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## Towards a Law of Inclusive Planning: A Response To “Fair Housing for a Non-Sexist City”

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TOWARDS A LAW OF INCLUSIVE PLANNING:  
A RESPONSE TO “FAIR HOUSING  
FOR A NON-SEXIST CITY”

*Olatunde C.A. Johnson\**

Noah Kazis’s important article, *Fair Housing for a Non-sexist City*, shows how law shapes the contours of neighborhoods and embeds forms of inequality, and how fair housing law can provide a remedy. Kazis surfaces two dimensions of housing that generate inequality and that are sometimes invisible. Kazis highlights the role of planning and design rules — the seemingly identity-neutral zoning, code enforcement, and land-use decisions that act as a form of law.<sup>1</sup> Kazis also reveals how gendered norms underlie those rules and policies. These aspects of Kazis’s project link to commentary on the often invisible, gendered norms that shape the design of ordinary objects, public space, data, and automated algorithms.<sup>2</sup>

As to housing specifically, Kazis’s emphasis on gender is noteworthy; most examinations of exclusion in housing and land use concern race and class. Kazis takes up the invitation of Professor Dolores Hayden, a prominent urban historian, to imagine how we might redesign urban spaces and rethink the connection between the city and suburb.<sup>3</sup> Kazis’s focus on “sex” means not just women as a broad category, but women who own businesses, participate in the wage economy, and need child-care zoned in their neighborhoods, as well as men who are low-income and need single-room occupancy (SRO) and other housing arrangements to make housing affordable.

Kazis notes in many of his examples that race and class are inevitably entangled with gender.<sup>4</sup> Yet what received less attention from Kazis is the role women might play in driving exclusion. Race and class dynamics do not only compound exclusion based on gender — the notion that gendered exclusion is most intensely felt for those who are poor or of color, or who operate in these intersectional categories. Race and class destabilize the very category of gender, because women themselves

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<sup>1</sup> See Noah M. Kazis, *Fair Housing for a Non-sexist City*, 134 HARV. L. REV. 1683, 1688–89 (2021).

<sup>2</sup> See, e.g., CAROLINE CRIADO PEREZ, *INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN* 2019 (showing how data used in economics, health, and education excludes gender, treats men as the standard, and thus propels gender-based inequalities).

<sup>3</sup> Dolores Hayden, *What Would a Non-sexist City Be Like? Speculations on Housing, Urban Design, and Human Work*, 5 SIGNS (SUPPLEMENT) S170, S171 (1980).

<sup>4</sup> See Kazis, *supra* note 1, at 1691.

and gendered norms can drive the decisions to exclude based on race and class. This is evident most powerfully in the creation and design of suburbs that subsidized and constructed neighborhoods to include a particular set of women, and a specific domestic conception of women and family, while it excluded other people and family arrangements.<sup>5</sup> Thus the story of the urban-suburban landscape is not simply one of gendered exclusion. The suburbs also are built on the dynamics of inclusion, placing (some) women at the center. As I argue below, these twin dynamics of exclusion and inclusion affect the law and politics of housing and planning.

In Part I, I begin with the Fair Housing Act<sup>6</sup> (FHA). Kazis's central observation that sex discrimination claims have been less prominent under the Act than race claims is persuasive.<sup>7</sup> Yet the FHA has incorporated new forms of discrimination: for instance, disability and discrimination against families with children are the most active enforcement categories under the Act. And sex discrimination has been an enforcement priority in other civil rights areas such as employment. This Part invites future work to better understand the political economy of gender discrimination in fair housing, and whether specifically the less prominent place of sex is distinctive to housing, and why. In Part II, I move away from the enforcement of the Act itself to highlight a key challenge of Kazis's argument. Kazis is careful to connect gender to race and class in understanding who is affected by discriminatory planning. His analysis contends less with how gender drives exclusion. Gendered assumptions and politics create the domestic prison that Kazis describes in the account of the suburbs, and they also drive the law and politics of exclusion. White women are often the beneficiaries of exclusionary housing policies. These historical dynamics allowed former President Trump to appeal explicitly to "suburban housewives"<sup>8</sup> in his attempt to weaken the Fair Housing Act directives that Kazis relies on for a solution. While this observation does not diminish Kazis's key insights, proffered solutions must be attentive to how gender shapes both exclusion and inclusion. Women might welcome Kazis's destabilization project to advance equity in planning and land-use; women might also be invested in preserving current arrangements. In Part III, I consider what inclusive planning might look like beyond the litigation that Kazis proposes, and

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<sup>5</sup> See *infra* notes 31–32 and accompanying text.

<sup>6</sup> 42 U.S.C. §§ 3601–3619.

<sup>7</sup> Class is not explicitly covered by the Fair Housing Act, but class-based exclusions such as exclusionary zoning often have the dual effect (and perhaps purpose) of excluding based on race and can under certain circumstances be challenged under the Fair Housing Act. See Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 305, 313–15 (2015) (describing history of exclusionary zoning and the role of the Fair Housing Act). In addition, as I show in Part III, class-based exclusion can sometimes be addressed under a range of regulatory, inclusive-planning interventions.

<sup>8</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 23, 2020, 11:46 AM), <https://twitter.com/realdonaldtrump/status/1286372175117791236> [<https://perma.cc/M2P5-BSPF>].

even beyond affirmatively furthering fair housing (AFFH). Standing alone, AFFH is at most a partial solution to propel more inclusive planning. However, insights from AFFH could form the basis of a more robust framework for building forward-looking, equitable neighborhoods and city planning that occurs not just at the federal level, but at the state level. Finally, I conclude on a more hopeful note, by suggesting future attention to the politics that might drive more inclusive housing policies.

## I. SEX AND THE FHA

Kazis argues that sex and gender receive less attention than race in the field of fair housing. As Kazis notes, gender is not utterly ignored as seen in recent litigation and regulatory attention to domestic violence and sexual harassment in housing, protecting families with children (often headed by women), and gender identity exclusion.<sup>9</sup> And the Supreme Court's holding in *Bostock v. Clayton County*<sup>10</sup> that "sex" discrimination in employment includes sexual orientation and gender identity should, by any reasonable interpretation, also apply to the FHA's prohibitions on "sex" discrimination.<sup>11</sup>

Yet one can easily agree that sex and gender are less central to public and legal conceptions of fair housing than race is. When the FHA was originally enacted in 1968, it did not include prohibitions against sex discrimination;<sup>12</sup> Congress added "sex" to the FHA's protected classes in 1974.<sup>13</sup> By contrast, race features prominently in the FHA's origin story — the result of organizing for "open housing" by civil rights advocates — with housing becoming the key terrain for civil rights battles outside

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<sup>9</sup> See, e.g., NAT'L FAIR HOUS. ALL., DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: 2019 FAIR HOUSING TRENDS REPORT 10, <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf> [<https://perma.cc/5SPH-63ZE>] (noting "unprecedented" level of focus on sexual harassment in housing in 2019).

<sup>10</sup> 140 S. Ct. 1731 (2020).

<sup>11</sup> See Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Under the Fair Housing Act After Bostock v. Clayton County*, KAN. L. REV. (forthcoming 2021) (manuscript at 1) (on file with the Harvard Law School Library) (arguing that the FHA's identical language prohibiting housing discrimination "because of . . . sex" should after *Bostock* be "interpreted to prohibit discrimination based on sexual orientation and gender identity"). The Department of Housing and Urban Development has recently issued a memorandum directing HUD enforcement and grant recipients to comply with *Bostock*. See Memorandum from Jeanine M. Worden, Acting Assistant Sec'y for Fair Hous. & Equal Opportunity, U.S. DEP'T OF HOUS. & URB. DEV. (Feb. 11, 2021), <https://www.hud.gov/sites/dfiles/FHEO/documents/WordenMemoEO13988FHActImplementation.pdf> [<https://perma.cc/PDC2-SCB5>].

<sup>12</sup> See Pub. L. No. 90-284, 82 Stat. 73 (1968).

<sup>13</sup> See Housing and Community Development Act of 1974, Pub. L. No. 983, § 808, 88 Stat. 633, 728.

the South.<sup>14</sup> The uprisings of 1967 resulted in the Kerner Commission Report, which made the passage of the FHA and addressing the “urban” crisis its focus.<sup>15</sup> In urging passage of the 1968 law, President Johnson specifically emphasized the need to address Black isolation from neighborhoods of opportunity.<sup>16</sup> The FHA’s initial emphasis on race is even more marked with regard to the AFFH provisions of the statute, which congressional drafters and advocates conceived as a tool to address the government’s history in funding and subsidizing segregation by using federal funds to proactively combat discrimination and promote integration.<sup>17</sup> Of course, while race historically has been the central concern of the FHA, racialized housing discrimination and segregation have not been fully addressed.

Gender’s absence from the initial civil rights conception is not unique to the Fair Housing Act. Title VI of the 1964 Civil Rights Act,<sup>18</sup> which prohibited discrimination in federally funded programs, was in part a response to under-enforcement of *Brown v. Board of Education*,<sup>19</sup> and does not include a prohibition on sex discrimination; it would not be until 1974 that Congress enacted Title IX<sup>20</sup> to address gender discrimination in schools. Sex prohibitions were famously added to Title VII on the House floor, over the initial objections of some of the Act’s proponents.<sup>21</sup>

As a general matter, these early statutory histories may shape initial patterns of litigation and regulatory enforcement,<sup>22</sup> but they do not seal

<sup>14</sup> See Mary Lou Finley, *Success and the Chicago Freedom Movement*, 15 POVERTY & RACE, May–June 2006, at 8, 8.

<sup>15</sup> See 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 204 (2014) (describing report by former Governor of Illinois Otto Kerner, Jr., as a “runaway best seller” that helped to “crystal[ize] the larger public sentiment” for a fair housing bill).

<sup>16</sup> See President Lyndon B. Johnson, Special Message to the Congress on Civil Rights, 1 PUB. PAPERS 55, 61 (Jan. 24, 1968) (“Segregation in housing compounds the Nation’s social and economic problems. . . . Unemployment and educational problems are compounded — because isolation in the central city prevents minority groups from reaching schools and available jobs in other areas.”).

<sup>17</sup> See 42 U.S.C. § 3608(e)(5) (requiring federal agencies and grantees to administer programs “in a manner affirmatively to further the policies” of the FHA).

<sup>18</sup> *Id.* §§ 2000e to -17.

<sup>19</sup> 347 U.S. 483 (1954).

<sup>20</sup> 20 U.S.C. §§ 1681–1688.

<sup>21</sup> While a common narrative was that the addition of sex was a “joke” or a poison pill to defeat Title VII, this has been disproven. Indeed there is evidence that women organized to include the provision in Title VII and relied on intersectionality arguments about providing protections for Black women. See generally Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713 (2015) (detailing the influential arguments of Pauli Murray on the need for a unified set of protections against gender and race discrimination); Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409 (2009).

<sup>22</sup> Regulators were initially slow to enforce Title VII’s prohibitions on sex discrimination because they believed race discrimination to be the law’s chief concern. See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1335 (2012).

a statute's fate. Researchers have found that many aspects of Title VII have been more successful in advancing gender than racial inequity for instance.<sup>23</sup> Regulatory attention can shift in response to social movements and new realities. For instance, other categories in the Act have come to command regulatory attention despite their initial omission from the FHA. Disability now occupies a central place in enforcement activity under the Act, as does discrimination based on family status.<sup>24</sup>

There remains a puzzle then as to why sex has been less a focus of the FHA from the advocacy perspective, and Kazis does not take on the project of explaining why, noting that this is likely the subject of another article.<sup>25</sup> The relative visibility of discrimination may play a role in shaping enforcement priorities. For instance, in the area of disability some argue that the high number of housing complaints results from the ease of detecting a landlord's failure to make housing accommodations.<sup>26</sup> Contrast that with racial discrimination in housing, which often remains invisible to those who are victimized by it, leading to fewer lawsuits. How visibility plays out with regard to gender enforcement is not entirely clear. Gender perhaps is too hidden in zoning and planning decisions to become an enforcement priority for lawyers or regulators.

Another potential factor that Kazis notes is that fair housing may have limited importance for middle-class and professional women.<sup>27</sup> SROs or the availability of childcare facilities may be less of a priority to gender-based social movements that are not led by poor women or women of color. If true, this explanation might also be implicated in the politics that sustain the land-use and zoning policies that Kazis seeks to challenge. I do not fault Kazis for not addressing these dynamics, but as I suggest in the next Part, the role of women in being indifferent to or sustaining exclusionary policies also requires examination. As Kazis notes when arguing for a more expansive reading of the AFFH provision, advocates and lawyers have played a crucial role in expanding the meaning of civil rights laws.<sup>28</sup> So a key question with regard to "sex" is to understand how social movements come to understand housing issues

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<sup>23</sup> See generally KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT (2012) (finding that white women (particularly those with educational credentials) made more progress than Black women or Black men).

<sup>24</sup> See NAT'L FAIR HOUS. ALL., *supra* note 9, at 15–16 (noting that disability discrimination complaints occupy about half of all fair housing complaints).

<sup>25</sup> See Kazis, *supra* note 1, at 1702 & n.108.

<sup>26</sup> See NAT'L FAIR HOUS. ALL., *supra* note 9, at 15–16 (noting that disability claims are typically based on inaccessibility and failure to accommodate, which are easier to detect than other forms of discrimination).

<sup>27</sup> See Kazis, *supra* note 1, at 1702 n.108.

<sup>28</sup> *Id.* at 1755; see also Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1790–91 (2017) (describing role of regulated entities and advocates in shaping the meaning of equal pay laws and Title IX).

as implicating gender and sex, and what explains those instances where they do not.

## II. “SUBURBAN HOUSEWIVES”: GENDER AND THE POLITICS OF EXCLUSION

Kazis’s argument is not only that sex receives less attention in fair housing enforcement, but also that gender and gendered norms are embedded in zoning, land use, urban design, and other housing decisions in ways that often go unseen. While Kazis’s examples (for instance, nuisance ordinances that harm victims of domestic violence enforcement and zoning regulations that exclude home-based childcare<sup>29</sup>) are persuasive, they also intersect with class, race, and family arrangements. At base, these planning decisions are exclusionary because they operate with a middle-class or traditional nuclear family at the center of their conception of the “good” neighborhood. Zoning for childcare centers would upset the divide between uses that characterize traditional single-family zoned neighborhoods from those that allow connections with paid work, industry, and commercial centers. This is gender at work, certainly, but also class — childcare centers are most necessary for families that depend on group care rather than being able to afford more privatized forms of care, such as a parent (a woman typically) as a primary caregiver or a hired nanny. Some of these zoning and enforcement policies may also target neighborhoods based on race and class. For instance, advocates have brought suit under the FHA arguing that chronic nuisance ordinances are disproportionately enforced against Black renters, and in Black neighborhoods.<sup>30</sup>

These examples show how exclusion might be driven by factors in addition to gender, such as race, class, or disability. Yet exclusion also operates by placing some women at the center of design and planning decisions. This occurs most powerfully in the account of the traditional post-war suburb. As is well documented, suburbs excluded based on race and class, through state and market subsidies (tax, insurance, and mortgage), racially restrictive covenants, and transit policies. These dynamics of exclusion also served to include: by placing women (white, middle-class) at the center of policy and design, as chief beneficiaries. As Dolores Hayden and others have shown, the traditional post-war suburb was designed and marketed to women.<sup>31</sup> Advertisers sold images of suburban, domestic bliss —in which women were surrounded

<sup>29</sup> See Kazis, *supra* note 1, at 1703–20.

<sup>30</sup> See, e.g., *Case Profiles: HOPE Fair Housing Center v. City of Peoria, Illinois, RELMAN COLFAX*, <https://www.relmanlaw.com/cases-peoria> [<https://perma.cc/RH4M-4TLK>] (summarizing settlement of lawsuit against the City of Peoria for discriminatory enforcement of nuisance claims).

<sup>31</sup> See DOLORES HAYDEN, *BUILDING SUBURBIA* 147–51 (2003); see also GERALD E. FRUG, *CITY MAKING* 154–55 (1999) (“The appeal of suburban isolation was built upon, and still depends

by consumer goods — giving product manufacturers, marketers, and advertisers a stake, along with the housing industry, in the suburban ideal. The implications of this suburban ideal, with its racial and class homogeneity and its spatial divide from the city, extend beyond the marketing of consumer goods, of course. Wealth and educational opportunity are built on these planning and policy decisions. The post-war suburbs facilitated the homogenization of immigrant and ethnic identities into “white” identity and constituted a social transfer of wealth that helped create the “American Dream” for some, while excluding others.<sup>32</sup>

Kazis’s project is, of course, to challenge the homogenized conceptions of gender and family structure that fueled these design decisions, and to highlight the way in which the built environment “reflects — and then entrenches” outmoded general roles.<sup>33</sup> Yet this project would also have to include women as agents of exclusion. The allure of this suburban “dream,” built to include some women but exclude others, complicates the gender analysis, and shapes the political economy of housing still today. Some women will find themselves restricted by these traditionally gendered housing and planning conceptions that sharply delineate work and domestic life, breed dependence on a primary (male) commuting breadwinner, and deny them more flexible ways of balancing care and work. Others will remain invested in the project for the social and economic advantages that it provides them and their families.

When President Trump tweeted to “suburban housewives” that the 2015 AFFH regulation would be rescinded and that those living out the “Suburban Lifestyle Dream [would] no longer be bothered or financially hurt by having low income housing built in” their neighborhoods,<sup>34</sup> he was appealing to this ideal of domesticity that constrains women and yet is built on the physical separation from African Americans and the poor. He was urging continued investment in the suburbs as an economic, political, racial, and yes — gendered — project.

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on, specific ideas about the role of women in American society. . . . [T]housands of bedroom suburbs were constructed — and the houses within them were designed — as physical expressions of what has been called the ‘cult of domesticity.’”)

<sup>32</sup> See BERNADETTE HANLON, *ONCE THE AMERICAN DREAM* 3 (2010); BARBARA M. KELLY, *EXPANDING THE AMERICAN DREAM* 148 (1993) (providing accounts of white, working-class families that were able to create the “American Dream” in the newly built, racially exclusionary Levittown).

<sup>33</sup> See Kazis, *supra* note 1, at 1686.

<sup>34</sup> Trump, *supra* note 8 (warning against adoption of the Biden housing plan); Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 9:19 AM), <https://twitter.com/realDonaldTrump/status/1288509568578777088> [<https://perma.cc/5V82-GVWU>] (noting the same upon repealing the AFFH); *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 12, 2020, 4:59 AM), <https://twitter.com/realDonaldTrump/status/1293517514798960640> [<https://perma.cc/9A74-3F4A>] (“The ‘suburban housewife’ will be voting for me. They want safety & are thrilled that I ended the long running program where low income housing would invade their neighborhood.”).



As I suggest below, this tweet depends on a conceptualization of the suburbs that is disappearing from people's lived experience. This conceptualization flattens the current racial, ethnic, class, and gender complexity of the suburbs, and calls out to an imagined woman who might no longer appreciate being reduced to a suburban housewife or targeted for racist appeals. Yet, it is an attempt to place women at the center of housing and urban policy; not to exclude them. And the more substantive action that the Trump Administration took of rescinding the 2015 AFFH regulation shows the contemporary resonance of this appeal.

The investment in the current spatial and political geography of the United States is an investment in perhaps the most powerful vehicle through which American society provides wealth and reproduces social and class status. Again, the dynamics are not just ones of exclusion, but also of inclusion. Women with education, wealth, social capital, and time are often driving housing and school policies and planning decisions today. Our structures of local government and our municipal policies are designed to enable these women to exercise school and neighborhood choice in order to maintain advantages for themselves and their families in a spatially segregated world.<sup>35</sup>

How to focus on gender given this context? When Hayden offered her challenge to design a non-sexist city, she attended to this iterative relationship between race, class, and gender. The harm in the urban design and planning of the suburbs was that it restricted women to particular roles, and excluded many other types of women, families, and ways of being a woman in the world.<sup>36</sup> Gender stereotypes and discrimination in planning create a wall — for those who are excluded by race, who may need to board public transportation to get to work, who may lack two parents, who rent — and a prison for those who must stay inside, anchored to this restrictive domesticity. Women are likely to be found on both sides of this physical separation; working to prop up the walls as well as dismantle them.<sup>37</sup>

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<sup>35</sup> See, e.g., Allison Roda & Amy Stuart Wells, *School Choice Policies and Racial Segregation: Where White Parents' Good Intentions, Anxiety, and Privilege Collide*, 119 AM. J. EDUC. 261 (2013) (showing how white parents are able to choose high-status, mostly white schools, and offering potential policy interventions to promote integrative choices); Matt Barnum & Gabrielle LaMarr LeMee, *Looking for a Home?*, CHALKBEAT (Dec. 5, 2019, 8:00 AM), <https://www.chalkbeat.org/2019/12/5/21121858/looking-for-a-home-you-ve-seen-greatschools-ratings-here-s-how-they-nudge-families-toward-schools-wi> [<https://perma.cc/7TU9-63CN>] (showing how school ratings embedded in real estate search sites facilitate segregation); cf. Erica Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2382–87 (2021) (describing social closure in the drawing of school boundaries in metropolitan areas, resulting in the hoarding of high-quality education for white, affluent students).

<sup>36</sup> Hayden, *supra* note 3, at S175–76.

<sup>37</sup> Of course, all categories of identity and social positioning will have internal contestation. Even within a racial group there may be disagreements over planning that can be driven by a range of factors including gender and income. See generally MARY PATILLO, *BLACK ON THE BLOCK*

### III. FURTHERING INCLUSIVE PLANNING

Even once we understand that gender, as well as race and class, shape zoning and design decisions, it is not obvious that law is relevant to the remedy. Kazis makes the case for fair housing law, which is not typically central in housing and planning discourse. Legal commentators concerned with exclusionary housing often focus on zoning, tax, and redevelopment policy but not always fair housing.<sup>38</sup> And Hayden's original appeal to design non-sexist cities appears written to community residents, planners, and developers, but not to lawyers.

First, I agree with Kazis that statutory civil rights law can play a role in producing inclusive planning. Notwithstanding Justice Kennedy's dicta in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>39</sup> (*ICP*) that disparate impact theory should not interfere with local planning decisions, the disparate impact standard might appropriately create opportunities and incentives for more equitable and inclusive planning. Leading planning organizations recognized this in *ICP* when they submitted an amicus brief urging the Court to retain the disparate impact standard, arguing that it "encourages planners and developers to engage proactively with communities affected by development plans" and "creates incentives for institutions and developers to share their findings with stakeholders and to explore less burdensome alternatives in an effort to obtain community support."<sup>40</sup>

Yet I believe that litigation under disparate impact will likely play only a modest role in advancing inclusive planning given the general piecemeal nature of litigation, specific barriers to litigation in the FHA context (such as the paucity of fair housing lawyers), the narrowness of disparate impact theory, and the fragmented nature of local land-use decisions.<sup>41</sup> The law that is likely to drive inclusive planning will be

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(2007). Black and Latino families are also no longer excluded from the suburbs to the extent they were in 1968, and may be invested in excluding poorer families from their neighborhoods to preserve their wealth and perceived quality of life. See generally ANDREW WIESE, *PLACES OF THEIR OWN* (2004) (describing African American suburbanization).

<sup>38</sup> See, e.g., Gerald Frug, *The Legal Technology of Exclusion in Metropolitan America*, in *THE NEW SUBURBAN HISTORY* (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (sketching a framework for legal rules that alter the spatial, economic, and political divide between cities and suburbs).

<sup>39</sup> 135 S. Ct. 2507 (2015).

<sup>40</sup> Brief for the American Planning Association and Housing Land Advocates as Amici Curiae in Support of Respondent at 12, *ICP*, 135 S. Ct. 2507 (No. 13-1371).

<sup>41</sup> For a pre-*ICP* assessment of disparate impact litigation in the federal courts, see generally Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357 (2013), which shows modest success rates of disparate impact litigation, but argues that the theory should be preserved by courts.

legislative and regulatory, involving the use of federal directives, spending, and grants to state and local governments. This law will involve multiple levels of government, though there will be a key role for federal and state (as opposed to simply local) governments, and it will need to engage housing and civil rights advocates to participate in administrative processes and press their claims in the administrative state.

As to AFFH specifically, the regime will have to be strengthened to be useful in advancing inclusive planning. The Trump Administration weakened the 2015 AFFH regulatory approach.<sup>42</sup> Even if the rule is restored by the present Administration,<sup>43</sup> by several accounts the 2015 rule was not sufficiently strong in the first instance; it relied too much on unenforceable “carrots” and was not attached to a wide-enough swath of federal funds to create pressure for change.<sup>44</sup> Like Kazis, I believe that AFFH has power despite these limitations; a sanguine perspective supported by evidence showing that the 2015 rule resulted in adoption of inclusive housing and planning policies.<sup>45</sup> But while Kazis suggests that current fair housing law remains the “essential legal mechanism” for promoting inclusive housing,<sup>46</sup> I believe that the law of inclusive planning will need to be developed beyond traditional fair housing law. AFFH’s elements should be extended into a broader framework, and connected to other pressing community and policy concerns such as affordability and supply.<sup>47</sup> Indeed, one advantage of a regime that goes beyond traditional fair housing law is that it allows for

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<sup>42</sup> HUD initially suspended the AFFH Rule, stating that it was “unworkable” because a high number of initial submissions failed HUD review and the rule required a high level of technical assistance from HUD. See Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922, 23,923 (proposed May 23, 2018). Ultimately after a period of notice and comment, HUD decided to rescind the rule and replace it with a new rule on Preserving Neighborhood Choice. See Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

<sup>43</sup> Upon taking office, President Biden issued a memorandum calling for HUD to examine the effect of President Trump’s new rule and of the rescission of the 2015 Rule. See Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies> [https://perma.cc/8BLQ-YXT9].

<sup>44</sup> See Michael Allen, *HUD’s New AFFH Rule: The Importance of the Ground Game*, in THE DREAM REVISITED (Ingrid Gould Ellen & Justin Peter Steil eds., 2019).

<sup>45</sup> See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POL’Y DEBATE 85, 102 (2019) (showing that jurisdictions adopted new, inclusive measures after HUD issued the 2015 AFFH rule).

<sup>46</sup> See Kazis, *supra* note 1, at 1758.

<sup>47</sup> Advocates have also offered recommendations for strengthening the AFFH rule. See, e.g., MEGAN HABERLE ET AL., POVERTY & RACE RSCH. ACTION COUNCIL, REVIVING AND IMPROVING HUD’S AFFIRMATIVELY FURTHERING FAIR HOUSING REGULATION: A PRACTICE-BASED ROADMAP (2020), <https://prprac.org/pdf/improving-affh-roadmap.pdf> [https://perma.cc/792M-DC92].

consideration of affordability and income, factors that are not explicit considerations in fair housing law.<sup>48</sup> Key elements of the AFFH regime that could inform a more expansive approach to inclusive planning at the federal, state, and local levels include impact assessments, robust and meaningful participation, mapping, and conditioned spending.

There is evidence that this new, broader framework for inclusive planning is gaining currency with lawyers, housing advocates, and planners at least in the area of race- and class-based exclusions. Commentators have advocated for a more inclusive and equitable approach to planning using the rubric of “anti-subordination planning” and “reparative planning” that incorporates some of these elements.<sup>49</sup> Lawyers and policy advocates urge use of regulatory impact assessments, such as “opportunity zone impact assessments” to evaluate how zoning and development projects further inclusion and mobility.<sup>50</sup> AFFH’s mapping instrument (even though it needs tweaking<sup>51</sup>) reveals disparities in access to opportunity and in the distribution of housing, quality schooling, transportation, and other social goods that are not always seen or understood as “discrimination” under traditional fair housing law. These are technocratic tools, but they also serve the democratic function of making visible the role of the state and powerful private actors as a counter to the narrative of neutral markets and policies. Mapping has thus become an advocacy tool to show how past Home Owners’ Loan Corporation (HOLC) redlining is manifested in contemporary patterns of disinvestment and where additional resources are required.<sup>52</sup>

The emerging “law” of inclusive planning includes regulation, prohibitions, and directives, but also conditioned spending. AFFH’s regulatory regime operates by placing requirements on state and local grantees

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<sup>48</sup> Race and class often intersect in housing, and AFFH remedies often consider class-based exclusions such as source of income protections, zoning restrictions, and restrictions on the siting of low-income and supported housing. See, e.g., CITY OF L.A. & THE HOUS. AUTH. OF THE CITY OF L.A., ASSESSMENT OF FAIR HOUSING (FHA) PLAN 2018–2023, at 96, 100 (2017), <https://hcidla.lacity.org/assessment-fair-housing> [<https://perma.cc/JTG8-QKAP>] (addressing zoning and siting restrictions affecting affordable housing).

<sup>49</sup> See generally Justin Steil, Commentary, *Antisubordination Planning*, J. PLAN. EDUC. & RSCH. ONLINE (2018); Rashad Akeem Williams, *From Racial to Reparative Planning: Confronting the White Side of Planning*, J. PLAN. EDUC. & RSCH. ONLINE (2020).

<sup>50</sup> See *Opportunity Zone Community Impact Assessment Tool*, URB. INST., <https://www.urban.org/oztool> [<https://perma.cc/773Y-QQ33>].

<sup>51</sup> See HABERLE ET AL., *supra* note 47, at 11–13 (providing recommendations for fixing HUD’s mapping tool).

<sup>52</sup> See, e.g., *Mapping Inequality: Redlining in New Deal America*, U. RICH. DIGIT. SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining> [<https://perma.cc/EV5R-S7L2>]; *Opportunity Mapping*, KIRWAN INST., <https://kirwaninstitute.osu.edu/opportunity-mapping> [<https://perma.cc/383E-SF4N>].

to advance regulatory goals of equity and inclusion. Given the fragmentation of housing policy and the political resistance at least to racial remedies, the carrots and sticks of federal spending offer an avenue to encourage states and localities to adopt these policies if a sufficient accountability mechanism, incentive structure, and political environment are in place.<sup>53</sup> As a practical matter, the current affordable housing crisis may help with the incentives and politics. Recognizing this crisis, current proposals build on the AFFH regime by recommending the conditioning of new money for housing and other infrastructure on state adoption of inclusive housing and planning measures.<sup>54</sup>

The law of inclusive planning will not just be federal; it will involve greater coordination at the regional and state levels. Commentators in the field have noted the fragmentation of American planning and housing policy, and in particular how an extensive reliance on local tax revenue serves to fuel race and economic inequality.<sup>55</sup> Federal law should be structured to encourage states (rather than localities) to take a more proactive role in housing planning.<sup>56</sup>

The broader inclusive planning framework that I encourage here is a form of law, but goes beyond litigation, and even beyond what is traditionally regarded as civil rights or fair housing law.

#### CONCLUSION

Finally, whether the regime of inclusion is built on the Fair Housing Act as Kazis urges, or on the broader framework that I suggest in Part III, politics will inevitably matter. In Part II, I suggested that Kazis's

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<sup>53</sup> In a different context, Professor Heather Gerken has argued that national values and policy goals are expressed and achieved vertically through the interaction and interdependence (sometimes fraught) between federal, state, and local governments. See Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 1, 38–43 (2010). In prior work, I have looked at how civil rights law's conditional-spending regimes such as AFFH have been used to advance racial, ethnic, and class-based inclusion at the state and local levels well beyond what is required either by constitutional law regimes or by judges implementing statutes. See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1362–69 (2012).

<sup>54</sup> See SOLOMON GREENE & INGRID GOULD ELLEN, URB. INST., *BREAKING BARRIERS, BOOSTING SUPPLY: HOW THE FEDERAL GOVERNMENT CAN HELP ELIMINATE EXCLUSIONARY ZONING 2* (2020) (“[T]o receive competitive funding for housing, transportation, and infrastructure, states must demonstrate measurable progress toward meeting regional housing needs and distributing affordable housing across a diverse range of communities.”).

<sup>55</sup> See generally Yonah Freemark et al., *Varieties of Urbanism: A Comparative View of Inequality and the Dual Dimensions of Metropolitan Fragmentation*, 48 POL. & SOC'Y 235 (2020) (showing how the United States differs from many countries in not having regional, state, or federal level planning for land use or affordable housing and explaining how this dynamic, along with extensive reliance on local tax revenues to fund crucial public services, contributes to inequality).

<sup>56</sup> See generally Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 305 (2015) (advancing a broader role for state planning in the federal AFFH process).

focus on gender understates the ways in which women of privilege have worked to maintain a status quo that frustrates the types of land use and zoning reforms that Kazis urges. These politics can also work against the reforms I suggest in Part III. The politics of housing often seem insurmountably difficult. There are the competitive and exclusionary incentives built into localism,<sup>57</sup> the hidden nature of the planning and design rules and decisions, and a formidable ideology of market and policy neutrality.<sup>58</sup> Our individual incentives and desires to create wealth for our families or access opportunity (“good” schools and “good” neighborhoods) seem to depend on exclusionary policies that do not serve the broader collective. This is the pessimistic account — one that seems well-supported by resistance to integrative remedies in housing and schools, a resistance in which women have often played crucial roles.<sup>59</sup>

In concluding, I want to suggest a more optimistic account that builds on Kazis’s intervention and the intervention of others in the field. Making visible how exclusion and norms operate in planning, land use, and housing to perpetuate inequality serves as a first step. Beyond visibility, the seeds of a more inclusive framework for reform are already sprouting. President Trump’s invocation to “suburban housewives” may have been mobilizing to some women. But others were taken aback by what one commentator termed “barely disguised racial fearmongering” revealing an “understanding of women voters [that] is based on six reruns of ‘Happy Days’ plus a vacuum cleaner ad from 1957.”<sup>60</sup> In the domain of partisan politics there is evidence that these fear-based appeals, timed before the 2020 presidential election, didn’t translate to hoped-for electoral success.<sup>61</sup>

Importantly, it may be that the imagined suburb is no longer real. The incremental, partial success of some fair housing policies and other interventions have altered the racial and demographic makeup of the

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<sup>57</sup> See Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 351, 355 (1990).

<sup>58</sup> See, e.g., David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in *THE NEW SUBURBAN HISTORY*, *supra* note 38, at 11 (detailing how the federal government and real estate industry marketed their interventions to subsidize housing markets as race-neutral and as the product of private choices and investments).

<sup>59</sup> See, e.g., ELIZABETH GILLESPIE MCRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* 219–40 (2018) (documenting how white women organized in the twentieth century to resist desegregation remedies such as “school busing”).

<sup>60</sup> Monica Hesse, Perspective, *All the President’s “Suburban Housewives,”* WASH. POST (July 31, 2020, 6:00 AM), [https://www.washingtonpost.com/lifestyle/style/all-the-presidents-suburban-housewives/2020/07/30/7b100624-d1d7-11ea-9038-af089b63ac21\\_story.html](https://www.washingtonpost.com/lifestyle/style/all-the-presidents-suburban-housewives/2020/07/30/7b100624-d1d7-11ea-9038-af089b63ac21_story.html) [https://perma.cc/9CUM-9ZDR].

<sup>61</sup> See William H. Frey, *Biden’s Victory Came from the Suburbs*, BROOKINGS (Nov. 13, 2020), <https://www.brookings.edu/research/bidens-victory-came-from-the-suburbs> [https://perma.cc/AU72-B75Z].

post-war, “American Dream” suburbs, making them more racially and ethnically diverse and more heterogeneous with respect to class than was true even thirty years ago.<sup>62</sup> And women (including suburban women) were sometimes at the forefront of adopting the inclusionary policies that transformed neighborhoods.<sup>63</sup>

And of course, family structures and women’s roles have changed, due to law, public policy, culture, and social movements. Some women thus may be less invested in the zoning and spatial arrangements of the past century, which depend on a vision of the family that is “now exceptional” in a world in which “traditional” male-female, two-parent families are declining, and most women with children participate in the wage economy.<sup>64</sup>

The question remains whether further change is possible. The present affordable housing crisis might create an opportunity for changing law and policy around land use and housing, providing an opening for new proposals to develop housing in a way that attends to racial and economic segregation, and might also better attend to sex and gender.<sup>65</sup> These developments provide some basis for optimism that more equitable neighborhoods and fairer spatial arrangements can be achieved.

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<sup>62</sup> See HANLON, *supra* note 32, at 4 (describing demographic changes in most suburbs); cf. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 579 (2015) (noting a decline in hypersegregation in many metropolitan areas). They also have higher poverty rates than they did twenty years ago. See generally ELIZABETH KNEEBONE & ALAN BERUBE, *CONFRONTING SUBURBAN POVERTY IN AMERICA* (2013) (documenting rise in suburban poverty in the 2000s, and that half of all the metropolitan poor live in the suburbs).

<sup>63</sup> See *40 Years Ago: Montgomery County, Maryland Pioneers Inclusionary Zoning*, NAT’L LOW INCOME HOUS. COAL. (May 16, 2014), <https://web.archive.org/web/20180503010100/http://nlihc.org:80/article/40-years-ago-montgomery-county-maryland-pioneers-inclusionary-zoning> [<https://perma.cc/7DRE-4KS8>] (noting the role of the League of Women Voters).

<sup>64</sup> FRUG, *supra* note 31, at 155–56 (arguing that there are prospects for changing suburban sprawl as women are no longer uniformly attracted to post-war spatial arrangements due to changes in family structure and the relationship to paid work).

<sup>65</sup> An example is California’s proposed legislation, S.B. 10, allowing greater building in “non-sprawl areas (areas that are close to job centers and/or transit and areas that are in existing urbanized locations, thus reducing vehicle usage and long commutes)” as well as increasing the supply of affordable housing in high opportunity communities. See *Senator Wiener Reintroduces Key Housing Legislation*, CAL. SENATE DIST. 11 (Dec. 8, 2020), <https://sd11.senate.ca.gov/news/20201208-senator-wiener-reintroduces-key-housing-legislation-%E2%80%93-10-%E2%80%93-provide-cities-powerful> [<https://perma.cc/GZ32-YB59>].