

REFLECTIONS ON THE PAST, LOOKING TO THE FUTURE: THE FAIR HOUSING ACT AT 40

john a. powell*

INTRODUCTION

Every ten years, dutiful law review editors across the nation call upon commentators and scholars to reflect upon the state of housing in the United States. Among all of the commemorative scholarship in the area of civil rights, perhaps none can be as somber or dispiriting as the state of fair housing. Although, and perhaps because, housing was “the last major frontier in civil rights,” it has proved the most resistant to change.¹ Although more African Americans in major metropolitan areas have moved to the suburbs than any other time in history, patterns of neighborhood-based residential segregation in our metropolitan areas remain persistent.² Research also suggests that the movement to the suburbs has not necessarily been a move to stable communities of opportunity.³ The reversals have been so stark that some commentators have gone so far as to suggest that integration may be “a nice dream, but not fit for the way people really are.”⁴

Although we typically refer to the Fair Housing Act⁵ as the “last plank [of] the civil rights” movement,⁶ this assertion implies an orderly, rational progression from domain to domain, eradicating bit-by-bit, piece-by-piece any vestiges of slavery and Jim Crow—a progression that in fact did not occur. The spasm of violence and outrage that preceded—one might say precipitated—the passage of the Fair Housing Act is now well known. If not for the tragic events of April 4, 1968, it is uncertain that the Fair Housing Act would have passed. The Act languished in Congress for years before the assassination of Dr. Martin Luther King, Jr., whose efforts to promote fair housing in the North, particularly in Chicago, symbolized the entrenched and insidious nature of Northern housing

* john a. powell is the Williams Chair in Civil Rights and Civil Liberties, Moritz College of Law, Ohio State University and Executive Director, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University. The Author does not capitalize his name.

1. Charles M. Lamb, *Equal Housing Opportunity*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 148, 148 (Charles S. Bullock III & Charles M. Lamb eds., 1984); see SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 3 (2004) (“Housing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.”).

2. Haya El Nasser, *Minorities Reshape Suburbs*, USA TODAY, July 9, 2001, available at <http://www.usatoday.com/news/nation/census/2001-07-09-burbs.htm>.

3. Monifa Thomas, *Suburbs No Guarantee of Opportunity: Affluent Blacks Leaving the City Tend to Cluster in Just a Few Communities, but Many Offer Limited Economic Benefits or Access to Good Schools, Jobs*, CHI. SUN-TIMES, Nov. 15, 2005, at 6.

4. David Brooks, *The End of Integration?*, INT’L HERALD TRIB., July 6, 2007, available at <http://www.iht.com/protected/articles/2007/07/06/opinion/edbrooks.php>.

5. 42 U.S.C. §§ 3601-3619 (2000).

6. CASHIN, *supra* note 1, at 3.

segregation.⁷

Instead, it might just be that despite its measured victories, the Fair Housing Act itself, and the anti-discrimination orientation that it conveys, is part and parcel of the problem. The Act itself was largely symbolic. The law created critical exemptions for single-family dwellings that were not sold using a realtor so long as the seller was not “in the business of selling or renting dwellings” nor advertised in violation of prohibitions in the Act.⁸ It also exempted multi-family dwellings consisting of less than four units, the so-called “Mrs. Murphy” exemption.⁹ Many of the anemic enforcement provisions were bolstered in the 1988 Amendments by instituting a new administrative enforcement procedure and an improved system that authorized civil actions by private parties.¹⁰ The anti-discrimination orientation of the Fair Housing Act may itself be an impediment to achieving the goal of an integrated society.¹¹ The orientation of the Act itself may be an obstacle to fulfilling its vision of fair housing. The enforcement mechanisms of the Act, whether when filed through the administrative apparatus or through a civil action, are largely individualistic, anti-discrimination tort approaches. These provisions may increase the freedom of choice for homebuyers, but have not necessarily helped produce integrated neighborhoods or addressed segregated living patterns.

Perhaps the Fair Housing Act is not robust enough to address the contemporary challenges and methods of housing exclusion and discrimination; certainly it is not a panacea to centuries of legally and culturally enforced housing segregation which confined African Americans to extremely isolated “ghettos.” This is not to deny the importance of housing: Lawrence Bobo describes residential segregation as the “‘structural linchpin’ of American racial inequality.”¹² Housing lies at the very heart of a system of institutional relations that reproduce inequality.¹³ Therefore, ensuring fair housing is still *the* critical strategy to address structural and systematic inequality.¹⁴ Former Nixon Housing and Urban Development (“HUD”) secretary George Romney was one of the first secretaries of HUD to be appointed after the implementation of the Act.¹⁵

7. U.S. Dep’t of Hous. & Urban Dev., History of Fair Housing, <http://www.hud.gov/offices/fheo/aboutfheo/history.cfm> (last visited May 18, 2008).

8. 42 U.S.C. §§ 3603(b)(1), 3604(c) (2000).

9. *Id.* § 3603(b)(2).

10. For a comprehensive discussion of the 1988 Amendments, see Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).

11. See Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1647 (2007).

12. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 33 (1995).

13. john a. powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING AND COMMUNITY DEV. L. 188, 195-201 (2003).

14. *Id.* at 188-90.

15. Christopher Bonastia, *The Unintended Lessons Mitt Romney (and the Rest of Us) Could*

Romney's statements and early policy positions reflected his understanding of the importance of integration in addressing the nation's civil rights challenges.¹⁶ As Romney stated, "The most explosive threat to our nation is the confrontation between the poor and the minority groups who are concentrated in the central cities, and the middle income and affluent who live in the surrounding and separate communities. This confrontation is divisive. It is explosive. It must be resolved."¹⁷ Romney felt that the tremendous resources of the federal government could be utilized to coerce local communities to enforce the Act and embrace integrated housing.¹⁸ This is a strategy still supported by fair housing experts and integration advocates to produce regional fair housing enforcement and true residential integration.¹⁹ Unfortunately, despite the potential for the federal government to play a strong hand in producing residential integration, actions by the Nixon administration continually stifled Romney's ambitions to use the Act to produce integration.²⁰

Forty years after the passage of the Fair Housing Act, we reflect upon the successes and failures of the Fair Housing Act and posit that the Act must be reinvigorated to address present and future housing challenges. Part I of this Article summarizes how the Act has produced great changes and how it has fallen short in providing fair housing and integration. A combination of structural impediments have limited the utility of the Act in many metropolitan areas, as school segregation and localized exclusionary housing policy have prevented fair housing gains. Part II discusses the need to reform our federal fair housing priorities by understanding new challenges and priorities in fair housing. Our metropolitan areas are constantly evolving and the Fair Housing Act must recognize these changes, primarily the resurgence of some inner city areas and the decline of older suburbs. The Low Income Housing Tax Credit ("LIHTC") program has taken over as the dominant federally subsidized housing program in the nation, and the federal government must assure that the LIHTC program is fully embracing the principles of fair housing. Part III highlights one of the most recent challenges; the sub-prime lending and foreclosure crisis. The foreclosure crisis gripping many metropolitan areas threatens to undermine many of the homeownership and fair housing gains in our nation.²¹ The Fair Housing Act

Learn from George Romney, HIST. NEWS NETWORK, Sept. 25, 2006, <http://hnn.us/articles/29900.html> [hereinafter Bonastia, *The Unintended Lessons*].

16. *Id.*

17. *Id.*

18. *Id.*; see also CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 3 (2006) [hereinafter BONASTIA, KNOCKING ON THE DOOR].

19. John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1574 (1993).

20. See BONASTIA, KNOCKING ON THE DOOR, *supra* note 18.

21. See ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N OF AM., SUBPRIME LOCATIONS: PATTERNS OF GEOGRAPHIC DISPARITY IN SUBPRIME LENDING 1 (2006), <http://www.consumerfed.org/pdfs/SubprimeLocationsStudy090506.pdf>.

needs to be directed toward addressing this crisis and assuring that predatory lending patterns do not endanger minority homeownership and communities of color in the future.

I. HAVE WE ACHIEVED FAIR HOUSING?

Forty years after the Fair Housing Act, has our nation solved its fair housing challenges? A review of data suggests some success, but certainly not full victory. Legalized, racially *explicit* barriers to fair housing have been successfully curtailed, and some success in integration has occurred. Despite this success, many persistent, putatively “race-neutral” structures and practices have impeded progress, upholding the damaging segregation and discrimination facing people of color.²² A review of the research and data related to segregation and integration indicate some gains, but continuing problems. In addition, there remain significant enforcement barriers that prevent the realization of the fair housing provisions.

A. *Race, Segregation, Concentrated Poverty, and the “American Dream”*

One positive gain since the Civil Rights movement is the significant growth in homeownership among people of color. In 1950, approximately one out of three African Americans owned their own homes;²³ by 2000, almost one out of two African Americans had achieved the “American Dream” of homeownership.²⁴ Despite these gains, significant disparities continue to persist between white and black homeownership rates. In 2000, the African American homeownership rate was 65% lower than the white homeownership rate.²⁵

Although homeownership rates have increased for people of color, residential segregation rates remain high.²⁶ African Americans remain the most racially segregated population in the nation, in reference to whites. Despite very modest improvements in recent decades, racial residential segregation remains severe in most metropolitan regions in the United States. Nationally, the average metropolitan region had a dissimilarity index score for African Americans and whites of .65 in 2000.²⁷ This means that 65% of the metropolitan African-

22. See generally Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998).

23. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1955, at 782 (1955), available at <http://www2.census.gov/prod2/statcomp/documents/1955-01.pdf>.

24. U.S. CENSUS BUREAU, CENSUS BUREAU ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP 8 tbl. 7 (2008), available at <http://www.census.gov/hhes/www/housing/hvs/qtr108/q108press.pdf>.

25. *Id.*

26. The following discussion of segregation trends is extracted from my remedial expert report in the *Thompson v. HUD* litigation. See Remedial Phase Expert Report of John A. Powell, J.D., *Thompson v. HUD*, 348 F. Supp. 398 (D. Md. 2005) (No. CIV.A.MJG-95-309), 2005 WL 4979114.

27. CASHIN, *supra* note 1, at 88.

American population would have to relocate in order for them to become fully integrated in our metropolitan regions.²⁸

In most metropolitan regions today, few truly integrated communities can be found.²⁹ In regions with large African-American populations, segregation is even more extreme.³⁰ Residential segregation (as measured by the dissimilarity index) declined by more than twelve points between 1980 and 2000 in regions that were less than 5% African American, but this decline was only six points in regions that were more than 20% African American.³¹

Further, the positive effect of homeownership is contingent upon where one's home is located. One's neighborhood is critical to determining social and economic access to opportunity: housing location, not the house per se, has major implications for employment, education, democratic participation, transportation, and childcare.³² Neighborhoods of concentrated poverty offer few such high quality amenities, and they often disproportionately house minorities.³³ In 2000, nearly three out of four people living in neighborhoods of concentrated poverty were black or Latino.³⁴ Concentrated poverty neighborhoods are communities where more than 40% of the population lived in poverty.³⁵ Analysis of census data for 1999 in metropolitan areas finds nearly one out of ten African Americans living in concentrated poverty neighborhoods.³⁶ Only one out of 100 whites were found living in concentrated poverty communities.³⁷ These facts, when viewed with the themes examined herein, further suggest that many of the policies implemented to improve integration have not achieved their desired effects.

B. *The New Suburbs—Retiring the City-Suburb Dichotomy*

A theme that has been emerging in the demographic profile of many major metropolitan areas in the United States suggests that we must retire some of our traditional views on city-suburban disparities. There is no longer a clear

28. *Id.*; EDWARD L. GLAESER & JACOB L. VIGDOR, BROOKINGS INST., RACIAL SEGREGATION IN THE 2000 CENSUS: PROMISING NEWS 5 (2001), http://www.brookings.edu/~media/Files/rc/reports/2001/04demographics_edward%20%20%20glaeser%20and%20jacob%20%20%20vigdor/glaeser.pdf.

29. CASHIN, *supra* note 1, at 42.

30. *Id.* at 89.

31. JOHN LOGAN, LEWIS MUMFORD CTR. ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND <http://mumford1.dyndns.org/cen2000/wholepop/wpreport/page1.html>.

32. powell, *supra* note 13, at 197-201.

33. PAUL A. JARGOWSKY, BROOKINGS INST., STUNNING PROGRESS, HIDDEN PROBLEMS: THE DRAMATIC DECLINE OF CONCENTRATED POVERTY IN THE 1990S, at 2, <http://www.brookings.edu/~media/Files/rc/reports/2003/05demographics-jargowsky/jargowskypoverty.pdf>.

34. *Id.* at 4 fig. 2.

35. *Id.* at 3; *see* U.S. CENSUS BUREAU, AREAS WITH CONCENTRATED POVERTY: 1999, at 1 (2005), <http://www.census.gov/prod/2005pubs/censr-16.pdf>.

36. JARGOWSKY, *supra* note 33, at 8 fig.3.

37. *Id.*

suburban-high opportunity/central city-low opportunity demarcation.³⁸ The suburbs themselves are segregating into the “favored quarter” suburbs and poorer, resource constrained suburbs.³⁹ Increasingly, inner-ring or “first” suburbs are taking on the characteristics of their central city neighbors.⁴⁰ Between 1999 and 2005, in the nation’s 100 largest metro areas (which encompass two-thirds of the U.S. population), poverty rates rose, and “52[%] of metro[] residents living below the poverty line were found in [the] suburbs.”⁴¹ This is the first time in modern history that more poor people are in the suburbs than the city.⁴² People (particularly new immigrants), jobs, and municipal distress are all suburbanizing.⁴³ As a result, a suburban address does not necessarily indicate a neighborhood of “high opportunity,” which casts doubt on the rosy glow of statistics indicating the increasing suburbanization of minorities.⁴⁴ With increasing minority and immigrant populations, first suburbs will grapple with the strain of providing for the increased demands placed on school and healthcare systems.⁴⁵ Small municipalities may not be able to effectively handle high demands for infrastructure maintenance, public transportation, and social service provision.⁴⁶ In addition, “first suburbs are caught in a policy blind spot between the benefaction long directed toward central cities for problems like housing and economic investment and the new attention . . . on fast-growing outer suburbs.”⁴⁷

The expectation for a high-quality residential experience in the suburbs is not realized in the actual experiences of most minority groups, and studies show that race and ethnicity are in fact better indicators of neighborhood quality.⁴⁸ Studies suggest that in fact, stratification may be greater within the suburbs than the

38. *Economic Opportunity and Poverty in America: Hearing Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways & Means*, 110th Cong. (2007) (statement of Alan Beurbe, Fellow, Metropolitan Policy Program, Brookings Institution), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5452> [hereinafter *Subcomm. on Income Security and Family Support*].

39. *Id.*

40. *Id.*

41. *Id.*; see also JARGOWSKY, *supra* note 33. The report finds that although the number of people living in concentrated poverty has declined, as has the number of concentrated poverty neighborhoods (“stunning progress”), there was a rise in poverty in the older/inner-ring suburbs (“hidden problems”). *Id.*

42. *Subcomm. on Income Security and Family Support*, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.*

46. BRUCE KATZ & ROBERT PUENTES, BROOKINGS INST., AFFLUENT, BUT NEEDY (FIRST SUBURBS) (2006), available at http://www.brookings.edu/opinions/2006/0212metropolitanpolicy_katz.aspx.

47. *Id.*

48. Samantha Friedman & Emily Rosenbaum, *Does Suburban Residence Mean Better Neighborhood Conditions for All Households? Assessing the Influence of Nativity Status and Race/Ethnicity*, 36 SOC. SCI. RES. 1, 22-23 (2007).

central city, given the presence and power of the majority-group protecting their interests as they pertain to wealth.⁴⁹ A recent study by Mary Fischer shows that metropolitan level segregation declines are largely due to steep declines in city segregation; suburban segregation has much lower average declines.⁵⁰ In fact, there are regional differences in the preponderance of within-city, between city and suburb, and within-suburb segregation. Segregation between blacks and other groups occurs more often across city lines in the Midwest and Northeast; it is largely due to within-suburb segregation in the West; and in the South, within-city segregation and within-suburb segregation contribute equally to the overall metropolitan segregation level.⁵¹ These instances are compounded by the structural discrimination minorities frequently encounter in both the housing and rental markets, in city and suburb alike, through mechanisms discussed below. Additionally, as social service providers remain in the central city, clients cannot always access them; the smaller, often faith-based providers in the suburbs become more stressed.⁵²

On the flip side, as concentrated poverty moves to the suburbs, many cities are experiencing economic revitalization. Recent research indicates that

[w]hile tracts that experienced significant changes in poverty in the 1990s were found in all parts of the metropolitan area, [census] tracts that improved were predominantly located in the inner portions of the central city and the outer rings of the suburbs. In contrast, tracts that worsened were more prevalent in the outer portions of cities and, in particular, the inner ring of the suburbs.⁵³

Further, suburban census tracts with higher poverty rates were much more likely to experience high racial demographic change. “[I]t appears that among neighborhoods where poverty worsened notably in the 1990s, the in-migration of lower-income minorities was an important influence.”⁵⁴ “Hispanics accounted for the largest share increases in 56[%] of the worsening high-race change tracts, and blacks were the leading group in another 31[%].”⁵⁵ Lastly, there is an increasing polarization between high- and low-income neighborhoods. A review

49. *Id.*

50. Mary J. Fischer, *Shifting Geographies: Examining the Role of Suburbanization in Blacks' Declining Segregation*, 43 URBAN AFF. REV. 475, 490-91 (2008).

51. *Id.* at 491.

52. *Subcomm. on Income Security and Family Support*, *supra* note 38. Berube notes the particular challenges with the suburbanization of poverty: (1) suburban does not necessarily mean “better quality”; (2) social service providers remain in the central city, and people cannot always get to them; the smaller, often faith-based providers in the suburbs are stressed; (3) appropriate housing is scarce. *Id.*

53. G. Thomas Kingsley & Kathryn L.S. Pettit, *Concentrated Poverty: Dynamics of Change*, NEIGHBORHOOD CHANGE IN URB. AM. (Urban Inst., D.C.), Aug. 2007, at 2, available at http://www.urban.org/uploadedpdf/411527_concentrated_poverty.pdf.

54. *Id.* at 7.

55. *Id.*

of census data between 1970 and 2000 shows that middle-income neighborhoods are disappearing faster than middle-income households.⁵⁶ Indeed, while middle-income “neighborhoods declined from 58[%] in 1970 to 41[%] in 2000,” middle-income households declined at a slower rate, from 28% to 22%, respectively.⁵⁷ This trend suggests that minority households may find it increasingly difficult to translate their economic gains to neighborhood quality.⁵⁸

C. *Continuing Impediments to Fair Housing*

What explains the mixed results in producing more integrated neighborhoods and fair and open housing? Despite the Fair Housing Act, private acts of racial discrimination against homeowners continue and contribute significantly to segregation.⁵⁹ “[H]ousing market discrimination may affect segregation through several mechanisms: price discrimination, exclusion, steering, and by altering the perceived desirability of particular neighborhoods.”⁶⁰ In addition to direct discriminatory action by the housing industry, a number of structural impediments and localism have stifled fair housing goals. Exclusionary zoning and localism, combined with a lack of federal support and court support for metropolitan school desegregation have doomed the prospects of integrated metropolitan regions.

D. *Steering and Discrimination*

Realtors can engage in steering in three ways: inspecting homes with clients, recommending homes to clients from the Multiple Listing Service, and editorializing, which is to “provide gratuitous positive or negative evaluations . . . about certain areas” the clients are considering.⁶¹ Editorializing appears to be the most prevalent sort of black/white steering mechanism.⁶² “[I]n at least 12 to 15% of the [audit] cases, agents systematically provide gratuitous geographic commentary that provides more information to white homebuyers and encourages

56. JASON C. BOOZA ET AL., BROOKINGS INST., WHERE DID THEY GO? THE DECLINE OF MIDDLE INCOME NEIGHBORHOODS IN METROPOLITAN AMERICA 1 (2006), http://www.brookings.edu/~media/Files/rc/reports/2006/06poverty_booza/20060622_middleclass.pdf.

57. *Id.*

58. *See id.*

59. *See* John Yinger, *Housing Discrimination Is Still Worth Worrying About*, 9 HOUSING POL’Y DEBATE 893, 920 (1998); *see also* NAT’L FAIR HOUS. ALLIANCE, THE CRISIS OF HOUSING SEGREGATION 3-4 (2007), www.nationalfairhousing.org [hereinafter THE CRISIS OF HOUSING SEGREGATION] (follow “Fair Housing Resources” then “NFHA Trend Reports”).

60. Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 396 (2004); *see also* George Galster, *Residential Segregation in American Cities: A Contrary Review*, 7 POPULATION RES. & POL’Y REV. 93 (1988).

61. 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).

62. *Id.* at 258.

them to choose areas with more [w]hite and fewer poor households.”⁶³ Although the impact may be great, the illegality of this sort of steering is very difficult to detect. Discrimination may be so intertwined with individual preference “that they cloud the determination of a clear legal standard.”⁶⁴ In the case of black, middle-class homebuyers, the issue is even more complicated. At least some portion of black residents in such communities may admit to choosing an area based on its composition.⁶⁵ If discrimination was involved in the editorializing process, it may also be very difficult to identify. Unless there is a testing process, a potential homebuyer may never become aware of the discrimination.⁶⁶ Unfortunately, “steering does not appear to have decreased since tougher fair housing laws were introduced in 1988. . . . [In fact], the incidence of Black/White segregation steering appears to have increased.”⁶⁷ Editorializing only to whites regarding school quality flies in the face of actual homebuyer concerns. Black and white homebuyers are equally concerned about affordability, school quality, proximity to work, crime, and quality of public services in their prospective new neighborhoods.⁶⁸

Another obstacle to redressing this sort of behavior may be a muddy legal standard. In *Village of Bellwood v. Dwivedi*,⁶⁹ Judge Richard Posner held that consumer preference for a particular racial composition in a neighborhood is a justifiable reason for an agent to steer on the basis of race.⁷⁰ Since the decision, HUD has attempted to clarify the role of consumer racial preferences, but with little success in preventing this type of steering.⁷¹

Another significant recent finding is that on average for African Americans, the higher your income, the less racially segregated you are.⁷² However, high-earning African Americans are more segregated from equally high-earning whites than they are from poorer whites.⁷³ In other words, high-income whites are still segregating themselves from high-income African Americans. Other studies note that “steering and outright exclusion from suburban areas appear to have become

63. *Id.* at 260.

64. Larkin, *supra* note 11, at 1642.

65. *Id.*

66. Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 892 (1988) (“[W]hen a black [homebuyer] is the victim of discriminatory treatment, he or she is likely to not even know it.”).

67. Galster & Godfrey, *supra* note 61, at 260.

68. GREGORY D. SQUIRES ET AL., HOUSING SEGREGATION IN THE UNITED STATES: DOES RACE MATTER? 13 (2001), http://www.lincolnst.edu/pubs/dl/616_squires_friedman_saidat.pdf.

69. 895 F.2d 1521 (7th Cir. 1990).

70. *Id.* at 1531.

71. Larkin, *supra* note 11, at 1645.

72. See JOHN ICELAND ET AL., U.S. CENSUS BUREAU, CLASS DIFFERENCES IN AFRICAN AMERICAN RESIDENTIAL PATTERNS IN U.S. METROPOLITAN AREAS: 1990-2000, at 11 (2003), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/paa_econseg.pdf.

73. *Id.* at 9.

more important in recent years.”⁷⁴

E. Exclusionary Zoning and Localism

In addition to steering, minorities are often disproportionately excluded from suburban areas through what is known as “exclusionary zoning.”⁷⁵ Exclusionary zoning refers to zoning tools that block or slow housing growth in a community, make housing more expensive, or limit rental units.⁷⁶ Research has found that “low-density zoning reduces rental housing,” which in turn “limits the number of [b]lack and Hispanic residents.”⁷⁷ “Building permit caps are also associated with lowered proportions of Hispanic residents.”⁷⁸ Further, despite the fact that the suburbs nationally have gained minorities, minority representations fell in jurisdictions with low-density zoning.⁷⁹ Due to the social and physical history of this country’s urban growth patterns, “[j]urisdictions with low-density-only zoning are disproportionately located in a few areas: Boston, New York, Philadelphia, Pittsburgh, and Cleveland.”⁸⁰

Legal scholars have been arguing for over a decade that the “democratic process” that produces and legitimates exclusionary zoning is questionable: as Richard Thompson Ford noted over a decade ago, “the only significant vote that will be taken on the exclusionary ordinance is the first vote. After it is enacted, exclusionary zoning has a self-perpetuating quality.”⁸¹ Unfortunately, the Supreme Court allows suburbs “to use exclusionary zoning . . . that have demonstrable racial effects, absent clear evidence of overt race-based animus.”⁸² In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁸³ the Court affirmed this view when it ruled that a finding of a racially discriminatory effect was irrelevant for purposes of an Equal Protection Clause challenge.⁸⁴

74. Dawkins, *supra* note 60, at 396.

75. See Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLANN. ASS’N 125, 125 (2000).

76. *Id.* at 125-26.

77. *Id.* at 126.

78. *Id.*

79. *Id.* at 132.

80. *Id.* at 138.

81. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1871 (1994) (Ford terms this “tautology of community self-definition.”).

82. John A. Powell & Kathleen M. Graham, *Urban Fragmentation as a Barrier to Equal Opportunity*, in RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 79, 85 (Diane M. Piche et al. eds., 2002).

83. 429 U.S. 252 (1977).

84. *Id.* at 264-66.

F. Segregated Schools and Segregated Neighborhoods

The impact of school desegregation policy and trends on residential segregation cannot be overlooked. Court enforced efforts to produce integrated schools primarily focused on urban school districts, ignoring suburban schools. The Supreme Court's 1974 *Milliken v. Bradley*⁸⁵ decision effectively barred the enforcement of metropolitan school desegregation while supporting localism, leaving inner city districts to face the burden of desegregating while suburban municipalities were allowed to remain exclusive and segregated.⁸⁶ With no barriers to white flight and segregated classrooms in the suburbs, central cities (and urban schools) quickly segregated as whites fled urban areas.

G. Orientation of the Act's Enforcement

The anti-discrimination orientation of the Fair Housing Act may itself be an impediment to achieving the goal of an integrated society.⁸⁷ The focus on anti-discrimination normative measures has served to increase the freedom of choice for homebuyers, but it has not necessarily helped produce integrated neighborhoods or addressed segregated living patterns. The protection of private consumer choice in many instances subverts the goal of promoting integration by insulating white and black enclaves. Because of the long exclusion of African Americans from many affluent neighborhoods, the cultural understanding of residential integration has often been translated into depressed property values and criminal activity.⁸⁸ Once the proportion of African Americans in a neighborhood reaches a certain threshold, whites tend to leave the neighborhood.⁸⁹

From the perspective of litigating an Equal Protection challenge against a discriminatory law or official action, establishing discrimination can be a nearly insurmountable difficulty in the absence of a "smoking gun." If a discriminatory zoning decision, for example, is made at a city council meeting where residents made explicitly racist comments, the decision is still presumed to be non-racist, unless plaintiffs could prove discriminatory intent on the part of the council members.⁹⁰ The sole intent of the city council may well have been to stabilize property values, and as such, with the intent of excluding poor residents from the community, they deliberately choose not to rezone the property. Even if the council likely associated poverty with blacks, such a predictable adverse outcome on a racial group is, by itself, insufficient under U.S. law to establish a claim of racial discrimination in an Equal Protection Clause challenge.⁹¹

85. 418 U.S. 717 (1974).

86. *See id.*

87. Larkin, *supra* note 11, at 1647.

88. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 115-85 (1993).

89. This phenomenon is known as tipping. *See, e.g.,* Larkin, *supra* note 11, at 1632-33.

90. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977).

91. Given the amount of confusion among the circuit courts of appeal regarding the role of

The Justice Department (“DOJ”) as an actor is in the best position to address the problem of housing discrimination by bringing “pattern or practice claims.” Unfortunately, the DOJ brings relatively few cases based on the results of testing. In 1999 and 2000, the DOJ brought fifteen cases based on the results of its testing program.⁹² From 2001 through 2006, it has only filed sixteen such suits.⁹³ In 2006 alone, the DOJ only brought thirty-one housing and civil enforcement cases, of which a mere eight involved racial discrimination claims.⁹⁴ In 1994, 194 such claims were brought.⁹⁵ These numbers need to be considered in light of the fact that HUD estimates over 3.7 million fair housing violations involving race occur annually.⁹⁶

II. LOOKING TOWARD THE FUTURE: REFORMING OUR FEDERAL FAIR HOUSING PRIORITIES

Given the limitations of the Fair Housing Act in producing greater integration in its forty year history, how can we reinvigorate the Act to counter existing impediments and future challenges? I believe three major modifications to the enforcement of the Fair Housing Act would make a significant difference in producing a true open housing market and more integrated communities in the future. First, fair housing must accept the changing nature of our metropolitan regions, accepting that any simple city-suburban dichotomy must be retired. A new and explicit “opportunity based” view on fair housing must be incorporated into our fair housing principles and actions. Second, the role of the LIHTC program must be brought to the forefront of evaluating the effectiveness of the federal government to “affirmatively further fair housing.” Finally, the Fair Housing Act must be aggressively applied to prevent predatory lending. The ongoing sub-prime lending fiasco and the foreclosure fallout produced by predatory lending behavior threaten to severely undermine the gains in homeownership since the Fair Housing Act’s inception.

intent and its use in challenging a Title VIII (Fair Housing Act) action, evidence of this type of predictable adverse outcome may likewise not be sufficient to sustain a Title VIII violation claim. *See Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1116-17 (D.D.C. 1987) (commenting on the differing approaches of the use of intent, used as a factor of analysis in some circuits and a requirement in others; the court significantly noted that a great deal of confusion remained because various federal courts—and sometimes the same courts—have stated their circuit’s intent rule in different and sometimes irreconcilable ways).

92. *Civil Rights Division Oversight: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Wade Henderson, President and CEO, Leadership Conference on Civil Rights), available at http://judiciary.senate.gov/testimony.cfm?id=2837&wit_id=6546.

93. *Id.*

94. *Id.*

95. *Id.*

96. THE CRISIS OF HOUSING SEGREGATION, *supra* note 59, at 26.

A. *New Challenges—The Twenty-first Century Metropolitan Geography of Opportunity*

As noted in the discussion above, the geography of race, poverty, and neighborhoods of opportunity is shifting in our metropolitan areas. Racial populations are suburbanizing and the perception of the suburbs as “lily white” is changing.⁹⁷ Although suburbanization has expanded the spatial distribution of people of color, research suggests that the suburbs are becoming more polarized and a move to the suburbs does not necessarily result in a move to a healthy community of opportunity. George Galster and The Brookings Institution have found a decline in our nation’s middle-class neighborhoods, as more communities are polarizing into poor or wealthy neighborhoods.⁹⁸ More impoverished residents are living in the suburbs than in our central cities.⁹⁹ Research by Myron Orfield at the Institute of Race and Poverty has shown that minority populations are more likely to move to “at risk” suburban neighborhoods.¹⁰⁰ In *The Failures of Integration*, Sheryll Cashin demonstrates that even the wealthiest African-American suburban community in the nation (Prince George’s County, MD) does not have access to the opportunities available in predominately white suburbs in the Washington, D.C. region.¹⁰¹ Our urban communities are changing as well, with redevelopment, in migration and investment occurring in many core urban neighborhoods throughout the United States. Even distressed Rust-Belt cities such as Detroit have small pockets of revitalization and reinvestment.

Our fair housing policies and programs must accept and understand the new dynamics of opportunity in our metropolitan areas. Affordable housing policy must be directed to affirmatively connect affordable housing to neighborhoods of opportunity, whether they are in a revitalized inner city or in an affluent suburb.¹⁰² An assessment of the social, economic, educational, and environmental health of all neighborhoods must be conducted at a metropolitan or regional scale to guide this informed decision making.¹⁰³ Mapping neighborhoods of opportunity throughout a metropolitan area can guide affordable housing policy to assure that people of color and other low-income

97. See generally WILLIAM H. FREY, BROOKINGS INST., MELTING POT SUBURBS: A CENSUS 2000 STUDY OF SUBURBAN DIVERSITY (2001).

98. BOOZA ET AL., *supra* note 56, at 9-12.

99. *Subcomm. on Income Security and Family Support*, *supra* note 38.

100. INST. ON RACE & POVERTY, MINORITY SUBURBANIZATION, STABLE INTEGRATION, AND ECONOMIC OPPORTUNITY IN FIFTEEN METROPOLITAN REGIONS 4, http://www.irpumn.org/uls/resources/projects/Minority_Suburbanization_full_report_032406.pdf. “At Risk” suburbs are defined as fiscally stressed suburbs with below average public resources and above average public resource needs. See *id.*

101. CASHIN, *supra* note 1, at 127-60.

102. See POWELL, *supra* note 13, at 188-90.

103. *Id.* at 203-05.

households have true access to opportunity.¹⁰⁴ This strategy is already in use in an on-going fair housing case in the U.S. District Court of Maryland. The plaintiffs in *Thompson v. HUD*¹⁰⁵ have adopted and proposed an opportunity-based remedial proposal to address HUD's fair housing violation in Baltimore. The remedial proposal from the plaintiffs recommends 7000 new housing opportunities be placed in high opportunity communities in the Baltimore region.¹⁰⁶

B. New Challenges—Applying Fair Housing Criteria to the LIHTC Program

Reinvigorating the Fair Housing Act also requires refocusing our attention on the primary production program for subsidized housing in the nation, the LIHTC.¹⁰⁷ LIHTC “is currently the largest federal program to fund the development and rehabilitation of housing for low-income households.”¹⁰⁸ Created by the 1986 Tax Reform Act, LIHTC is administered by the Department of the Treasury through state and local housing credit agencies.¹⁰⁹ The program reflects a major shift from subsidies for construction distributed by HUD or the Department of Agriculture to a tax credit program, with subsidies totaling roughly \$5 billion per year.¹¹⁰ The LIHTC program has been described “as the de facto new construction program for low- and moderate-income housing.”¹¹¹ As of 2003, 1.3 million units were produced by the LIHTC program, (with an estimated 100,000 units “placed in service” each year in recent years¹¹²) dwarfing

104. JOHN A. POWELL ET AL., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL 11 (2007), <http://kirwan.gripservers3.com/publicationspresentations/publications/index.php> (follow “Communities of Opportunity: A Framework for a More Equitable and Sustainable Future for All” hyperlink for pdf).

105. 348 F. Supp. 2d 398 (D. Md. 2005).

106. For more information, please review the plaintiff's *Thompson* post-trial review brief available on the NAACP Legal Defense Fund website at: http://www.naacpldf.org/content/pdf/thompson/THOMPSON_Post_Trial_Brief.pdf.

107. 26 U.S.C. § 42 (2000).

108. Roisman, *supra* note 22, at 1011-12.

109. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252(a), 100 Stat. 2085, 2189-208 (codified as amended at 26 U.S.C. § 42 (2000)).

110. Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Tax Credit*, 58 VAND. L. REV. 1747, 1779 (2005).

111. LANCE FREEMAN, BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S, at 3 (2004), http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf. “[T]he tax credit subsidy alone reduces rents only to a moderate level”; and because LIHTC units serve a range of affordable-housing needs, only about 1/3 (31%) of LIHTC residents are Section 8. Roisman, *supra* note 22, at 1015-16.

112. JILL KHADDURI ET AL., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED

HUD production programs, which produced about 50,000 units total in the 1990s.¹¹³

While the LIHTC program has taken prominence as the preeminent affordable housing program in the nation, many fair housing advocates have grown concerned the program is not affirmatively furthering fair housing, despite its potential to do so. For example, a decade ago, Professor Florence Wagman Roisman argued that the program was actually producing “separate and unequal housing.”¹¹⁴ For example, a 1989 amendment provides an incentive (a 30% density increase) for “any building located in a qualified census tract or difficult development area.”¹¹⁵ This amendment has highlighted concern from legal and policy activists that LIHTC, while ostensibly race-neutral, is segregating, or re-segregating, low-income families, particularly minority families, from opportunity-rich neighborhoods.¹¹⁶

Recent research on LIHTC siting supports the concern that the program is concentrating units in lower-income, segregated areas. Reviewing data on LIHTC units (with two or more bedrooms) placed in service in large metropolitan areas between 1995 and 2003, researchers found that only 22% of these units were in low-poverty neighborhoods (less than 10% poverty rate).¹¹⁷ Across all metropolitan units, low-poverty and higher-poverty census tracts have similar percentages of two-bedroom units; that is, there is not a tendency to locate family housing in higher-poverty neighborhoods and one-bedroom units in lower-poverty neighborhoods, although this may be true within individual metropolitan areas.¹¹⁸ However, there is tremendous variation by state. A state-by-state review found that “Utah, New Hampshire, New York, Wisconsin, Delaware, Nebraska, and Colorado” “have made the greatest efforts to provide opportunities for families with children to live in low poverty neighborhoods.”¹¹⁹ “In contrast,” the researchers note, “Illinois, South Carolina, Kentucky, Pennsylvania, Connecticut, Massachusetts, Idaho, Arizona, and the District of Columbia place small fractions of their LIHTC family housing in census tracts in which fewer than 10[%] of all people are poor.”¹²⁰ States do worse on offering racially integrative opportunities with LIHTC units than they do offering socioeconomic integration: “Quite a few states place less than a quarter of their LIHTC family housing in large metropolitan areas in census tracts with less than the average minority population rate for the metropolitan area.”¹²¹ We do not know who is occupying the units in low-poverty, low-minority neighborhoods because current

NEIGHBORHOODS? (2006).

113. FREEMAN, *supra* note 111, at 4.

114. Roisman, *supra* note 22, at 1020.

115. *Id.* at 1018 (quoting 26 U.S.C. § 42(d)(5)(C)(i)(I) (2000)).

116. *Id.* at 1020-22.

117. KHADDURI ET AL., *supra* note 112, at 7.

118. *Id.* at 8.

119. *Id.* at 22.

120. *Id.*

121. *Id.*

LIHTC program requirements do not include collection of racial and ethnic data on occupants.¹²²

Research by Lance Freeman using Census 2000 data found similar conclusions, noting that the LIHTC program is doing better at providing integrative housing units than traditional public housing, but is still disproportionately concentrated in higher-minority, lower-income neighborhoods when compared to the average metropolitan neighborhood.¹²³ Unless the LIHTC program is more deliberately aligned to providing affordable units in higher opportunity neighborhoods, these challenges will continue. Restrictive zoning, land prices, and Not In My Backyard (“NIMBY”) behavior will continue to provide impediments to providing LIHTC housing units in neighborhoods of opportunity unless policy is explicitly targeted to support these more integrative housing developments. Several states are already pursuing this goal, adopting LIHTC development criteria to promote development in lower-poverty, higher-opportunity areas.¹²⁴

III. ADDRESSING THE LENDING AND FORECLOSURE CRISIS

An alarming new phenomenon is shaking the entire housing market and threatens to unravel the successes in homeownership for communities of color. One of the top items in the news and making national headlines is the increased foreclosure rates due to subprime lending practices that comprised 20% of the mortgage market in 2005, up from 5% in 1994.¹²⁵ An estimated two million foreclosures are expected in the next two years.¹²⁶ If current trends continue, a disproportionate share of these foreclosures will occur in urban communities of color.¹²⁷ In 2006, 52.44% of African Americans received loans that were subprime, compared to 22.2% of white non-Hispanic families.¹²⁸

Recent statistics show that in the United States, we have achieved record levels (69%) of homeownership.¹²⁹ This growth in homeownership rates

122. *Id.*; FREEMAN, *supra* note 111, at 11.

123. FREEMAN, *supra* note 111, at 6-8.

124. ALANNA BUCHANAN ET AL., POVERTY & RACE RESEARCH ACTION COUNCIL, BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM 18-20, 27-28 (2006), <http://www.prrac.org/pdf/BuildingOpportunity.pdf>.

125. FISHBEIN & WOODALL, *supra* note 21, at 4.

126. ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 2 (2006), <http://www.responsiblelending.org/pdfs/foreclosure-paper-report-2-17.pdf>.

127. See Vikas Bajaj, *Bad Loans Put Wall St. in a Swoon*, N.Y. TIMES, Mar. 14, 2007, at C6; Juan Gonzalez, *Set Up For A Fall: Subprime Mortgages Lead to Record Foreclosures in the City's Poorest Nabes*, N.Y. DAILY NEWS, Mar. 28, 2007.

128. CTR. FOR RESPONSIBLE LENDING, A SNAPSHOT OF THE SUBPRIME MARKET 2 (2007), <http://www.responsiblelending.org/pdfs/snapshot-of-the-subprime-market.pdf>.

129. Matt A. Barreto et al., *Homeownership: Southern California's New Political Fault Line?*, 42 URB. AFF. REV. 315, 318 (2007). However, a substantial gap—“more than 27%”—still exists

represents a surge in new cohorts of homeowners, including female-headed families, young people, minorities, and immigrants.¹³⁰ Unfortunately, this growth is characterized by a dual mortgage delivery system: “government-backed loans and lending by subprime and manufactured housing specialists account for almost two-thirds of recent [homeownership] increases in low-income neighborhoods,” whereas conventional prime lending represents “81[%] of the loans to higher-income borrowers in higher-income neighborhoods.”¹³¹ Homeownership gains are made even more tenuous by the fact that only 9% of subprime loans between 1998 and 2006 were to first-time home buyers (representing homeownership gains), yet 15.6% of all subprime loans resulted in (or are expected to result in) almost one million homes lost due to foreclosures since 1998.¹³² These figures represent a *net loss* in each year for the past nine years in the subprime market.¹³³

Subprime lenders extended mortgages to perceived high risk creditors;¹³⁴ however, research by the Center for Responsible Lending shows that these mortgages were racially discriminatory: “African-American and Latino borrowers are at greater risk of receiving higher-rate loans than white borrowers,

between rates of white homeownership and those of African Americans and Latinos. *Id.*

130. *Id.*

131. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION’S HOUSING 2002*, at 1 (2002), <http://www.jchs.harvard.edu/publications/markets/son2002.pdf>.

132. CTR. FOR RESPONSIBLE LENDING, *SUBPRIME LENDING: A NET DRAIN ON HOMEOWNERSHIP 3-4* (2007), <http://www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf>.

133. *Id.*

134. Federal Reserve Chairman Ben Bernanke explained:

Subprime mortgages are loans intended for borrowers who are perceived to have high credit risk. Although these mortgages emerged on the financial landscape more than two decades ago, they did not begin to expand significantly until the mid-1990s. The expansion was fueled by innovations—including the development of credit scoring—that made it easier for lenders to assess and price risks. In addition, regulatory changes and the ongoing growth of the secondary mortgage market increased the ability of lenders . . . to sell many mortgages to various intermediaries, or “securitizers.” The securitizers in turn pooled large numbers of mortgages and sold the rights to the resulting cash flows to investors, often as components of structured securities. This “originate-to-distribute” model gave lenders (and, thus, mortgage borrowers) greater access to capital markets, lowered transaction costs, and allowed risk to be shared more widely. The resulting increase in the supply of mortgage credit likely contributed to the rise in the homeownership rate from 64[%] in 1994 to about 68[%] now—with minority households and households from lower-income census tracts recording some of the largest gains in percentage terms.

Subprime Mortgage Lending and Mitigating Foreclosures: Before the H. Comm. on Financial Servs., 110th Cong. (2007) (statement of Hon. Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System), available at <http://www.federalreserve.gov/newsevents/testimony/bernanke20070920a.htm> [hereinafter Bernanke Testimony].

even after controlling for legitimate risk factors.”¹³⁵ Many subprime borrowers have been swept up in a wave of foreclosures threatening the health of families, neighborhoods,¹³⁶ cities,¹³⁷ and major financial markets.¹³⁸ “Adjustable-rate subprime mortgages [(“ARMs”)] originated in late 2005 and . . . have performed the worst, with some of them defaulting after only one or two payments” (or none at all).¹³⁹ Combined with sharp declines in home prices since 2005, borrowers are left with no home equity or cannot afford to refinance (which would avoid the large interest rate resets).¹⁴⁰ This enormous wave of foreclosures is significant because the housing sector plays a major role in state and local economies, as “[r]esidential investment, housing consumption, and housing-related expenditures together account for nearly one-fifth of GDP.”¹⁴¹ In fact, over \$1 billion is projected to be lost in local house prices and tax bases each, for twenty-four states and forty-two counties, due to expected foreclosures.¹⁴² Studies estimate that the spillover effects of foreclosures into adjacent neighborhoods will result in decreased property valuations (and depleting tax bases), a near 1% decrease, and these effects are found to be cumulative.¹⁴³

At the same time, those still hanging on to their homes are more likely than ever to have affordability problems. From 1990-2000, affordability problems

135. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006), http://www.responsiblelending.org/pdfs/rr011-Unfair_Lending-0506.pdf.

136. For research on the stabilizing effect on communities that homeownership has, see MICHAEL COLLINS, PURSUING THE AMERICAN DREAM: HOMEOWNERSHIP AND THE ROLE OF FEDERAL HOUSING POLICY 4 (2002), <http://www.nw.org/network/pubs/studies/documents/pursuingAmDreamCollins2002.pdf>. For an example of the effect on a specific community, see Tim Jones, *Cleveland Rocked by Home Foreclosures*, COLUMBUS DISPATCH, Mar. 23, 2007.

137. See recent complaints filed by cities and their mayors, e.g., Complaint for Declaratory and Injunctive Relief and Damages, Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., No. L08CV 062 (D. Md. Jan. 8, 2008), 2008 WL 117894 [hereinafter Balt. Complaint]; Complaint, City of Cleveland v. Deutsche Bank Trust Co., No. CV-08-646970 (Ohio Ct. Com. Pl. Jan. 10, 2008) [hereinafter Cleveland Complaint].

138. Eric Dash, *Citi to Announce Big Cuts and New Investors*, N.Y. TIMES, Jan. 15, 2008, at C1.

139. Bernanke Testimony, *supra* note 134 (noting that delinquent subprime ARMs have tripled since mid-2005, reaching 15%; in contrast, “less than 1 [%] of [prime-mortgage] loans are seriously delinquent”).

140. *Id.*

141. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 131, at 6.

142. CTR. FOR RESPONSIBLE LENDING, *supra* note 128, at 3.

143. That is, for every additional foreclosure, values decreased by almost 1% as well. CTR. FOR RESPONSIBLE LENDING, SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS \$202 BILLION; 40.6 MILLION HOMES LOSE \$5,000 ON AVERAGE 1 (2008), <http://www.responsiblelending.org/pdfs/subprime-spillover.pdf>. Decreases were even higher in lower-income neighborhoods, approximately 1.44%. *Id.*

increased by 52%, two-and-a-half times the rate of homeownership increases.¹⁴⁴ Low-income families and minorities are hardest hit by decreasing affordability.¹⁴⁵ Low-income homebuyers also face greater risks in terms of costly home repairs, given that more of their income is dedicated to their mortgage.¹⁴⁶ Lower-income homeowners “with less than 80[%] of area median income levels are more likely to be elderly, disabled, minority, or single parents with children than higher income owners.”¹⁴⁷ “The quality of their housing stock is often poor: inadequacy rates are over twice as high for the units of these owners than for those with higher incomes.”¹⁴⁸

The foreclosure crisis is not just depleting city and lender coffers. Homeownership is understood to be an important component of “social, economic, . . . psychic,” and financial well-being.¹⁴⁹ Public opinion polls indicate that most renters aspire to be homeowners and that homeownership is a high priority, regardless of one’s demographic status (married, single, with children, etc.).¹⁵⁰ The benefits of homeownership include wealth generation and inter-generational wealth transfer, protection from inflation, increased borrowing power, community involvement, and the like.¹⁵¹ Unfortunately, these benefits, particularly home equity building and inter-generational wealth transfer, have been unequally distributed by race.¹⁵² For example, for every \$1 in assets held by African Americans, whites hold more than \$10.¹⁵³ The median asset value for a white household in 2000 was \$79,400.¹⁵⁴ For African-American households, this was \$7,500 (a disparity of 1059%).¹⁵⁵

Owning is more than building equity. Tax subsidies to homeowners (wherein homeowners write mortgage interest off of their taxable income) amounted to a \$119.3 billion subsidy nationwide.¹⁵⁶ Additional subsidies include

144. PATRICK A. SIMMONS, FANNIE MAE FOUND., RISING AFFORDABILITY PROBLEMS AMONG HOMEOWNERS: 1990S HOMEOWNERSHIP BOOM LEAVES A HANGOVER OF OWNERS WITH SEVERE COST BURDENS (2004), http://www.FannieMaeFoundation.net/programs/pdf/census/notes_13.pdf.

145. *Id.*

146. Josephine Louise et al., *The Housing Needs of Lower-Income Homeowners* 3 (Joint Ctr. for Hous. Studies Harvard Univ., Working Paper No. W98-8, 1998).

147. *Id.* at 9.

148. *Id.*

149. Barreto et al., *supra* note 129, at 315-16.

150. *Id.* at 317.

151. *Id.*

152. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999); see also OLIVER & SHAPIRO, *supra* note 12.

153. SHAWNA ORZECZOWSKI & PETER SEPIELLI, U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000, at 2, <http://www.census.gov/prod/2003pubs/p70-88.pdf>.

154. *Id.*

155. *Id.*

156. CUSHING N. DOLBEARE ET AL., NAT’L LOW INCOME HOUS. COAL., CHANGING PRIORITIES: THE FEDERAL BUDGET AND HOUSING ASSISTANCE 1976-2005, at 4 (2004), <http://www>.

write-downs for property depreciation, the use of a home office, interest on home-equity debt, moving expenses, refinancing, and the like.¹⁵⁷ The impending wave of foreclosures set to hit communities of color will increase the wealth gap and place more barriers between people of color and access to the ample financial benefits of homeownership. Early estimates of the asset loss due to the foreclosure and subprime crisis are shocking. A recent study released by United for a Fair Economy estimates the loss of equity to “all subprime borrowers of color” to be nearly a quarter of a trillion dollars.¹⁵⁸ The loss of assets will be due to direct foreclosures and the financial impact in property devaluation in minority neighborhoods where foreclosures (and vacant homes) are concentrated.¹⁵⁹ Even before the subprime crisis, however, researchers noted that “low-income homeowners typically do not benefit from mortgage and property tax deductions because the value of the standard deduction exceeds the value of these itemized deductions to them.”¹⁶⁰ Only 3% of home owners with incomes of under \$20,000 itemized their deductions in 1998; in contrast, 86% of homeowners with incomes above \$75,000 itemized.¹⁶¹ “And even among low-income homeowners that do itemize,” the value of the mortgage interest deduction is lower because their marginal tax rates are lower.¹⁶²

Action is needed to bring fair housing laws into negating the impacts of the foreclosure crisis. Two cities have already started legal action against major lenders in response to the discriminatory, community-wide impacts of the crisis. In January 2008, the Mayor and City Council of Baltimore filed suit against Wells Fargo for declaratory and injunctive relief and damages with respect to the bank’s lending practices in Baltimore, bringing the complaint in district court pursuant to the Fair Housing Act.¹⁶³ The suit alleges that lenders were “[e]nticed by . . . short-term profits resulting from exorbitant organization fees, points, and related pricing schemes.”¹⁶⁴ Lenders offered irresponsible subprime loans to borrowers who could not afford them, with deceptive means and “promises to

nlihc.org/doc/cp04.pdf.

157. For a full list, see Kiplinger.com, *Deductions for Homeowners*, <http://www.kiplinger.com/features/archives/2007/01/hometaxopedia.html> (last visited May 24, 2008); see also Kenneth R. Harney, *Tax Benefits Still Generous for Homeowners, but Biggest Incomes Earn the Biggest Share*, WASH. POST, Feb. 5, 2005, at F1.

158. AMAAD RIVERA ET AL., UNITED FOR FAIR ECON., *FORECLOSED: STATE OF THE DREAM 2008*, http://www.faireconomy.org/files/StateOfDream_01_16_08_Web.pdf.

159. *Id.* at 26.

160. Eric S. Belsky et al., *The Financial Returns to Low-Income Homeownership 4* (Joint Ctr. for Hous. Studies Harvard Univ., Working Paper No. W05-9, 2005), <http://www.jchs.harvard.edu/publications/finance/w05-9.pdf>; see also Steven C. Bourassa & William G. Grigsby, *Income Tax Concessions for Owner-Occupied Housing*, 11 HOUS. POL’Y DEBATE 521, 531 (2000).

161. Bourassa & Grigsby, *supra* note 160, at 532.

162. Belsky et al., *supra* note 160, at 5.

163. Balt. Complaint, *supra* note 137.

164. *Id.* ¶ 25.

refinance at a later date.”¹⁶⁵ Subprime lenders underwrote “loans based only on consideration of whether the borrower [could] make payments during the initial teaser rate period, without regard to the sharply higher payments that [would] be required for the remainder” of the thirty-year loan.¹⁶⁶ Lenders misled borrowers into thinking they could afford the “same low monthly payment for the entire 30-year term of the loan, or that they [could] refinance their loan before the teaser rate period expire[d].”¹⁶⁷ The refinanced loans would charge substantial new fees, often hidden, stripping much of the equity gained.¹⁶⁸ They charged “excessive points and fees that [were] not associated with any increased benefits for the borrower.”¹⁶⁹ In short, the lender would make a quick profit from the loan origination, but set borrowers up for default and foreclosure.

Further, the suit alleges that Baltimore’s African-American neighborhoods were disproportionately impacted by subprime foreclosures.¹⁷⁰ The complaint discusses the practice of “reverse redlining,” or targeting residents in certain geographic areas for credit on unfair terms due to “the racial or ethnic composition of the area.”¹⁷¹ Unlike redlining, which is denying prime credit to those communities, reverse redlining is targeting an area for “deceptive, predatory, or otherwise unfair lending practices.”¹⁷² “Reverse redlining has repeatedly been held to violate the . . . Fair Housing Act.”¹⁷³ In Baltimore, the neighborhoods with 90% African-American populations “are at the center of the foreclosure crisis.”¹⁷⁴ Two-thirds of Wells Fargo’s foreclosures in 2005 to 2006 were in census tracts that were over 60% African-American, but only 15.6% were in tracts that were 20% or less African-American.¹⁷⁵ “[A] Wells Fargo loan in a predominantly African-American neighborhood [was] four times as likely to result in foreclosure as a Wells Fargo loan in a predominantly white neighborhood.”¹⁷⁶ “Wells Fargo made high-cost loans . . . to 65% of its African-American mortgage customers in Baltimore, but only to 16% of its white customers in Baltimore.”¹⁷⁷ Importantly, “an African-American borrower was 2.5 times more likely to be high cost than a refinance loan to a white borrower.”¹⁷⁸

The plaintiffs are acutely aware of the structural reverberations of the crisis

165. *Id.*

166. *Id.* ¶ 26(a).

167. *Id.*

168. *Id.* ¶ 26(b).

169. *Id.* ¶ 26(f).

170. *Id.* ¶ 2.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* ¶ 34.

175. *Id.* ¶ 3.

176. *Id.* ¶ 39.

177. *Id.* ¶ 47.

178. *Id.*

beyond those families experiencing the loss of their homes.¹⁷⁹ Foreclosures lead to abandoned and vacant homes.¹⁸⁰ This causes neighborhoods, especially ones already struggling, to decline rapidly by reducing the value of property of nearby homes.¹⁸¹ A Fannie Mae study in Chicago found that every “foreclosure is responsible for an average decline of approximately 1% in the value of each single-family home within a quarter of a mile.”¹⁸² This in turn results in lost tax revenue from property taxes, which makes it more difficult “for the [c]ity to borrow funds because the value of the property tax base is used to qualify for loans.”¹⁸³ In addition, cities lose real estate transfer tax revenues because of the depressed market for home sales.¹⁸⁴ “[T]hese cities must spend additional funds for services related to foreclosures, including the cost of securing vacant homes, [and] holding administrative hearings, . . . conducting other administrative and legal procedures, . . . [and] providing additional police and fire protection as vacant properties become centers of dangerous and illicit activities.”¹⁸⁵ The total estimated costs for the city of Baltimore are about \$34,199 per foreclosure.¹⁸⁶

Taking another perspective of the impact of the crisis, the City of Cleveland filed suit in the Cuyahoga County Court of Common Pleas against various subprime securitizers (twenty-one defendants in total) on the grounds that their conduct resulted in a public nuisance under Ohio common law.¹⁸⁷ The City is suing the securitizers for damages (the City’s costs for increased services, demolition, etc., and property tax losses and interest).¹⁸⁸ The complaint notes that “[a]n average of [twenty] Cleveland homeowners faced” foreclosures *every day* of the year in 2007¹⁸⁹ and that a Center for Responsible Lending study estimated “that homes in Cuyahoga County collectively depreciated more than \$462 million due to their proximity to foreclosed property.”¹⁹⁰ The City alleges that, given that subprime securitization works only if properties are gaining in value (only if your property appreciates can you afford the higher rates that follow the “teaser” rates), and given that it was generally known that Cleveland’s home values and economy generally were flat, the securitizers should have foreseen that massive foreclosures were the inevitable result of their actions.¹⁹¹

179. *Id.* ¶¶ 65-66.

180. *Id.* ¶ 66(b).

181. *Id.* ¶ 68.

182. *Id.* ¶ 67 (citing Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL’Y DEBATE 57 (2006)).

183. *Id.* ¶ 19.

184. *Id.* ¶ 20.

185. *Id.*

186. *Id.* ¶ 69.

187. Cleveland Complaint, *supra* note 137.

188. *Id.* ¶ 65.

189. *Id.* ¶ 37.

190. *Id.* ¶ 61.

191. *Id.* ¶¶ 4-5 (“Cleveland’s economy and housing situation differed significantly from the

Although the suit makes reference to reverse redlining,¹⁹² the suit does not allege violations of the Fair Housing Act, unlike the Baltimore complaint.

CONCLUSION

The Fair Housing Act was conceived under a set of conditions very different from the ones we practice in today: a predominately production-oriented subsidized housing market, a clear city-suburban quality-of-life dichotomy, and a simplified mortgage market pre-securitization (and internationalization). The task that lies ahead is to assess the efficacy of fair housing advocacy in a changed era (one of indirect production through tax subsidies), a complex and ever-changing metropolitan geography, and complex global financial markets. A thoughtful fair housing activism and legal practice must engage with these changing conditions and posit new mechanisms for intervention into structures and practices that continue to segregate, by race and income, our communities. The Fair Housing Act was far more than a narrow anti-discrimination measure. The Act targeted false advertising, unfair terms, false representations, and, further, required government actors to affirmatively further fair housing mandates. Addressing our current residential arrangements requires an approach equally bold. Housing remains the linchpin of racial inequality because of its centrality and relationship with major economic, social, and political institutions. Failing to ensure fair housing for all Americans will undoubtedly undermine efforts to promote integration in every other area of American life.

rest of the country's at the time sub-prime lending reached its peak. The disparities made mass foreclosures the only possible result of flooding the local market with sub-prime mortgages, even if doing likewise in other cities created no such apparent risk.”).

192. *Id.* ¶ 62.

