educ., 624 F. Supp 1276 (S.D.N.Y. 1985) (initial ruling in the housing and school desegregation case brought by the U.S. Department of Justice finding that the schools and housing in Yonkers, N.Y. were intentionally segregated by race).
39 PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 242 (2006) (containing case studies of Yonkers and other housing desegregation litigation within a framework of skepticism that government is suited to managing diversity).
40 Id. at 243.
41 Id. at 253 (acknowledging that movers from public housing did not affect property values or crime rates). Professor Schuck’s conclusions are supported in Xavier de Souza Briggs, Social Capital and the Cities: Advice to Change Agents, 86 NAT’L CIVIC REV. 111, 116 (2007).
build in effective input from stakeholders, it can fail. This may be even more true for housing litigation where resistance to remedies are overdetermined by the context described in Part I: neighborhood contours and identity, bound up with familial wealth accumulation and status, as well as deep-seated ideological commitments to the notion that spatial arrangements are natural or the result of market realities and individual choice.

However, a closer look allows more nuance on how we should assess the potentials and limits of integration litigation. For one, the time frame in which one evaluates success or failure matters. Some of the litigation that seemed to meet the most resistance from communities—such as the integration of public housing residents and the economic integration remedies in the Mount Laurel, New Jersey case that required townships across the state to develop their fair share of affordable housing—seem more successful over time. The judge of whether Yonkers is successful will lie less in whether public housing residents have barbecues with their white neighbors than whether the children of these residents have access to low-poverty schools and the social capital of their white classmates. Analysis of residents of low-income housing projects built in low-poverty suburbs reveal long-term benefits, particularly with regard to mental health, academic development of children, and economic and employment benefits for adults, as compared to similarly situated families who were unable to


44 See S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter Mt. Laurel I] (liability decision finding that township’s zoning policies that excluded low- and moderate-income housing violated the state constitution); S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter Mt. Laurel II] (remedial decision instituting process for assuring that New Jersey townships provide their “fair share” of low- and moderate-income housing as required by the New Jersey State constitution).
Long-term analyses of the Yonkers litigation have found benefits for those who moved to lower poverty areas of the city. The first generation of institutional reform litigation in housing does provide important information about how courts might better structure remedies. Most early analyses of *Southern Burlington County NAACP v. Township of Mount Laurel* revealed that the new affordable housing developments built in the suburbs disproportionately benefited whites rather than people of color, which (along with early studies of the federal Moving to Opportunity Program (MTO)) makes plain the need for explicit attention to race and the provision of counseling when structuring mobility remedies. Moreover, opening up the suburbs to a small number of low-income families is a necessarily limited form of integration and fails to address the challenges of the urban poor who remain in place. Still, expanding the time frame is an important corrective measure to the despairing narrative of institutional reform litigation.

45 See Douglas S. Massey et al., Climbing *Mount Laurel*: The Struggle for Affordable Housing and Social Mobility in an American Suburb (2013).


47 See John A. Powell, Injecting a Race Component into Mount Laurel-Style Litigation, 27 Seton Hall L. Rev. 1369, 1369–70 & n.4 (1997) (introducing discussion of the limitations of the Mount Laurel remedy in addressing racial segregation); Naomi Bailin Wish & Stephen Eisdorfer, The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants, 27 Seton Hall L. Rev. 1268 (1997) (finding that whites were overrepresented in Mount Laurel-created housing while Blacks and Latinos were underrepresented, and that the program did not lessen racialized housing segregation).

Second, the domain in which we might measure success is wider than the specific case. If a key challenge in housing is the hyper-investment (by public and private actors) in a status quo of segregation—the normalization of segregation through a legal and political infrastructure—litigation has done much to alter the assumptions embedded in that infrastructure. Litigation to address race-based decisions in site selection and tenant assignment in the design of public housing makes plain the effects of institutionalized government decisions on living patterns and outcomes in Black, low-income communities. It provides an opening to alter a discourse in which housing decisions are natural or inevitable, by revealing the underlying public and private choices and actions. The concrete outcome of this litigation is the implementation of remedies in specific cases that have become the bedrock of government policy to undo segregation.

Specifically, the *Gautreaux v. Chicago Housing Authority* litigation, a challenge to city and federal decisions segregating public housing, was then followed by litigation against most major public housing authorities. The mobility remedy put in place in *Gautreaux*, which provided vouchers to some percentage of public housing residents to move to low-poverty suburbs, launched one of the most successful interventions in the lives of poor families. The resulting mobility program has led to enduring changes in the structure of federal public housing and voucher programs. This includes the early MTO Program

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49 See Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 340–46 (2007) (detailing history of public housing litigation beginning with cases brought by the NAACP Legal Defense Fund in the 1950s, through the litigation beginning in 1966 in Chicago; Texarkana, Arkansas; East Texas; Dallas; Buffalo, New York; and most recently in 1996 in Baltimore); see also Thompson v. HUD, 348 F. Supp. 2d 398, 451 (D. Md. 2005) (finding federal government liable for failing to affirmatively further fair housing as required by the FHA).

50 See Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969) (suit against the Chicago Housing Authority); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (suit against HUD). For an account of the litigation by one of the lawyers who brought both cases, see *ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006).

and the current housing choice voucher program, which allow voucher recipients to move to lower poverty communities, as well as the 2016 rule that calculated rents for voucher recipients in a way that allowed them greater opportunities to access lower poverty communities within a metropolitan area.\textsuperscript{52} As Professor Florence Roisman has noted, housing mobility programs are the “fruits” of the public housing desegregation litigation.\textsuperscript{53} These programs provided a key remedy for state-enabled segregation, and from these remedies much emerged about how best to structure effective mobility programs (for instance, the need for counseling on mobility and the varied effects depending on the age at which children move).\textsuperscript{54}

Enlarging the frame similarly yields important insights about the impact of more recent housing litigation, such as the litigation in Westchester County, New York. This case involved a challenge by a New York-based civil rights law firm against Westchester County, claiming that the county’s annual certification to the federal government that it was “affirmatively furthering fair housing” in its use of federal funds was false.\textsuperscript{55} Plaintiffs in effect claimed that the county was receiving HUD money without developing affordable housing opportunities for Black and Latino families in low-poverty areas. The district court granted the plaintiffs partial summary judgment on their federal False Claims Act claim. With HUD pressure, the defendant county agreed to settle the case, negotiating a consent decree that

\textsuperscript{52} Under the Obama Administration, HUD put in place the Small Area Fair Market Rent (SAFR) rule. The rule determines rents for voucher system within a zip code instead of the larger metropolitan area. The rule was put in place to provide more options for voucher recipients and to diminish segregation. According to a study by NYU’s Furman Center, the SAFR rule will lead to a decrease in affordable housing options for voucher recipients in a few metropolitan areas, but in twenty out of twenty-four metropolitan areas, voucher recipients would have more options. See \textit{How Do Small Area Fair Market Rents Affect the Location and Number of Units Affordable to Voucher Holders?}, NYU FURMAN CTR. (Jan. 5, 2018), https://furmancenter.org/files/NYUFurmanCenter_SAFMRbrief_5JAN2018_1.pdf [https://perma.cc/9MA6-Z7NU]. The current administration initially sought to delay implementation of the new rule, but a federal district court blocked the agency’s action and the administration has moved forward on the rule. See \textit{Open Cmty. All. v. Carson}, 286 F. Supp. 3d 148 (D.D.C. 2017).

\textsuperscript{53} See Roisman, \textit{supra} note 34, at 346.

\textsuperscript{54} This is the implication of Professor Raj Chetty’s work on the long-term impacts of the MTO program. See Chetty et al., \textit{supra} note 21.

continues to be subject to monitoring by the district court.\textsuperscript{56} The success of the case is mixed, bearing out accounts of the difficulties of reform litigation. The county has resisted building affordable housing and failed to establish some of the non-discrimination protections and affirmative marketing necessary to provide affordable housing for low-income Black and Latino residents. Yet part of the eventual evaluation of the Westchester litigation must ultimately include an assessment of its regulatory legacy—the reshaping of the Affirmatively Furthering Fair Housing (AFFH) regulations. The Westchester litigation revealed the inadequacies of the existing rule purporting to implement the FHA’s AFFH requirement, and led to the 2015 redrafting and strengthening of the rule.\textsuperscript{57}

From the traditional perspective in which we judge the success of institutional reform litigation, the public housing litigation reveals lessons about how best to structure and design litigation. In Yonkers, the federal government was the plaintiff, challenging the actions of the city and meeting heavy resistance along the way. In the public housing desegregation cases, the federal government was a defendant (or a key participant) with particular advantages for the finding of liability and the structure of the remedy. The liability claims against the federal government did not depend on a finding of intentional discrimination (though evidence was often ample), but on the failure to affirmatively further fair housing opportunities within a broader regional area.\textsuperscript{58} Indeed the Baltimore case does not fault the city at all, placing responsibility on the federal authorities as much as courts had in other

\textsuperscript{56} For an account of the origins of the litigation, see Olatunde C. A. Johnson, Beyond the Private Attorney General: Equality Directives in American Law, 87 N.Y.U. L. REV. 1339 (2012).


\textsuperscript{58} See Thompson v. HUD, 348 F. Supp. 2d 398, 461–62 (D. Md. 2005) (holding that the FHA imposes upon HUD an obligation “to do something more than simply refrain from discriminating” and finding that “through regionalization, HUD had the practical power and leverage to accomplish desegregation through a course of action that Local Defendants could not implement on their own given their jurisdictional limitations”) (internal quotation marks omitted); see also An Analysis of the Thompson v. HUD Decision, POVERTY & RACE RES. ACTION COUNCIL 3, https://scholarblogs.emory.edu/baltimoreriots/files/2015/11/PRRAC-Thompson-v-HUD1.pdf [https://perma.cc/MZ83-2YYF] (analyzing the decision and noting that it relied heavily on precedent and the facts in the case “are little different than the role played by HUD in any number of metropolitan areas”).
public housing desegregation cases.\textsuperscript{59} While initially resisting, the federal government ultimately settled all the remaining public housing cases during the Clinton Administration. Federal money and design of federal programs could also be part of the remedy of each case because the federal government was a party.

From a less traditional perspective of judging the impact of institutional reform litigation, \textit{United States ex rel. Anti-Discrimination Center of Metro N.Y. v. Westchester County, N.Y.}’s legacy will be the AFFH rule. The point here is, while paying necessary attention to the limits of litigation in housing, we risk overlearning the lessons of “failure” that emerge from case studies of resistance in cases like \textit{Yonkers}. Redesign of the federal programs, however incremental and despite the current and real threats, must be counted as part of the success.

\section*{III. Localities’ Under-Theorized Integration Incentives}

The incentives of localities and regions and their residents to subvert integration remedies can pose barriers to inclusion. State and local zoning and land use policies and communities’ tolerance of discrimination and violence were crucial in creating and maintaining segregation.\textsuperscript{60} Localities have resisted the imposition of federally-directed remedies, as seen in the resistance to HUD’s Open Communities initiative in the 1970s.\textsuperscript{61} Racism, seemingly-neutral land-use policies, and the more nuanced ways in which the value of property, schools, and local government are enhanced by social distancing from people of color and the poor, all sustain segregation today. The logic of state and local government organization is that communities should compete to have the least amount of poor people and people of color.\textsuperscript{62}

\begin{footnotesize}
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  \item See An Analysis of the Thompson v. HUD Decision, \textit{supra} note 58, at 2 (noting that the decision places “responsibility fully on HUD,” finding that the city’s options for placement of housing were limited outside the city).
  \item See sources cited \textit{supra} note 34 and accompanying text.
  \item See Charles M. Tiebout, \textit{A Pure Theory of Local Expenditures}, 64 J. POL. ECON. 416 (1956) (discussing interlocal competition); William A. Fischel, \textit{The Homevoter Hypothesis: How
Relatively wealthy communities can use land use mechanisms (such as exclusionary zoning) and taxing to bar entry, a phenomenon we might see as a form of opportunity hoarding. Once segregation’s infrastructure is already in place, it is easy to deploy the mechanisms of state and local government (school and housing siting, zoning, and assignment) to limit access and preserve hierarchies. Those who can, exercise choice to avoid neighborhoods deemed undesirable for the presence of racial and ethnic minorities or poor people. Local incentives would seem to point towards segregation.

It is easy to understand how communities become and remain segregated; it is a wonder that any become or remain integrated. And indeed, stably integrated neighborhoods are not the norm. But they do exist, and by some accounts, they are growing. Communities zone for inclusion, not just exclusion, vote to increase or support affordable housing, and expand anti-discrimination protections such as those based on source of income. Localities are not always obstructions to integration. And individual families “choose” racially integrated suburbs over those less so (or at least some of the features that often accompany socioeconomic and racial integration, including communities with more

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63 See Lee Anne Fennell, Homes Rule, 112 YALE L.J. 617 (2002) (reviewing FISCHER, supra note 62) (arguing that systems of exclusionary zoning empower homeowners to place value in their homes to achieve the benefits of a “good” neighborhood, such as good public schools).

64 See Reeves, supra note 37 (discussing hoarding effects of exclusionary zoning).

65 See WILLIAM JULIUS WILSON & RICHARD P. TAUB, THERE GOES THE NEIGHBORHOOD: RACIAL, ETHNIC, AND CLASS TENSIONS IN FOUR CHICAGO NEIGHBORHOODS AND THEIR MEANING FOR AMERICA (2006) (majority Black neighborhoods are thought to lead to a diminishment in the “structural position” of a neighborhood in relation to social goods such as school quality, crime, and property values).

66 See Frug, supra note 33, at 219 (“The current legal structure reinforces the common belief that the way to deal with urban problems is to run away from them—to cross city lines and protect oneself from the bad things going on elsewhere.”).

67 See INGRID GOULD ELLEN, SHARING AMERICA’S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION (2000); CASHIN, supra note 4, at 40–52 (profiling integrated neighborhoods).

density, walkable communities, and those with access to transportation). And recent years have seen a “return to the city,” which holds promise for increasing integration even as these changes present new challenges of displacement and a lack of affordable housing.

A prominent example of choosing inclusion is Montgomery County, Maryland’s pioneering inclusionary zoning efforts. In 1974, the county established the nation’s first inclusionary zoning plan, requiring that developments of more than fifty units set aside fifteen percent of their units for moderate- to low-income residents, and providing density bonuses for such developers. In addition, the county’s public housing authority can buy up to forty percent of the units for use by very low-income families. The program continues, and the inclusionary housing policies along with school integration measures have particular salience today, as a result of the recent findings of Professor Raj Chetty and his colleagues tracking economic mobility by race and ethnicity. Their data show that nationwide patterns are less of upward mobility and more of downward mobility for Black males, in particular, across most census tracks. Suburbs in Montgomery County stand as an exception. Neighborhoods that produced the most mobility have certain features, including the presence of Black fathers (not necessarily in that particular household), lower rates of racial bias, and lower poverty rates. As the next phase of research moves to understanding the dynamics of mobility, one also wonders about the pro-integration decisions made by the county that allow poor families greater access to low-poverty neighborhoods. To be sure, these policies have their limits. The county still has variation in poverty and integration levels across

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71 See id.

72 See id.
neighborhoods. In some areas, the very wealthy are able to live largely in isolation even from the middle class—much less than the poor, the program creates an insufficient supply of affordable housing to keep up with demand, and efforts to build affordable housing in low-poverty neighborhoods are sometimes rejected by particular neighborhoods. And yet the inclusionary zoning program has increased the supply of affordable housing in low-poverty neighborhoods with effects on economic and racial integration, and with positive outcomes for poor children attending low-poverty schools.

Montgomery County’s program was prompted by a mix of political pressure from civil rights and housing advocates, self-interest (enlightened or not) to provide housing for the working class, and the pragmatic realization that segregation might produce worse outcomes for poor residents. Today, this mix of ideology and incentive likely motivates the expansion of inclusionary zoning, source of income discrimination and other anti-discrimination laws, adoption of mobility vouchers, and local implementation of the federal rule to affirmatively further fair housing.

Along these lines, some communities are taking steps to implement the AFFH regulations, even in the absence of substantial federal enforcement and oversight. After the 2015 revision, the current AFFH rule requires local grant recipients to conduct an assessment (Assessment of Fair Housing or AFH) of a wide range of fair housing barriers facing their communities (such as the siting of public and

73 See 40 Years Ago: Montgomery County, Maryland Pioneers Inclusionary Zoning, supra note 69.


affordable housing, mobility for voucher holders, weak enforcement of anti-discrimination laws, exclusionary zoning, and displacement). This assessment must be conducted with involvement from a range of public agencies, community groups, and community members. Localities must then develop a plan to address those barriers to integration and fair housing within their communities.

When a new administration assumed power in 2017, it sought to weaken efforts to implement the new AFFH rule, suspending enforcement and giving communities until 2020 to submit fair housing plans. And yet, some jurisdictions are continuing to implement the rule, developing AFHs as planned. This persistence stems in part from the fact that some cities had already prepared their AFH plans before the new administration announced the delay. But it also reveals that despite the extensive planning and engagement process required by the rule and its potential to uncover uncomfortable realities about racial and economic exclusion, at least some localities realized that there were benefits to the AFH process.

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78 Id.
80 Los Angeles, Philadelphia, and New York are among the cities that have committed to the AFFH process despite the rule suspension. See County Affirms Commitment to Fair Housing, L.A. Cnty. Supervisor, District 3, (Apr. 27, 2018), https://supervisorskuehl.com/county-affirms-commitment-to-fair-housing [https://perma.cc/VR5G-EJQ3]; Amy Plitt, N.Y.C. Launches Fair Housing Planning Process, Despite HUD Delays, CURBED (Mar. 9, 2018, 11:50 AM), https://ny.curbed.com/2018/3/9/17097132/new-york-fair-housing-hud-ben-carson [https://perma.cc/EUG5-VG5Y]; Eleanor Goldberg, Trump Administration Killed a Housing Discrimination Rule. Some Cities Are Following It Anyway., HUFFPOST (June 1, 2018), https://www.huffingtonpost.com/entry/cities-following-suspended-housing-discrimination-rule_us_5b1195cbe4b0d5e89e1fa5c8 [https://perma.cc/RD7G-FQDW] (quoting Philadelphia’s Planning and Development Director as saying, after completion of the planning process, “It was a lift, but it proved to be a worthwhile lift. . . . We embraced the opportunity and ran with it.” Philadelphia’s process culminated in a “758-page document that led the city to consider issues it previously didn’t . . . [and the Obama Administration’s] HUD accepted the city’s submission in the first round”).
81 See Goldberg, supra note 80 (reporting that as result of the plan “Philadelphia realized it needed to do a better job protecting its renters” from eviction).
Los Angeles is an example. Los Angeles conducted an AFH that was approved by the Los Angeles City Council in October 2017.\(^{82}\) The AFH “analyzes a variety of fair housing issues including patterns of integration and segregation[,]... racially or ethnically concentrated areas of poverty... within Los Angeles and regionally; disparities in access to opportunity in education, employment, transportation, environmental health, and exposure to poverty; and disproportionate housing needs.”\(^{83}\) The L.A. Plan offers a series of recommendations including increased affordable housing in neighborhoods of opportunity, preventing displacement in changing neighborhoods, and enhancing “mobility”—particularly transportation and schooling opportunities—for African Americans and Latinos living in neighborhoods of concentrated poverty.\(^{84}\)

Even beyond the AFH, Los Angeles officials and residents have taken on efforts to advance integration and inclusion in the city. In 2017, the City Council passed a measure to enhance the development of more supportive housing facilities throughout the city.\(^{85}\) In 2016, the city residents adopted by referendum an inclusionary zoning ballot measure that would require private developers to set aside some developments for low- and moderate-income housing.\(^{86}\)

Much remains to be seen about how successful any of L.A.’s efforts will be—and whether the AFH goals will become a reality. But the professed commitment reveals local interests that are more complex than the localities-as-exclusionary model suggests. In Los Angeles, the urgency around fair housing is framed within a context of pragmatic


\(^{83}\) See id. at 16 (executive summary).

\(^{84}\) See id. at 18–20 (listing key goals and strategies).


\(^{86}\) See Elijah Chiland, Measure JJJ Triggers New Incentives to Encourage Affordable Housing Near Transit, CURBED LA (Mar. 14, 2017), https://la.curbed.com/2017/3/14/14928306/los-angeles-incentives-affordable-housing-transit-jjj [https://perma.cc/EF8C-2H5L]. While supported by many fair housing groups, the measure was opposed by some affordable housing groups who feared that it would not be successful in producing affordable housing as intended. See id.
concerns about affordable housing and poverty, increased political representation of communities of color—as voters and advocates but also as decision-makers—and ideological commitments by city officials to addressing inequality.

Beyond L.A., one sees emergent localist trends towards integration—including inclusionary zoning and increased anti-discrimination protections at the local levels (which has, predictably, led to push back from conservative lawmakers at the state level to thwart these local efforts). Whether these are manifestations of a sustained movement remains to be seen, but they cut against a traditional account of local incentives to segregation. Demographic realities may well be a factor—growing racial and ethnic diversity might make it more difficult to externalize all affordable housing and exclude all poor people of color. Communities of color and low-income individuals might also make demands for integration and manifest emerging political power that allows realization of those demands.

The impetus for these changes is unlikely to be a purely local calculus, but also comes from federal regulation. Even a weakly enforced AFFH rule can serve as incentive, deliver an example of what is possible, or provide local officials cover for taking some efforts towards integration. As Professors Justin Steil and Nicholas Kelly’s work shows, since the promulgation of the 2015 rule, jurisdictions are adopting more robust AFH plans.

All these efforts will require more study in the years to come, as one endeavors to understand this emerging legal and regulatory infrastructure of integration and the political and social movement dynamics operating at the sub-national level.

87 See Johnson, The Local Turn, supra note 68, at 119–22 (describing state and local measures in these areas).
88 See id. at 135–37 (discussing rise of state preemption of local power).
89 See FREY, DIVERSITY EXPLOSION, supra note 13 (detailing profound demographic changes in the nation).
IV. LIMITS OF TECHNOCRACY: BOTTOM-UP INTEGRATION POLITICS

Behind the success or failure of regulatory and legal change in integration lies politics. Integration is thwarted by the politics of resistance, indifference, or adherence to status-preserving policies by middle and upper-middle classes. This is the familiar account of the politics that prevented the Open Communities plan and prolonged and limited the implementation of the Mount Laurel and Yonkers remedies. The question of how to get fair housing and integration remedies to be accepted is shaped in the shadow of this politics of resistance. If integration policies are advanced at all, they are structured to avoid white flight or tipping points on a theory of incrementalism in the hopes of avoiding backlash. But this very incrementalism frustrates efforts towards integration, leading only to the adoption of remedies (like mobility programs) that are difficult to scale without complimentary efforts to assist those “left behind” in minority communities. These remedies risk being seen as tokenistic by people of color and as advancing integration on the terms of white people.

Yet the politics of fair housing are more complex than the politics of white resistance. Fair housing has also involved the politics of morality and faith commitments to integration and pragmatic attempts to meet housing needs and address inequality. The politics of communities of color also undergirded the FHA: the work of social movements led by people of color, primarily in the North, that fought

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91 See supra notes 60–66 and accompanying text (discussing deployment of local government's infrastructure to concentrate advantage).
92 See, e.g., Hochschild & Danielson, supra note 43 (providing an account of resistance to housing and school desegregation remedies in Yonkers, New York).
against segregated schools and housing and lack of access to sufficient housing opportunities. The legacy of these movements might be different than integration shaped only in the shadow of the politics of resistance. Instead, contemporary integration might require engagement of those constituencies most affected by economic and racial segregation (people of color and low-income people) working in alliance with those with moral, ideological, and pragmatic commitments to similar goals. One can observe strands of this transformational, bottom-up approach today in the emergence of a new politics of fair housing that not only speaks of “integration,” but of sharing opportunity by promoting participation and belonging, social inclusion, and creating equitable “all-in” cities and places.

Examples of this emerging politics can be found in movements to connect regional and local governments, and in recent pro-integration organizing by grassroots, citizen-based organizations. The first example is the Building One America Coalition, a network of America’s “first” suburbs, which reframes the narrative of suburbs as necessarily exclusionary. This is an effort by older, inner-ring suburbs—built outside of cities in the post-war era, often enabled by exclusionary policies—which are now in some cases experiencing economic distress and confronting the challenges of building opportunity for a racially, ethnically, and socioeconomically diverse population. The movement is born of pragmatism—the perceived need to build a political coalition to advance federal and state level policies that better attend to the infrastructure, transportation, housing, and other challenges facing

diverse suburbs and their residents. A second example is found in the efforts of community groups to organize to advance integration, defined in ways that both expand opportunities in low-poverty (traditionally “white”) areas, as well as building opportunity for low-income people of color within cities that are changing as a result of development and gentrification. These efforts are manifest in the “accountable development” movement, efforts to expand mobility and choice among voucher recipients, and prevent displacement in gentrifying neighborhoods. Along these lines, community-based efforts in New York City seek to leverage residential diversity to diminish economic and racial segregation in the public schools. In New York City, housing diversity is enabled by a school policy that enhances the ability of white and upper middle-class families to avoid schools that are majority African American and Latino or that have significant numbers of poor children. New York City’s public schools are among the most segregated in the country, more segregated even than housing patterns would seem to dictate. In recent years, educators, local politicians, families, students, and community groups have engaged in small scale efforts to alter this dynamic. This has included piloting a program of socioeconomically diverse schools (with

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101 See Building One America, Strategies and Policies for Defending and Expanding the Middle Class in Metropolitan America, https://buildingoneamerica.org/sites/default/files/attachments/policydocboa2013.pdf [https://perma.cc/57UA-YN2W] (“[E]ven as middle-class suburbs—once known for their exclusivity and even restrictive practices—are becoming more diverse, years of bad federal policies have left the towns in the middle as both the most desirable and most at-risk communities in our metropolitan regions. In many parts of America, they are now experiencing an all-too-familiar set of challenges—increasing poverty, struggling schools, aging infrastructure and declining tax bases that threaten to undo their social progress and undermine them as engines of middle class wealth, opportunity and prosperity.”).

102 See About, supra note 100 (“Building One America promotes the goals of social inclusion, racial justice, sustainability and economic opportunity . . . .”).


funding from the state),\textsuperscript{105} the passage of a city law requiring reporting and data on school diversity,\textsuperscript{106} and a multi-year effort to re-zone schools, beginning with adopting an assignment targeting poor socioeconomic, racial, and disability inclusion in elementary schools on the Lower East Side of Manhattan.\textsuperscript{107}

These efforts are not without challenges and resistance, but there are signs that these efforts are leading to systemic change.\textsuperscript{108} That integration is even in the conversation in both schools and housing might be counted as a success. As New York City touted itself as diverse, policy reports and deep reporting made plain in recent years that this was diversity without equity or meaningful integration.\textsuperscript{109} Efforts started in New York City to engage students and families in a broad definition of integration in the context of schools have now expanded nationally.\textsuperscript{110} The plans have started off small, but in the words of one parent, “it has to start somewhere.”\textsuperscript{111}

\begin{footnotesize}
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\item See id.
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Attention to the once and future dynamics of change in fair housing teaches us that progress is neither impossible nor inevitable. Demographic change will not inevitably lead to integration because segregation is built into the current legal and regulatory structure, and for those who benefit, there is little incentive to change the status quo. Indeed, efforts at change are often deemed to be unnatural or coercive—engineered interventions that upset market realities and free choice. In the face of these headwinds, those who advocate for integration will continually need to attend to the question of how courts, government agencies, and community members can promote and sustain change. Given the scope of the challenges in fair housing, change is unlikely to be swift or comfortable.