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"Social Engineering": Notes on the Law and Political Economy of Integration

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

Olatunde C. A. Johnson[†]

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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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¹ See Fair Housing Act, 42 U.S.C. § 3601 (2018).

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.³ 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.⁴

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.⁵ 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.⁶ 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.⁷ 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 1968,⁸ the percentage of Americans living in "shared" neighborhoods is growing steadily,⁹ and there has been a decline in the

⁵ See, e.g., 42 U.S.C. § 3604(a) (2018) (prohibiting discrimination in the sale and rental of housing).

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).

⁷ See Stephen L. Ross & Margery Austin Turner, *Housing Discrimination in Metropolitan America: Explaining Changes Between 1989 and 2000*, 52 SOC. PROBS. 152 (2005).

⁸ Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIOLOGICAL FORUM 571, 579 (2015) (describing Black segregation as having "declined substantially in some metropolitan areas" but also as displaying a "remarkable persistence in many places"); Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, 11 DU BOIS REV. 205 (2014) (analyzing 287 metropolitan areas and finding decreases in Black-white segregation from 1970 to 2010, and continued, though modest, progress (4.5 points per decade)); EDWARD GLAESER & JACOB VIGDOR, *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA'S NEIGHBORHOODS 1890-2010* (2012), https://www.manhattan-institute.org/pdf/cr_66.pdf [<https://perma.cc/65F3-E6SR>].

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.¹⁰ While some researchers have cast those improvements as marking the end of segregation as a key feature of the American landscape,¹¹ other researchers have less positively characterized progress towards integration as “stalled.”¹² 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.¹³ In addition, there is little evidence of progress towards integration in areas that were deemed “hypersegregated” in 2010.¹⁴ 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

Ingrid Gould Ellen et al., *Pathways to Integration: Examining Changes in the Prevalence of Racially Integrated Neighborhoods*, 14 CITYSCAPE 33, 37 (2012) In 2000, 23.9% of Americans resided in such “shared” census tracts and the percentage increased to 30.3% by 2011–2015. See JONATHAN SPADER & SHANNON RIEGER, JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., PATTERNS AND TRENDS OF RESIDENTIAL INTEGRATION IN THE UNITED STATES SINCE 2000 8 (2017).

¹⁰ See Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373 (1989) (defining hypersegregation as a pattern of “extreme segregation on all [five spatial] dimensions” for African Americans in large urban areas); Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 DEMOGRAPHY 1025, 1028 (2015) (finding that the number of areas in which African Americans were hypersegregated decreased from forty to twenty-one between 1970 and 2010, and that the percentage of African Americans living in hypersegregated neighborhoods declined by half).

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

¹² Rugh & Massey, *supra* note 8; see also JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS (2011), <https://docs.google.com/viewer?url=http%3A%2F%2Fwww.s4.brown.edu%2Fus2010%2FData%2FReport%2Freport2.pdf>.

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.¹⁵ 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."¹⁶

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.¹⁷ While all groups profess a desire to live in "integrated" neighborhoods, the definition of integration is startlingly different for particular groups.¹⁸ 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.¹⁹ Blacks and Latinos express preferences for neighborhoods that are more integrated than whites are willing to tolerate.²⁰ 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

¹⁵ See Massey, *The Legacy of the 1968 Fair Housing Act*, *supra* note 8, at 580 (citing Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century*, 41 DEMOGRAPHY 23 (2004)) (the average Latino segregation increased slightly from 1970 to 2010, and by 2000, New York and Los Angeles (the metropolitan areas with the largest Latino communities) had become hypersegregated); see also Margery Austin Turner, *A Place-Conscious Approach Can Strengthen Integrated Strategies in Poor Neighborhoods*, BROOKINGS INST. (Aug. 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Download-the-paper-4.pdf> [<https://perma.cc/UWZ5-WQ9A>].

¹⁶ See generally PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013).

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.

¹⁹ See Camille Zubrinsky Charles, *Who Will Live Near Whom?*, in *AMERICA'S GROWING INEQUALITY: THE IMPACT OF POVERTY AND RACE* 328, 330 (Chester Hartman ed., 2014).

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.²¹ 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.²²

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).

²² See generally Raj Chetty & Nathan Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility II: County Level Estimates* (Nat'l Bureau of Econ. Research, Working Paper No. 23002, 2017) (other factors include larger middle class, greater social capital, and higher quality public schools).

²³ The FHA requires that the Department of Housing and Urban Development (HUD) administer its programs to "affirmatively . . . further" fair housing, an effort to reverse the federal government's role in creating and furthering housing segregation. 42 U.S.C. § 3608(e)(5) (2018). HUD, in 2015, strengthened the statute's implementing rules, promulgating new regulation. See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, and 903). The Trump Administration suspended the rule in early 2018, giving jurisdictions until 2020 to put forward plans. See *Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants*, 83 Fed. Reg. 683 (Jan. 5, 2018).

²⁴ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (finding statutory support for disparate impact standard).

²⁵ See *Reconsideration of HUD's Implementation of the FHA's Disparate Impact Standard*, 83 Fed. Reg. 28560, 28561 (June 20, 2018) (inviting comment to "determine what changes, if any, may be necessary in light of the *Inclusive Communities* decision").

challenges to the implementation of the rule continue.²⁶ Opponents, including the current Department of Housing and Urban Development (HUD) Secretary, have attacked federal integration efforts as a form of “failed socialism”²⁷ and “social engineering,”²⁸ 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.²⁹ This reality was understood by the key drafters of the FHA. And yet, commentators observe that this

²⁶ For instance, a group of insurance companies are currently challenging the disparate impact regulations in federal court. See *Am. Ins. Ass’n v. HUD*, 74 F. Supp. 3d 30 (D.D.C. 2014), *vacated per curiam*, No. 14-5321, 2015 BL 309063 (D.C. Cir. Sept. 24, 2015), *remand docketed*, No. 13-CV-00966 (D.D.C. 2018).

²⁷ See Ben S. Carson, Opinion, *Experimenting with Failed Socialism Again: Obama’s New Housing Rules Try to Accomplish What Busing Could Not*, WASH. TIMES (July 23, 2015), <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish> [<https://perma.cc/LTN6-M67S>].

²⁸ See *id.*; Thomas B. Edsall, Opinion, *Where Should A Poor Family Live?*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/05/opinion/where-should-a-poor-family-live.html> [<https://perma.cc/X4TV-LY74>] (describing opponents’ claims that HUD’s Affirmatively Furthering Fair Housing (AFFH) rule constitutes “social engineering”); see also Jeremy Carl, *The Obama Administration Thinks Hillary’s Hometown is Racist: Does Congress Agree?*, NAT’L REV. (May 18, 2016, 1:42 PM), <http://www.nationalreview.com/article/435531/obama-administration-thinks-hillarys-hometown-racist-does-congress-agree> [<https://perma.cc/97SW-TMLP>] (“AFFH undercuts the independence of suburbs, towns, and small cities by forcing them to make up for supposed ‘imbalances’ in the racial, ethnic, and class composition of their greater metropolitan regions.”).

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.³⁰ The failure to remedy is linked to the forgetting.³¹ 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.³² 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.³³

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.³⁴ This stands as an example of local resistance to top-down regulatory approaches that appear to force integration.

³⁰ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

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).

³⁴ See Florence Wagman Roisman, *A Place to Call Home? Affordable Housing Issues in America*, 42 *WAKE FOREST L. REV.* 333 (2007); see also ROBERT MASON, *RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY* 149 (2004); CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* (2005).

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

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-bd33-395c05608059_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").

³⁶ See Henry Grabar, *Why Was California's Radical Affordable Housing Bill So Unpopular?*, SLATE (Apr. 20, 2018, 5:22 PM), <https://slate.com/business/2018/04/why-sb-827-californias-radical-affordable-housing-bill-was-so-unpopular.html> [https://perma.cc/HG2F-TN4G] (describing how liberal and progressive communities opposed legislation that would have overridden local controls on density to encourage more affordable housing and integration).

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,³⁸ 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.”³⁹ 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.⁴⁰ 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.⁴¹

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.⁴² 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.⁴³

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.⁴⁴ 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

⁴² See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016–18 (2004) (detailing standard critiques that call into question the democratic legitimacy of public law litigation and its efficacy in producing change in public institutions).

⁴³ See DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995); Jennifer Hochschild & Michael N. Danielson, *Can We Desegregate Public Schools and Subsidized Housing? Lessons from the Sorry History of Yonkers, New York*, in *CHANGING URBAN EDUCATION* 23 (Clarence N. Stone ed., 1998) (drawing lessons from Yonkers about the difficulty of housing and school segregation which coerce remedies that cut against market forces).

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).

move.⁴⁵ Long-term analyses of the *Yonkers* litigation have found benefits for those who moved to lower poverty areas of the city.⁴⁶

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,⁴⁷ which (along with early studies of the federal Moving to Opportunity Program (MTO)⁴⁸) 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).

⁴⁶ See Rebecca C. Fauth et al., *Seven Years Later: Effects of a Neighborhood Mobility Program on Poor Black and Latino Adults' Well-Being*, 49 J. HEALTH & SOC. BEHAV. 119 (2008) (finding employment, mental health, and collective efficacy benefits for those moving to low-poverty neighborhoods).

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).

⁴⁸ The initial studies of the Moving to Opportunity Program, a ten-year demonstration project providing certain voucher holders the ability to use their vouchers to move to lower poverty neighborhoods, found modest effects on mental health outcomes for female youth and adults, but no effect on the reading and math achievement of children or on labor market outcomes for adults. See THE NAT'L BUREAU OF ECON. RES., *A SUMMARY OVERVIEW OF MOVING TO OPPORTUNITY: A RANDOM ASSIGNMENT HOUSING MOBILITY STUDY IN FIVE U.S. CITIES* 4, <http://www.nber.org/mtopublic/MTO%20Overview%20Summary.pdf> [<https://perma.cc/7BTP-QWKN>] (summarizing findings of studies). Later studies, focusing primarily on those who moved as children found significant benefits. See Chetty et al, *supra* note 21; see also Jonathan Rothwell, *Sociology's Revenge: Moving to Opportunity (MTO) Revisited*, BROOKINGS INST. (May 6, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/05/06/sociologys-revenge-moving-to-opportunity-mto-revisited> [<https://perma.cc/4842-7GGF>] (discussing contrast between earlier and older studies).

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.⁴⁹ 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.⁵⁰ 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.⁵¹ 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

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 generally ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006).

⁵¹ For analyses of the *Gautreaux* mobility remedy, see Barbara Sard & Douglas Rice, *Creating Opportunity for Children: How Housing Location Can Make a Difference*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 15, 2014), <http://www.cbpp.org/research/creating-opportunity-for-children> [<https://perma.cc/S4MN-KFWN>]; ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012).

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.⁵² As Professor Florence Roisman has noted, housing mobility programs are the “fruits” of the public housing desegregation litigation.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).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.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

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 *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 *Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017).

⁵³ See Roisman, *supra* note 34, at 346.

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

⁵⁵ See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cty.*, N.Y., 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

continues to be subject to monitoring by the district court.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.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.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

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).

⁵⁷ See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, and 903).

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/baltimore riots/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.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, *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 *Yonkers*. Redesign of the federal programs, however incremental and despite the current and real threats, must be counted as part of the success.

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.⁶⁰ Localities have resisted the imposition of federally-directed remedies, as seen in the resistance to HUD's Open Communities initiative in the 1970s.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.⁶²

⁵⁹ See *An Analysis of the Thompson v. HUD Decision*, *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).

⁶⁰ See Frug, *supra* note 33; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1860-74 (1994) (showing how public and private actions create and sustain racially-identified spaces and are often hidden in law); Gerald Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1069-70 (1996)

⁶¹ See sources cited *supra* note 34 and accompanying text.

⁶² See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (discussing interlocal competition); WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW*

Relatively wealthy communities can use land use mechanisms (such as exclusionary zoning) and taxing to bar entry,⁶³ a phenomenon we might see as a form of opportunity hoarding.⁶⁴ 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.⁶⁵ Localist incentives would seem to point towards segregation.⁶⁶

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.⁶⁷ 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.⁶⁸ 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

HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (discussing limits of Tiebout's model).

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).

⁶⁸ For evidence of the expansion of inclusionary zoning, see Constantine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFF. 716, 717–18 (2014). For a discussion of jurisdictions that have adopted laws prohibiting discrimination based on “source of income,” see Olatunde C. A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 119–22 (2016).

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.⁶⁹ 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.⁷⁰ Their data show that nationwide patterns are less of upward mobility and more of downward mobility for Black males, in particular, across most census tracts.⁷¹ 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.⁷² 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

⁶⁹ See *40 Years Ago: Montgomery County, Maryland Pioneers Inclusionary Zoning*, NAT’L LOW-INCOME HOUSING COALITION (May 16, 2014), <http://nlihc.org/article/40-years-ago-montgomery-county-maryland-pioneers-inclusionary-zoning> [<https://web.archive.org/web/20180503010100/http://nlihc.org:80/article/40-years-ago-montgomery-county-maryland-pioneers-inclusionary-zoning>]. Other jurisdictions had early efforts that went against exclusionary zoning. Massachusetts in 1969 adopted what became known as “anti-snob zoning,” which limited the ability of local governments to avoid the production of affordable housing within their jurisdiction. Connecticut and Rhode Island also enacted similar laws. See Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFF. 295, 297, 308 (2006).

⁷⁰ See RAJ CHETTY ET AL., RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE (Mar. 2018) http://www.equality-of-opportunity.org/assets/documents/race_slides.pdf [<https://perma.cc/C7Y9-GALN>].

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,⁷³ and efforts to build affordable housing in low-poverty neighborhoods are sometimes rejected by particular neighborhoods.⁷⁴ 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.⁷⁵

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.⁷⁶ 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.

⁷⁴ See Dan Reed, *Montgomery County Caves on Affordable Housing Near Metro in Silver Spring and Will Built It Elsewhere*, GREATER GREATER WASH. (Feb. 27, 2018), <https://ggwash.org/view/66673/montgomery-county-rejects-affordable-housing-in-silver-spring-will-build-it-elsewhere> [<https://perma.cc/FV9R-8SQ3>].

⁷⁵ HEATHER SCHWARTZ, HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND (2010), <https://tcf.org/assets/downloads/tcf-Schwartz.pdf> [<https://perma.cc/R6CU-5QYW>].

⁷⁶ For a history of Montgomery County's inclusionary zoning program, see *40 Years Ago: Montgomery County, Maryland Pioneers Inclusionary Zoning*, *supra* note 69. For an account of the role of "enlightened self-interest" in Shaker Heights, Ohio—one of the most famously racially integrated communities—where whites sought to make peace with the influx of Blacks moving to the middle-class suburbs in the 1960s, see Isabel Wilkerson, *Balancing Act; A Special Report; One City's 30-Year Crusade for Integration*, N.Y. TIMES, (Dec. 30, 1991), <https://www.nytimes.com/1991/12/30/us/balancing-act-a-special-report-one-city-s-30-year-crusade-for-integration.html?pagewanted=all> [<https://perma.cc/8NWY-F3UG>].

affordable housing, mobility for voucher holders, weak enforcement of anti-discrimination laws, exclusionary zoning, and displacement).⁷⁷ 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.⁷⁸

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.⁷⁹ And yet, some jurisdictions are continuing to implement the rule, developing AFHs as planned.⁸⁰ 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.⁸¹

⁷⁷ See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, and 903).

⁷⁸ *Id.*

⁷⁹ See Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Recipients, 83 Fed. Reg. 683 (Jan. 5, 2018). Several groups have challenged the suspension of the rule as arbitrary and capricious. See Complaint, Nat'l Fair Hous. All. v. Carson, No. 18-CV-01076 (D.D.C. May, 8, 2018), https://www.aclu.org/sites/default/files/field_document/2018.05.08_ecf_1_affh_complaint.pdf [<https://perma.cc/J9MJ-MCS8>].

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. CTY. SUPERVISOR, DISTRICT 3, (Apr. 27, 2018), <https://supervisorkuehl.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

⁸² See generally CITY OF L.A. & THE HOUS. AUTH. OF L.A., ASSESSMENT OF FAIR HOUSING PLAN 2018–2023 (2017), <https://hcidla.lacity.org/assessment-fair-housing> [https://perma.cc/JTG8-QKAP] (“The Assessment of Fair Housing (AFH) Plan identifies fair housing issues and develops strategies to reduce existing barriers throughout the City of Los Angeles.”).

⁸³ See *id.* at 16 (executive summary).

⁸⁴ See *id.* at 18–20 (listing key goals and strategies).

⁸⁵ See Supportive Housing Fair Share Res., L.A. City Council File Number: 17-0090-S3 (Cal. 2017), http://clkrep.lacity.org/onlinedocs/2017/17-0090-s3_reso_02-21-2018.pdf [https://perma.cc/44KX-ZTNE] (setting goal of building at least 10,000 units of supportive housing over the next 10 years).

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 levels⁸⁷ (which has, predictably, led to push back from conservative lawmakers at the state level to thwart these local efforts⁸⁸). 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.⁸⁹ 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.⁹⁰

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).

⁹⁰ See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, (Future of Housing Policy in the U.S. Conference, Working Paper) (forthcoming 2018), <https://furtheringfairhousing.mit.edu/sites/default/files/documents/Steil%20Kelly%20Fairest%20of%20them%20All%202018%2005%2008.pdf> [https://perma.cc/ZSW7-X9F6] (analyzing all of the twenty-eight AFH plans submitted between October 2016 and July 2017).

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.⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴

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.⁹⁵ 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

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).

⁹³ See David Card et al., *Are Mixed Neighborhoods Always Unstable? Two-Sided and One-Sided Tipping* (Nat’l Bureau of Econ. Research Working Paper No. 14470, Nov. 2008), <http://www.nber.org/papers/w14470.pdf> [<https://perma.cc/54UN-3SL4>] (describing the point at which integrated neighborhoods “tip” and become majority minority due to white flight or avoidance).

⁹⁴ See EDWARD G. GOETZ, *THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES* 58–60 (2018).

⁹⁵ See, e.g., Anne Frantilla, *The Seattle Open Housing Campaign, 1959–1968—Detailed Narrative*, SEATTLE MUN. ARCHIVES, <https://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/the-seattle-open-housing-campaign/open-housing-narrative> [<https://perma.cc/M8RB-LLYA>] (last visited Dec. 26, 2018) (describing social movement and voluntary integration pressures led by African Americans, civil rights activists, and interracial faith leaders and groups).

against segregated schools and housing and lack of access to sufficient housing opportunities.⁹⁶ 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,⁹⁷ social inclusion,⁹⁸ and creating equitable “all-in” cities and places.⁹⁹

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.¹⁰⁰ 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

⁹⁶ See THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008).

⁹⁷ See EVAN BISSEL ET AL., *HASS INST. FAIR & INCLUSIVE SOC’Y AT U.C. BERKELEY, HOUSING POLICY AND BELONGING IN RICHMOND* (2018), https://haasinstitute.berkeley.edu/sites/default/files/haasinstitute_housingandbelongingrichmond_pspring_jan11.pdf [<https://perma.cc/42M7-ZMQF>] (discussing programs to create “belonging” in East Bay, California, and expand who participates in the structure of communities and the development of housing policy).

⁹⁸ See *generally About*, *CTR. SOC. INCLUSION*, <https://www.centerforsocialinclusion.org/about/> [<https://perma.cc/8NJT-HVUM>] (last visited Dec. 26, 2018) (discussing goals of promoting participation, equity, and inclusion).

⁹⁹ See Angela Glover Blackwell, *The Case for All-In Cities*, *NATURE CITIES* (Oct. 23, 2015), <https://www.thenatureofcities.com/2015/10/23/the-case-for-all-in-cities> [<https://perma.cc/UYZ9-K4J9>].

¹⁰⁰ See *About*, *BLDG. ONE AM.*, <https://buildingoneamerica.org/content/about-building-one-america-0> [<https://perma.cc/JL53-D2JE>] (last visited Dec. 26, 2018).

diverse suburbs and their residents.¹⁰¹ The movement also reflects moral and ideological commitments to integration and inclusion.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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

¹⁰¹ See BLDG. ONE AM., 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 . . .”).

¹⁰³ See Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88, 89 (2009); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING 113, 113–14 (2008).

¹⁰⁴ See NICOLE MADER ET AL., CTR. FOR N.Y.C. AFF., *THE NEW SCH., THE PARADOX OF CHOICE: HOW SCHOOL CHOICE DIVIDES NEW YORK CITY’S ELEMENTARY SCHOOLS* (2018), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a61c8758d46599ed10013/1530552778646/Paradox+of+Choice.pdf> [<https://perma.cc/5X5W-KE75>].

funding from the state),¹⁰⁵ the passage of a city law requiring reporting and data on school diversity,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.¹⁰⁷

These efforts are not without challenges and resistance, but there are signs that these efforts are leading to systemic change.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.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.¹¹⁰ The plans have started off small, but in the words of one parent, “it has to start somewhere.”¹¹¹

¹⁰⁵ See Christina Veiga, *Five New York City School Districts Putting Integration on the Map*, CHALKBEAT (Oct. 5, 2016), <https://www.chalkbeat.org/posts/ny/2016/10/05/five-new-york-city-school-districts-putting-integration-on-the-map> [https://perma.cc/B2C2-ZQEZ].

¹⁰⁶ See Brad Lander, *City Council Passes “School Diversity Accountability Act”*, N.Y.C. COUNCILMEMBER BRAD LANDER (May 27, 2015), <http://bradlander.nyc/news/updates/city-council-passes-school-diversity-accountability-act> [https://web.archive.org/web/20170113080746/http://bradlander.nyc/news/updates/city-council-passes-school-diversity-accountability-act].

¹⁰⁷ See Christina Veiga, *Efforts to Integrate Schools in One Corner of New York City Show Promise, According to New Data*, CHALKBEAT (Mar. 22, 2018), <https://chalkbeat.org/posts/ny/2018/03/22/efforts-to-integrate-schools-in-one-corner-of-new-york-city-show-promising-signs-according-to-new-data> [https://perma.cc/PFG5-4DLN].

¹⁰⁸ See *id.*

¹⁰⁹ See Press Release, The Civil Rights Project, *New York Schools Most Segregated in the Nation* (Mar. 26, 2014), https://www.civilrightsproject.ucla.edu/news/press-releases/2014-press-releases/new-york-schools-most-segregated-in-the-nation/CRPRelease_NY-v6.pdf [https://perma.cc/LMD8-RFY8].

¹¹⁰ See INTEGRATE N.Y.C., <https://www.integratenyc.org> [https://perma.cc/QML9-Y3WT] (last visited Dec. 26, 2018) (describing creation of “IntegrateUS,” a nationwide student-led school integration effort).

¹¹¹ See Winnie Hu, *‘It Has to Start Somewhere’: Grass-Roots Drive to Integrate New York Schools*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/nyregion/it-has-to-start-somewhere-grass-roots-drive-to-integrate-new-york-schools.html> [https://perma.cc/G57M-2VY5].

CONCLUSION

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.