

SYMPOSIUM THE FAIR HOUSING ACT AFTER 40 YEARS: CONTINUING THE MISSION TO ELIMINATE HOUSING DISCRIMINATION AND SEGREGATION

LIVING TOGETHER: ENDING RACIAL DISCRIMINATION AND SEGREGATION IN HOUSING

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There is no such thing as the State
And no one exists alone;
Hunger allows no choice
To the citizen or the police;
We must love one another or die.¹
W.H. Auden

This year marks the fortieth anniversary of three major events with respect to residential racial discrimination and segregation in the United States: the enactment of the “comprehensive” Federal Fair Housing Act of 1968, the Supreme Court’s holding that the 1866 Civil Rights Act prohibits racial discrimination in the sale and rental of property even where there is no state action, and the assassination of the Reverend Dr. Martin Luther King, Jr.²

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This Article is dedicated to my beloved granddaughter, Cassandra Julieann Roisman, with the ardent hope that she and her contemporaries will mature in a much more just, peaceful, and civilized world than that into which they were born.

1. W.H. Auden, *September 1, 1939*, in *ANOTHER TIME: POEMS BY W.H. AUDEN* 112, 114 (1940). Cf. EDWARD MENDELSON, *EARLY AUDEN* 325-26 (1981) (stating that Auden later omitted this stanza from his collected poetry and still later changed the last line to “We must love one another and die”).

2. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (2000); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that the Civil Rights Act of 1866, now codified in part at 42 U.S.C. § 1982, applies to private as well as public discrimination on the basis

Although the 1968 Fair Housing Act has prohibited residential racial discrimination and segregation for forty years, and the 1866 Act has prohibited them for more than a century, the United States still is characterized by substantial racial discrimination with respect to the sale, rental, and occupancy of housing and by pervasive racial residential segregation.³ Recognizing this, the *Indiana Law Review* determined to devote its 2008 Symposium Issue to exploring this matter. The editors invited some of the leading scholars and practitioners in the field to contribute papers and to participate in a live discussion on April 3-4, 2008. We were honored that Theodore Shaw, retiring as Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc. and now a professor at Columbia Law School, agreed to open the Symposium with a keynote address and close it with his vision of the future in a "Post-Affirmative Action America." We also were honored by the willingness of other distinguished researchers, academics, and practitioners to write for this Issue. Most, though not all, were able also to present their papers in April.⁴

Professor Monroe H. Little, Jr. sets the context for the Symposium with his perceptive tribute to Dr. King. Professor Little writes that Dr. King "has been reduced to a mere dreamer" who allegedly advocated a color-blind society, a "one-dimensional caricature of the real King" who fought against war, white privilege, and economic injustice.⁵ Professor Little reminds us that the real Dr. Martin Luther King, Jr. admonished that "[a] society that has done something special *against* the Negro for hundreds of years must now do something special *for* him, in order to equip him to compete on a just and equal basis."⁶ He renews Dr. King's urging that whites "reject[] . . . white privilege and the normed inequities of the white polity . . . [to] be able to stand together with non-whites in speaking out, struggling against and dismantling the politicoeconomic system of white supremacy" that perpetuates racial discrimination and segregation with respect to housing and all other resources and services.⁷

One point is common ground for the participants in this Symposium: all

of race); JULES WITCOVER, *THE YEAR THE DREAM DIED: REVISITING 1968 IN AMERICA* 152-53 (1997).

3. See generally JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 719 (2008).

4. Those who presented are: Michael Allen, Jeannine Bell, Elizabeth K. Julian, James A. Kushner, John A. Powell, John P. Relman, Florence Wagman Roisman, James E. Rosenbaum, Robert G. Schwemm, and Margery Austin Turner. Those who contributed to this Issue, but were unable to participate in April are: Leonard Rubinowitz, Kathryn Shelton, and Stefanie DeLuca.

5. Monroe H. Little, Jr., *More Than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 524 (2008).

6. *Id.* at 536 (quoting MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 105-06 (Bantam Books 1968) (1967)).

7. *Id.*

agree that the Fair Housing Act was intended to end both discrimination and segregation and has not been fully successful in either respect.⁸ Margery Austin Turner summarizes the most recent evidence on these topics, showing (among other things) that there still is substantial discrimination against minorities seeking to acquire housing, mortgage loans, and home insurance, and that levels of racial and economic segregation continue to be high, especially in large urban areas with large minority populations.⁹ John Powell emphasizes one especially shocking result of the studies: that a particular form of discrimination, steering, “does not appear to have decreased since tougher fair housing” enforcement requirements were imposed by the Fair Housing Amendments Act of 1988.¹⁰ “In fact,” he writes, “the incidence of Black/White segregation steering appears to have increased.”¹¹ Jeannine Bell provides a chilling discussion of both old and recent cases in which whites used violence to prevent minorities from living in neighborhoods that whites had claimed as their own.¹²

8. Although the statute does not use the word “integration,” the Supreme Court has said, and other courts and commentators generally agree, that one of the goals of the statute was integration. *See, e.g., Hills v. Gautreaux*, 425 U.S. 284, 299 (1976) (stating that the actionable “wrong committed by HUD confined the respondents to segregated public housing”); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (adopting the statement of Senator Walter Mondale, a drafter of the legislation, that “the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns’” (quoting 114 Cong. Rec. 3422 (1968))); Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 559 (2008); John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 615 (2008) (noting that the goals of integration and anti-discrimination may sometimes conflict); Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 717-19 (2008) [hereinafter Schwemm, *Discriminatory Municipal Services*]; Turner, *supra* note 3, at 814-15.

9. Turner, *supra* note 3, at 800-03; *see also* Julian, *supra* note 8, at 555-59; Powell, *supra* note 8, at 620-27.

10. Powell, *supra* note 8, at 613 (quoting George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLANN. ASS’N 251, 253 (2005)); *see also* Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619.

11. Powell, *supra* note 8, at 613 (quoting Galster & Godfrey, *supra* note 10, at 253); *accord* Turner, *supra* note 3, at 803-06.

12. *See generally* Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537 (2008). Note in this connection Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, in *FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA* 206, 209 (John F. Bauman et al. eds., 2000) (quoting GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944) for the proposition that New Deal programs extended “‘protection’ to areas and groups of white people who were earlier without it” and stating that “[t]he result was that the emergent sense of entitlement that appeared after World War II embraced not merely the fact of property ownership, but a broader conception of homeowners’ rights that included the assumption of a racially exclusive neighborhood”); *see also* JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* *passim* (2005); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* 209-58

Given that the goals of the statute have not been achieved, the obvious questions are: Why not? and What can we do to improve the situation? To what extent and in what ways do we need improved enforcement of the Fair Housing Act? To what extent and in what ways do we need changes in judicial interpretation of the Act? To what extent and in what ways do we need legislative changes in the Act itself? What other kinds of changes are required if we are to eliminate residential racial discrimination and segregation in the United States?

Our contributors provide a basis for answering these questions. They consider the creation of the Fair Housing Act, the inevitable political compromises that marked its enactment, and the consequences of those agreements. They offer a menu of suggested improvements in the battle for truly fair and open housing and access to opportunities.

We begin with an exploration of the relationship between the enactment of Title VIII and the Chicago Freedom Movement (“CFM”) of which Dr. King was a leader.¹³ Leonard Rubinowitz and Kathryn Shelton conclude that while reactions to the CFM probably contributed to the defeat of federal fair housing legislation in 1966, the CFM—and Dr. King’s assassination—may well have helped to persuade Congress to enact such legislation in 1968.¹⁴ The analysis of this legislative activity should inform proposals to amend the Fair Housing Act now.¹⁵

(1996).

13. Leonard S. Rubinowitz & Kathryn Shelton, *Non-Violent Direct Action and the Legislative Process: The Chicago Freedom Movement and the Federal Fair Housing Act*, 41 IND. L. REV. 663, 663-64 (2008); see also Julian, *supra* note 8, at 559 (suggesting that “the difficult compromises involved in securing” the adoption of Title VIII may have caused its relative ineffectiveness); Schwemm, *Discriminatory Municipal Services*, *supra* note 8, at 756-78 (providing an analysis of the legislative history of the statute, particularly with regard to the two issues Professor Schwemm addresses).

14. See generally Rubinowitz & Shelton, *supra* note 13. It also is reasonable to infer that Dr. King’s assassination and the riots it caused significantly influenced the Supreme Court in its decision in *Jones v. Alfred H. Mayer Co.*, reinterpreting the 1866 Civil Rights Act to apply to private action. See THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 731 (Del Dickson ed., 2001) (referring to the decision as “[a] dramatic reinterpretation of § 1982”); *id.* at 729 (noting that the Justices’ first discussion of the case in conference took place on the day after Dr. King’s assassination and stating that “[a]s the Justices deliberated, much of Washington, D.C., was beset by violent race riots”). The case was decided on June 17, 1968, less than two weeks after the June 5 shooting and June 6 death of presidential candidate Robert F. Kennedy. WITCOVER, *supra* note 2, at 259. The Supreme Court’s conferences on the case, however, were held on April 5 and April 19, before the murder of Senator Kennedy. THE SUPREME COURT IN CONFERENCE, *supra*, at 729-30.

15. See Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 360-63 (2007) (discussing the legislative history of the 1968 Act); Mara S.

One of the principal problems with enforcement of the Act, identified by several participants, has been the fair housing movement's "relatively singular focus . . . on individual acts of discrimination."¹⁶ Margery Austin Turner, for example, reviews studies of knowledge and exercise of fair housing rights.¹⁷ She reports that most people seem to know what rights are established by fair housing laws, but "most people who experience discrimination fail to act."¹⁸ "Only 1% of the people who believed that they experienced discrimination went to a fair housing group; 1% filed a complaint with a government agency; and 2% consulted a lawyer."¹⁹ Most of these people thought that complaining "would not have been worth the effort . . . or . . . would not have helped" much.²⁰

Such findings as these show that reliance on individual complaints cannot be expected to lead to the elimination of residential racial discrimination and segregation.²¹ Turner prescribes more enforcement that does not rely on complaints from individuals, such as increased government funding for "proactive paired testing" of housing providers, lenders, brokers, and insurance providers.²² Similarly, John Powell urges the Department of Justice to increase testing, "pattern or practice" claims, and all forms of housing enforcement, noting that in recent years the Department of Justice has filed far fewer cases than in the past.²³ Others have proposed structural changes in the statute.²⁴

Robert Schwemm, John Relman, and John Powell address judicial enforcement of the Fair Housing Act.²⁵ As Professor Schwemm reminds us,

Sidney, *Images of Race, Class, and Markets: Rethinking the Origin of U.S. Fair Housing Policy*, 13 J. POL'Y HIST. 181 (2001).

16. Julian, *supra* note 8, at 559.

17. Turner, *supra* note 3, at 803-06.

18. *Id.* at 805.

19. *Id.* at 806 (citing MARTIN D. ABRAVANEL, U.S. DEP'T OF HOUS. & URBAN DEV., DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW 36 (2006)).

20. *Id.* (citing ABRAVANEL, *supra* note 19, at 36-37); *see also* TOI DERRICOTTE, THE BLACK NOTEBOOKS 67 (1997) (describing the decision of sophisticated victims of discrimination not to challenge it).

21. *See* John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1585 (1993) (noting that "experience [with other civil rights laws] has shown that effective compliance strategies cannot rely upon the punishment of individual acts of misconduct. Instead they require the design of affirmative, system-wide remedies").

22. Turner, *supra* note 3, at 814-15.

23. Powell, *supra* note 8, at 616; *cf.* James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575, 596-97 (2008) (noting that "Title VIII . . . never received administrative and enforcement leadership or adequate funding").

24. *See* Boger, *supra* note 21, at 1601-15 (proposing a federal "fair share" plan to promote residential racial integration).

25. *See* Schwemm, *Discriminatory Municipal Services*, *supra* note 8; John P. Relman,

although the Supreme Court in the past admonished that the Fair Housing Act implements “a ‘policy that Congress considered to be of the highest priority,’ and that [the Act] should be given a ‘generous construction,’”²⁶ some post-1968 presidents have appointed to the federal bench many who are not proponents of civil rights, so that “the modern federal judiciary has grown so hostile to civil rights that decisions narrowing the coverage of the Nation’s anti-discrimination laws have become the norm.”²⁷

Against this background, Professor Schwemm analyzes two important issues being re-interpreted by conservative federal courts. The first issue is whether homeowners in a predominantly Black neighborhood may maintain claims under the Fair Housing Act if municipal services provided to them are grossly inferior to the services provided to white neighborhoods.²⁸ The Fifth Circuit held in *Cox v. City of Dallas, Texas*²⁹ that such suits may not be maintained under the Fair Housing Act, except perhaps where the lack of services constitutes constructive eviction.³⁰ The second issue is broader—whether people already in their homes, as distinguished from people who are seeking homes, ever have claims cognizable under the Fair Housing Act.³¹ In *Halprin v. Prairie Single Family Homes of Dearborne Park Ass’n*,³² the Seventh Circuit held that they do not.³³ Professor Schwemm, after a detailed examination of other cases involving these issues and the language, legislative history, and administrative interpretation of the 1968 Act, concludes that the analyses in *Cox* and *Halprin* “are so flawed—and . . . have so misconstrued § 3604(b) of the [Fair Housing Act]—that they should be rejected by other federal and state courts.”³⁴

Both John Relman and John Powell write about the application of fair housing principles to the predatory lending crisis.³⁵ Relman urges the use of “creative litigation strategies to break down barriers to spatial and racial mobility, and shore up transitional minority neighborhoods struggling to hang on

Foreclosures, Integration, and the Future of the Fair Housing Act, 41 IND. L. REV. 629 (2008); Powell, *supra* note 8, at 615-16.

26. Schwemm, *Discriminatory Municipal Services*, *supra* note 8, at 720 n.11 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-12 (1972)).

27. *Id.* at 720; see also Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1600 (2003) (making the same point about the federal judiciary with respect to school desegregation cases).

28. See generally Schwemm, *Discriminatory Municipal Services*, *supra* note 8.

29. 430 F.3d 734, 746 (5th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006).

30. See generally Schwemm, *Discriminatory Municipal Services*, *supra* note 8.

31. See generally *id.*

32. 308 F.3d 327 (7th Cir. 2004).

33. *Id.* at 330.

34. Schwemm, *Discriminatory Municipal Services*, *supra* note 8, at 795; see also Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 215-22 (2006).

35. Relman, *supra* note 25, at 629-32; Powell, *supra* note 8, at 620-27.

in the face of rising foreclosures.”³⁶ His article focuses on litigation in which he represents the Mayor and City Council of Baltimore, Maryland, in a suit challenging a major lender “for targeting [Baltimore’s] minority communities for discriminatory lending practices that [Baltimore] alleges have resulted in unnecessarily high rates of foreclosure.”³⁷ powell writes about both the Baltimore suit and litigation in Cleveland that invokes public nuisance doctrine against those it charges with responsibility for the foreclosure crisis in that city.³⁸ powell’s article discusses the background to and theory of the suit and concludes with consideration of “the implications that the remedies sought by Baltimore have for the broader struggle to promote integration.”³⁹

The “broader struggle to promote integration” provides the basis for substantial and important discussion among the contributors. Several write about the importance of achieving both racial and economic integration. Margery Austin Turner reports on recent studies that show that residential segregation severely limits access to economic opportunity with respect to employment, education, and home values.⁴⁰ The merits of residential racial and economic integration are documented also by James E. Rosenbaum and Stefanie DeLuca, who discuss some of the lessons to be learned from two major programs that have allowed poor families of color to move to neighborhoods with less poverty—the *Gautreaux* Housing Mobility Program and the Federal Moving to Opportunity (“MTO”) experiment.⁴¹

The *Gautreaux* program enabled poor, Black families living in or eligible for Chicago public housing to move to predominantly white, suburban communities outside Chicago where schools, employment opportunities, and safety were much better than in city neighborhoods.⁴² MTO allowed some public housing families to move to areas with less poverty, though the areas still might be predominantly minority. Many of the MTO children attended “schools in the same school district (often the same schools), and even when they changed schools, the new schools were not much better than the original schools.”⁴³ Continuing more than

36. Relman, *supra* note 25, at 630.

37. *Id.* (citing Complaint for Declaratory and Injunctive Relief and Damages ¶ 6, Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., No. 1:08-cv-062-BEL (D. Md. filed Jan. 8, 2008), 2008 WL 117894)).

38. powell, *supra* note 8, at 620-27.

39. *Id.*

40. Turner, *supra* note 3, at 809-13 (noting, *inter alia*, that “high levels of segregation have been shown to increase high school drop-out rates among blacks, reduce employment among blacks . . . , and widen the gap between black and white wages”).

41. See generally James E. Rosenbaum & Stefanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago Gautreaux Housing Program and Recent Mobility Programs*, 41 IND. L. REV. 653 (2008).

42. *Id.* at 654; see also powell, *supra* note 8, at 616-17 (stating that there no longer is a clear division between suburbs with high opportunities and central cities with low opportunities, because more poor people live in the suburbs than in the cities).

43. Rosenbaum & DeLuca, *supra* note 41, at 660. For more information about MTO, see

two decades of research, Rosenbaum and DeLuca describe both quantitative and qualitative studies, concluding that “[t]he *Gautreaux* findings suggest that it is possible for low-income black families to make permanent escapes from neighborhoods with concentrated racial segregation, crime, and poverty and that these moves are associated with large significant gains in education, employment, and racially integrated friendships, particularly for children.”⁴⁴ They also describe research they believe should be undertaken to explore further the possibilities of these housing mobility programs.⁴⁵ That the results of MTO were less encouraging than the results of the *Gautreaux* program strongly suggests the importance of using race-conscious remedies. As Justice Blackmun wrote in 1978, “[T]o get beyond racism, we must first take account of race.”⁴⁶ Betsy Julian criticizes the use of MTO research “to argue against policies that support racial and economic integration”⁴⁷ and states that this use of the research “reflects less a policy concern that housing mobility will not succeed than a political concern that it will.”⁴⁸

These articles make a strong case for the development of more housing mobility programs designed to promote racial as well as economic integration. Margery Austin Turner builds on this by recommending specific incentives for pro-integrative moves, including downpayment assistance, low-interest loans, equity insurance, and improvements for schools, police protection, and recreational and other facilities in integrated neighborhoods.⁴⁹ In this vein, several participants discuss the importance of applying fair housing principles in the implementation of particular public programs that in the past have created

generally John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 127 (Xavier de Souza Briggs ed., 2005) [hereinafter *THE GEOGRAPHY OF OPPORTUNITY*].

44. Rosenbaum & DeLuca, *supra* note 41, at 662. Accord Julian, *supra* note 8, at 563-65; see also, e.g., LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 83-172 (2000); James Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519 (1993); James E. Rosenbaum et al., *Low-Income Black Children in White Suburban Schools: A Study of School and Student Responses*, 56 J. NEGRO EDUC. 35, 35-43 (1987); James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 43, at 150, 156-70. For citations to other research reports on the *Gautreaux* program, see Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 507-08 (1995) (book review); see generally with respect to the *Gautreaux* litigation, ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006).

45. Rosenbaum & DeLuca, *supra* note 41, at 661-62.

46. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

47. Julian, *supra* note 8, at 563.

48. *Id.* at 564.

49. Turner, *supra* note 3, at 815-16.

and perpetuated discrimination and segregation, including “federal homeownership assistance, public housing, urban renewal, and exclusionary zoning and land use regulations.”⁵⁰ Julian writes about the HOPE VI public housing program, which has been used to exacerbate racial segregation, and urges that it be redesigned to satisfy the statutory directive that HUD “affirmatively further” the purposes of the Fair Housing Act.⁵¹ Both she and John Powell focus on the Low Income Housing Tax Credit (“LIHTC”) program, administered by the Treasury Department and state housing finance agencies, urging that it be administered in a way that promotes residential desegregation.⁵² Julian also discusses the importance of land use regulation as a tool of racial exclusion.⁵³ To redress the segregatory effect of past zoning and other land use strictures, and to turn such controls into tools for residential integration, we must look to federal and state rather than local governance of land use, so that decisions are made on the basis of the general welfare rather than on the basis of the perceived welfare of a small, self-centered community.⁵⁴ Inclusionary zoning ordinances hold much promise as tools for promoting economic and racial inclusion.⁵⁵

Two articles provide broad visions of the past forty years and proposals for the future. In one, James Kushner surveys urban evolution in the United States from 1945 through 2008, identifying four past phases, the most recent (1990-2008) characterized by the hypersegregation⁵⁶ named by Douglas Massey and Nancy Denton in their seminal book, *American Apartheid*.⁵⁷ Kushner hypothesizes that the United States may be entering a fifth phase of “Smart

50. *Id.* at 807 n.66.

51. Fair Housing Act, 42 U.S.C. §§ 3608(d), 3608(e)(5) (2000); Julian, *supra* note 8, at 566-69; *see* Roisman, *supra* note 15, at 353-68 (discussing the meaning of the “affirmatively further” obligation).

52. Julian, *supra* note 8, at 569-71; *see also* Powell, *supra* note 8, at 618-20; Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747 (2005); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998).

53. Julian, *supra* note 8, at 571-73; *see also* Kushner, *supra* note 23, at 602 (noting that “traditional urban planning and land regulation have rendered the nation more segregated by race, ethnicity, and class”); Powell, *supra* note 8, at 614 (discussing exclusionary zoning).

54. *See* *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (“It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 95-98 (2001).

55. Kushner, *supra* note 23, at 597-603; *see, e.g.*, Valerie Feldman, *Local Land-Use Advocacy: Inclusionary Zoning to Achieve Economic and Racial Integration*, 42 CLEARINGHOUSE REV. 61 (2008).

56. *See generally* Kushner, *supra* note 23.

57. MASSEY & DENTON, *supra* note 3.

Growth.”⁵⁸ Kushner, while emphasizing that he “remains an unadulterated integrationist,”⁵⁹ identifies three developments that he says provide “reason to question the value of integration and diversity in contemporary American culture.”⁶⁰ These are (1) a study showing that some Black people prefer neighborhoods in which other Black people live,⁶¹ (2) a study by Edward Glaeser and Joseph Gyourko suggesting “that greater ethnic diversity in the United States is the reason for significantly lower social welfare spending in America as compared to Europe,”⁶² and (3) reports about recent research by Professor Robert Putnam, who writes that “[i]n the short to medium run, . . . immigration and ethnic diversity challenge social solidarity and inhibit social capital.”⁶³

In the other article, Betsy Julian takes us back to the 1968 Kerner Commission report, whose “basic conclusion” was that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.”⁶⁴ The Commission warned that “[t]o continue present policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying areas.”⁶⁵ Responding to the concerns expressed by the Kerner Commission, the Fair Housing Act was designed to undo racial and economic segregation and “to address the twin evils of Jim Crow: separate and unequal.”⁶⁶ That effort produced two movements, she writes—fair housing and community development—but each came to focus on only one of the evils and therefore ended by perpetuating both.⁶⁷ Her call is for “advocates from the fair housing and community development movements [to] overcome their longstanding divide” in order to end both evils at which the Kerner Commission Report and the Fair Housing Act were aimed.⁶⁸

58. Kushner, *supra* note 23, at 597-601.

59. *Id.* at 599.

60. *Id.*

61. Patrick J. Bayer et al., *A Unified Framework for Measuring Preferences for Schools and Neighborhood*, 115 J. POL. ECON. 588 (2007).

62. Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Harvard Inst. of Econ. Research, Working Paper No. 1948, 2002), <http://www.economics.harvard.edu/pub/hier/2002/HIER1948.pdf>.

63. Kushner, *supra* note 23, at 600 (citing Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds that Diversity Hurts Civil Life. What Happens When a Liberal Scholar Unearths an Inconvenient Truth?*, BOSTON GLOBE, Aug. 5, 2007, at D1); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137, 138 (2007).

64. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968) (commonly known as the Kerner Commission Report). The Commission was appointed by President Johnson in 1967 to investigate the causes of civil disorders.

65. *Id.* at 22.

66. Julian, *supra* note 8, at 558.

67. *Id.* at 557-58.

68. *Id.* at 565.

As Julian details, the struggle for racial and economic integration has been “both socially uncomfortable and politically difficult,” leading many to seek to avoid it.⁶⁹ She points out that current legal and academic developments have “reinvigorated those who would argue that the goal of an integrated society is utopian at best and undesirable or even illegal at worst.”⁷⁰ She refers principally to the Supreme Court’s decision in the Seattle and Louisville voluntary integration cases,⁷¹ to the use of MTO research results to cast doubt on the successes of *Gautreaux*, and to commentary about Professor Putnam’s research.⁷²

The anti-integration attacks cited by Kushner and Julian focus our attention on a fundamental problem with achieving the goals of the Fair Housing Act: that many people who possess—or perceive that they possess—power and privilege do not support any action they fear might reduce their power and privilege. As Margery Austin Turner reports, “considerable evidence suggests that the fears of white people perpetuate neighborhood segregation,” the fears being “that an influx of minorities into their neighborhood will inevitably lead to a downward spiral of declining property values, rising crime, and white flight.”⁷³

There are dispositive responses to each of the anti-integration arguments cited by Kushner and Julian. As to “Black preference,” while there is no doubt that some Blacks demonstrate a preference for neighborhoods with significant Black occupancy, it also still is true that, as Kenneth Clark noted decades ago, because Blacks well know that they will meet hostility in many white neighborhoods, no study can show what Blacks would choose if they were truly free to make a choice.⁷⁴ Moreover, virtually all studies agree that Black choice

69. *Id.* at 556.

70. *Id.* at 561.

71. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

72. Julian, *supra* note 8, at 561 (discussing *Parents Involved in Cmty. Schs.*, 127 S. Ct. 2738); *id.* at 563–65 (discussing MTO and *Gautreaux*); *id.* at 562 (discussing Putnam’s research).

73. Turner, *supra* 3, at 814.

74. See KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 234 (1965) (stating that “many liberal whites believe that Negroes prefer to live together. . . . No one will ever, in fact, know whether Negro culture *does* bind its members together until Negroes have the freedom others have to live anywhere”); accord SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 17 (2004) (“Knowing the history of discrimination and hostility against them, it is not surprising that many blacks would consider an overwhelmingly black neighborhood more attractive than an overwhelmingly white one.”); Sheryll Cashin, *Dilemma of Place and Suburbanization of the Black Middle Class*, in *THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE* 87, 89 (Robert D. Bullard ed., 2007) (stating that middle-class Black families “are frequently forced to choose between a black enclave that comes with some costs but provides a spirit-reviving balm against the stress of living as a black person in America, or a community that offers a wealth of opportunities and benefits but where they would be vastly outnumbered by whites, a kind of integration they may not want” (footnotes omitted)); see also Bell, *supra* note 12, *passim*; John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-The-Future Essay*, 71 N.C. L. REV. 1487, 1492 (1993) (“offer[ing] a critique of residential integration as tokenistic,

is a relatively small part of the explanation for residential racial segregation.⁷⁵

As to the point that the goal of racial integration reduces the amount of money spent on social programs, this is not a surprise; indeed, it is part of the problem for which integration is a solution. As Betsy Julian writes, the white majority in the United States long has offered a deal with the Devil—if advocates for social justice want resources devoted to social programs, they will have to allow those programs to be racially separate. But history and social science show that separate is inherently unequal with respect to housing, healthcare, recreation, and the environment—with respect to everything, not simply with respect to education.⁷⁶ This is precisely why Julian urges that those concerned with improving the housing and neighborhood conditions of Blacks and other minorities insist upon recognition that the origins of and solutions for those problems lie in race consciousness.⁷⁷

The story of the reports about the Putnam research provides a particularly important object lesson for us. The Putnam research is about diversity created by immigration, not by racial difference, and its methodology and conclusions, though only preliminary, have been the subject of significant criticism.⁷⁸ Robert

gradualistic, and subordinating”); Julian, *supra* note 8, at 560 (noting that the goal of integration always has been undermined not only by hostile whites but also by people of color who “rightly found offensive any notion that they must live among whites to be able to access equal opportunity”); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937 (2002) (finding that the preferences of Blacks “are driven not by solidarity or neutral ethnocentrism but by fears of white hostility”); see also discussion of steering, *supra* p. 509.

75. See Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 396 (2004) (stating that while “[t]here is new evidence to support the existence of self-segregation among blacks . . . , this effect appears smaller than the effect of self-segregation among whites”). For earlier authority for the proposition that residential segregation is not generally the result of Black preference, see Roisman, *supra* note 44, at 487-88 n.47.

76. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954); MASSEY & DENTON, *supra* note 3; Turner, *supra* note 3.

77. See Julian, *supra* note 8, at 559 n.22 (explaining that this was why liberals in 1949 “preserved” the public housing program by allowing it to be racially segregated); see generally with respect to other social welfare programs, IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005); ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

78. Casey J. Dawkins, *Reflections on Diversity and Social Capital: A Critique of Robert D. Putnam’s “E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture,”* 19 HOUSING POL’Y DEBATE 208 (2008) (criticizing “methodological and conceptual limitations of the study”); see also BARBARA ARNEIL, *DIVERSE COMMUNITIES: THE PROBLEM WITH SOCIAL CAPITAL* (2006) (suggesting that what has been perceived as increased division and distrust has led to increased justice for women and cultural minorities). An important

Putnam himself has emphasized that “[i]ncreased immigration and diversity are not only inevitable, but over the long run they are also desirable. Ethnic diversity is, on balance, an important social asset”⁷⁹ He cautions that “[i]t would be unfortunate if a politically correct progressivism were to deny the reality of the challenge to social solidarity posed by diversity. It would be equally unfortunate if an ahistorical and ethnocentric conservatism were to deny that addressing that challenge is both feasible and desirable.”⁸⁰

Nonetheless, precisely what Professor Putnam has warned against has happened: his article has been seized upon as a purported justification for rejecting the goal of integration. David Brooks wrote in the *New York Times*: “[I]t could be the dream of integration itself is the problem. It could be that it was like the dream of early Communism—a nice dream, but not fit for the way people really are.”⁸¹ And David Brooks is not alone. As Professor Kushner reported, other “opinion makers” used the Putnam article as a basis for challenging the goal of integration.⁸² The *New York Times Magazine* recently gave more credence to this idea, citing the Putnam research and reporting the suggestion “that living in close proximity to other races—sharing industries and schools and sports arenas—actually makes Americans less sanguine about racial harmony rather than more so.”⁸³

This campaign against integration is not an accident. The identification of integration with Communism is not an accident. These articles all reflect a broad-ranging attack on the goals of integration, an attack in every forum—courts, legislatures, agencies, media, and, most importantly, the public mind. David Brooks speaks for this campaign when he writes: “[M]aybe integration is not in the cards. Maybe the world will be as it’s always been, a collection of insular compartments whose fractious tendencies are only kept in check [sic] by constant maintenance.”⁸⁴

forthcoming book by Sheila Suess Kennedy analyzes the Putnam findings and questions their persuasiveness. SHEILA SUESS KENNEDY, *DISTRUST, AMERICAN STYLE: DIVERSITY AND OUR CRISIS OF PUBLIC CONFIDENCE* (forthcoming 2009) (manuscript on file with *Indiana Law Review*) (citing other critical analyses of Putnam’s thesis and pointing out, inter alia, that the fact that increased diversity and decreased trust may have occurred at the same time certainly does not prove that one causes the other; that the vast array of trust-depleting events in the United States suggests that trust would have diminished regardless what happened with respect to diversity; and that “trust” is not the most important quality for us to seek, our democracy being founded not on trust but on distrust—distrust expressed in such doctrines as checks and balances, separation of power, and federalism).

79. Putnam, *supra* note 63, at 138.

80. *Id.* at 165; see also Xavier de Souza Briggs, *On Half-Blind Men and Elephants: Understanding Greater Ethnic Diversity and Responding to “Good-Enough” Evidence*, 19 HOUSING POL’Y DEBATE 218 (2008).

81. David Brooks, Op-Ed., *The End of Integration*, N.Y. TIMES, July 6, 2007, at A15.

82. Kushner, *supra* note 23, at 599.

83. Matt Bai, *What’s the Real Racial Divide?*, N.Y. TIMES MAG., Mar. 16, 2008, at 15-16.

84. Brooks, *supra* note 81.

As Betsy Julian says, however, none of this can justify abandoning our efforts to achieve an inclusive community. She poses the central question: "Can we continue to honor the principles of our Constitution and laws, and acknowledge the mistakes of our past, if we embrace segregation as a goal for our future?"⁸⁵

The answer to her question is and must be: No. Racial and economic integration must continue to be our goal, and we must do much better at reaching that goal. This certainly requires better enforcement of the Fair Housing Act and a return to the generous, remedial interpretations of the Act by the courts. It would be aided by structural improvements in the Act itself. But the most fundamental changes need to be made in our own understandings of the moral and practical evils that segregation causes. How can this be achieved? Turner prescribes education to overcome fears and stereotypes.⁸⁶ Schwemm, in an earlier article, discussed the importance of changing our national attitudes⁸⁷ and, in the article for this Symposium, shows that integration itself can be a cure for discrimination and segregation, for when people do live together they learn to move beyond stereotypes.⁸⁸ Strong leadership unquestionably is another and very important way of promoting and achieving integration.⁸⁹ Each of us, in many ways, individually and institutionally, with research and advocacy and art, with courage and perseverance, with imagination and creativity and determination, must devise new and ever more effective ways to achieve the goal of truly open and integrated communities. We must heed the call of Langston Hughes:

America!
Land created in common,
Dream nourished in common,
Keep your hand on the plow! Hold on!
If the house is not yet finished,
Don't be discouraged, builder!
If the fight is not yet won,

85. Julian, *supra* note 8, at 562; *see also* Kushner, *supra* note 23, at 601 (stating that he "believe[s] it is essential to overcome fear, distrust, and the walled metropolis as an essential component of community").

86. Turner, *supra* note 3, at 815-16.

87. Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-07 (2007); *but see* Bai, *supra* note 83, at 16 (stating that "those living in the shadow of postindustrial atrophy seem to have a harder time detaching from enduring stereotypes").

88. *See generally* Schwemm, *Discriminatory Municipal Services*, *supra* note 8.

89. *See, e.g.*, MICHAEL N. DANIELSON & JAMES W. DOIG, NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT 166 (1982); MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 115, 125-26, 130, 252, 309-10 (1976); ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA 133 (1973); Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150, 151-56, 158 (1998); Roisman, *supra* note 54, at 99-100.

Don't be weary, soldier!
The plan and the pattern is here,
Woven from the beginning
Into the warp and woof of America:

ALL MEN ARE CREATED EQUAL.

NO MAN IS GOOD ENOUGH
TO GOVERN ANOTHER MAN WITHOUT
THAT OTHER'S CONSENT.

BETTER DIE FREE,
THAN LIVE SLAVES.

Who said those things? Americans!
Who owns those words? America!

Who is America? You, me!
We are America!
To the enemy who would conquer us from without,
We say, NO!
To the enemy who would divide
and conquer us from within,
We say, NO!

FREEDOM!
BROTHERHOOD!
DEMOCRACY!

To all the enemies of these great words:
We say, NO!⁹⁰

To paraphrase W.H. Auden, we must all live together, or die—spiritually, if not literally.⁹¹

90. Langston Hughes, *Freedom's Plow*, in *SELECTED POEMS OF LANGSTON HUGHES* 291, 296-97 (1974).

91. Auden, *supra* note 1.

