Case Western Reserve Law Review

Volume 70 | Issue 3 Article 5

2020

SYMPOSIUM: *MOVING TOWARD INTEGRATION* -- Fair Housing Past, Present, and Future: Perspectives on *Moving Toward Integration*

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— Symposium —

FAIR HOUSING PAST, PRESENT, AND FUTURE: PERSPECTIVES ON *MOVING TOWARD INTEGRATION*

INTRODUCTION

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People of color have long faced discrimination in the housing market. In many instances, African Americans encountered violent opposition when they tried to move into previously all-white communities.[1] More commonly, various public policies and private practices promoted residential segregation. For example, zoning ordinances sought to maintain segregated housing patterns, public housing was located in places that maintained racial isolation, federal agencies refused to insure mortgages in racially mixed neighborhoods, private lenders refused to make loans in such neighborhoods, real estate agents engaged in racial steering to maintain residential segregation, and property owners refused to sell or rent to persons of color.[2]

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1. *See* JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013); Leonard S. Rubinowitz & Imani Perry, *Crimes without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2001). For accounts of local violence, see, e.g., KEVIN BOYLE, ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE (2004) (examining the Ossian Sweet case, which arose from a black family's effort to move into a previously all-white Detroit neighborhood); GLENN T. ESKEW, BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE 53–83 (1997) (discussing bombings that sought to maintain residential segregation in Birmingham, Alabama); Thomas J. Sugrue, *Jim Crow's Last Stand: The Struggle to Integrate Levittown*, *in* SECOND SUBURB: LEVITTOWN, PENNSYLVANIA 175 (Dianne Harris ed., 2010) (describing the violent reaction to a black family's move into an all-white community). *See also* Daisy D. Myers, *Reflections on Levittown*, *in* SECOND SUBURB, *supra*, at 41 (offering the perspective of one member of that black family).

2. *See, e.g.,* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING (1955); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

The Supreme Court's record in housing discrimination cases is decidedly mixed. More than a century ago, in *Buchanan v. Warley*,[3] the Court struck down a zoning ordinance that explicitly relied on race in determining who could legally reside on particular blocks.[4] And just over fifty years later, in *Jones v. Alfred H. Mayer Co.*,[5] the Court held that section 1 of the Civil Rights Act of 1866 prohibited private racial discrimination in the purchase, sale, or rental of housing, but it noted that this provision was not a comprehensive fair-housing law.[6] Around the same time, the Court rebuffed political efforts to make it difficult, if not practically impossible, for states and localities to adopt their own fair-housing legislation.[7] But the Court rejected zoning challenges where race was not an explicit factor and the land-use decisions seemed to have plausibly neutral justifications.[8] And only a few years after *Buchanan*, the Court in *Corrigan v. Buckley*[9] rejected a constitutional challenge to restrictive covenants that prohibited African Americans as well as members of disfavored religious and ethnic groups from owning, leasing, or occupying property that was covered by those agreements. Although the Court later held that such covenants were not judicially enforceable,[10] those private agreements remained in place for years afterward.

3. 245 U.S. 60 (1917).

4. That unanimous ruling did not discourage other cities from enacting race-based zoning ordinances, although courts invalidated those measures. *See, e.g.,* Monk v. City of Birmingham, 185 F.2d 859 (5th Cir. 1950); City of Richmond v. Deans, 37 F.2d 712 (4th Cir.), aff'd per curiam, 281 U.S. 704 (1930); Land Dev. Co. of La. v. City of New Orleans, 17 F.2d 1016 (5th Cir. 1927).

5. 392 U.S. 409 (1968).

6. *Id.* at 413–14. Section 1 of the 1866 Act is codified at 42 U.S.C. § 1982 (2018).

7. Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating a city charter provision that required voter approval of any fair-housing ordinance); Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating a state constitutional amendment that gave property owners absolute discretion to choose with whom they would deal, thereby repealing a state fair-housing law and preventing further legislation against housing discrimination).

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

9. 271 U.S. 323 (1926).

10. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (prohibiting state courts from enforcing restrictive covenants); *see also* Hurd v. Hodge, 334 U.S. 24 (1948) (prohibiting federal courts from enforcing restrictive covenants); Barrows v. Jackson, 346 U.S. 249 (1953) (forbidding courts to award damages for breach of restrictive covenants).

Congress passed the federal Fair Housing Act in 1968.[11] Although its effectiveness has been widely questioned, that law was much more comprehensive than the Reconstruction statute at issue in *Jones v. Mayer* in that it addressed discrimination based on religion and national origin as well as race, and it prohibited discrimination not only in the sale or rental of housing but also in ancillary services, brokerage, financing, and advertising, established administrative enforcement mechanisms, provided for damages as well as injunctive relief for violations, and authorized litigation by the Department of Justice. A few states and municipalities already had adopted their own antidiscrimination measures, but those measures were relatively weak and generally were controversial. A number were repealed in referenda, even in such reputedly liberal communities as Berkeley, California.[12]

Social scientists have been studying residential segregation for many years.[13] Those studies have found exceedingly high levels of segregation between blacks and whites, who in some communities live almost completely apart. Those racial patterns have been notably more extreme than those for other ethnic groups.[14] Recently, however, the extent of residential segregation by race has declined, although it remains quite high.

The persistence of residential segregation has generated some valuable scholarly books. Those major publications seem to appear generationally. In the 1960s, Taeuber and Taeuber published a comprehensive analysis of residential segregation in over 200 cities that examined trends over three decades.[15] In the 1990s, Massey and Denton updated and extended that work in a high-profile book.[16] Both of these books were produced by outstanding social scientists, and those books in turn have generated much additional social research.

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11. Civil Rights Act of 1968, Pub. L. No. 90–284, tit. VIII, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§ 3601–3631 (2018)).

12. *See* STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 178–83, 202 (2000). For a critique of other aspects of Meyer's book, see Jonathan L. Entin, *Book Review*, 33 URB. LAW. 189 (2001).

13. For explanations of statistical measures of residential segregation, see Otis Dudley Duncan & Beverly Duncan, *A Methodological Analysis of Segregation Indexes*, 20 AM. SOC. REV. 210 (1955); David R. James & Karl E. Taeuber, *Measures of Segregation*, 15 SOC. METHODOLOGY 1 (1985).

14. *See, e.g.*, STANLEY LIEBERSON, ETHNIC PATTERNS IN AMERICAN CITIES 129 (1963).

15. KARL E. TAEUBER & ALMA F. TAEUBER, NEGROES IN CITIES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE (1965).

16. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

Recently, a new team of scholars produced an ambitious inter–disciplinary book. *Moving Toward Integration* was written by two law professors, both of whom also earned Ph.D. degrees, and a sociologist who has written extensively about residential segregation.[17] The book contains extensive and original legal, historical, and social scientific research. Precisely because of this interdisciplinary focus, it is a significant intellectual event that also has potentially important impli–cations for law and public policy. Accordingly, in November 2019 the *Case Western Reserve Law Review*, with financial support from Affordable Housing Partners, convened an interdisciplinary "author meets readers" symposium about *Moving Toward Integration*. This issue contains the papers that were presented on that occasion, as well as the authors' response.

The symposium begins with an overview of the book by two of its authors, Richard Sander and Yana Kucheva.[18] Professor Sander is a legal scholar holds a Ph.D. in economics and wrote his dissertation as well as several articles on residential segregation. Professor Kucheva is a demographer holds a Ph.D. in sociology. They explain the book's genesis, place it in the context of other scholarship on housing discrimination, and illustrate some of their major findings. Five commentaries follow.

John Logan, a prominent sociologist and leading scholar of residential segregation, and co-author Wenquan Zhang examine the role of so-called global neighborhoods in the recent reduction in residential segregation.[19] Those neighborhoods contain black, white, Hispanic, and Asian residents, and they have contributed disproportionately to the overall decline in residential segregation since 1980. Other metropolitan areas that have fewer immigrants, and therefore remain essentially black and white only, continue to be more highly segregated. Professors Logan and Zhang suggest that these demographic factors are likely to be more influential in reducing residential segregation than are legal and public-policy initiatives, and they recommend that fair-housing advocates take explicit account of changes in metropolitan population composition in their work.

Robert Schwemm, perhaps the leading legal scholar of fair housing, offers high praise for many aspects of *Moving Toward Integration* in his contribution to the symposium, while expressing some reservations

17. RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING (2018).

18. Richard H. Sander & Yana Kucheva, *Why We Wrote* Moving Toward Integration, 70 CASE W. RES. L. REV. 665 (2020).

19. John R. Logan & Wenquan Zhang, *Global Neighborhoods' Contribution to Declining Residential Segregation*, 70 CASE W. RES. L. REV. 675 (2020).

about the book.[20] He notes that the book's optimism about progress against housing discrimination differs from the pessimism that other commentators have expressed, and he questions some of the authors' historical interpretations. And while Professor Schwemm agrees that exclusionary zoning has been an important aspect of fair-housing litigation, he tempers the authors' optimism that a focus on litigating the disparate impact of zoning under the Fair Housing Act can be a fruitful strategy at least in the near term. He first explains two types of discriminatory-effect claims: disparate-impact and segregative-effect. Federal courts have recognized both of these theories of liability, and they have continued to do so in the aftermath of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[21] He then analyzes the implications of recent Trump Administration initiatives that could undermine some of those litigation efforts.

Kristen Barnes, who also has written important articles on fair-housing law, similarly praises many aspects of the book while disagreeing with the authors in a couple of significant respects.[22] For example, she has a less optimistic view than do the authors of the potential for exclusionary-zoning claims in the wake of *Inclusive Communities*, a view that is shaped by the disposition of that case on remand but also by what she regards as analytical shortcomings in the Supreme Court's opinion in that case. And while Professor Barnes agrees with the authors about the importance of banks in promoting housing integration, she faults the book for downplaying how lending institutions have contributed to residential segregation. In this connection, she addresses lawsuits brought against Wells Fargo, one by the Department of Justice that resulted in a settlement and the other by the City of Miami that never got resolved on the merits but was recently dismissed after the Supreme Court granted certiorari for the second time to address the city's standing.[23] She raises questions about the role of the city in promoting or impeding integration and accordingly suggests greater scrutiny of public partnerships with private banks and developers.

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20. Robert G. Schwemm, *Reflections on* Moving Toward Integration *and Modern Exclusionary-Zoning Cases Under the Fair Housing Act*, 70 CASE W. RES. L. REV. 689 (2020). Professor Schwemm has another article in this issue that is not formally part of the symposium but which nevertheless complements the discussion here. Robert G. Schwemm, *Source-of-Income-Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573 (2020).

21. 135 S. Ct. 2507 (2015).

22. Kristen Barnes, *The Pieces of Housing Integration*, 70 CASE W. RES. L. REV. 715 (2020).

23. Bank of Am. Corp. v. City of Miami, 140 S. Ct. 1259 (2020).

Cathy Lesser Mansfield, another law professor who focuses on consumer finance, also addresses the book's attention to banking issues.[24] She particularly lauds the focus on why African-American and Hispanic borrowers were more likely to receive predatory mortgages than similarly qualified white borrowers and why they also had higher default rates. But she faults the authors for inadequately explaining their conclusion that those lending practices might not have been discriminatory. She argues that the subprime-mortgage market was itself discriminatory and that it reflected a system of reverse redlining, the flip side of traditional redlining in which conventional lenders refused to finance housing loans in minority neighborhoods; under reverse redlining, mortgage loans are issued to African-American and Hispanic borrowers on more expensive and less favorable terms than similarly situated whites receive.

The final commentary on *Moving Toward Integration* comes from Kermit Lind, a community development lawyer.[25] Professor Lind agrees with the authors that the Fair Housing Act has had some success but that much remains to be done. He advocates a new model, "Just Sustainability," that values community welfare above private profit. Professor Lind seeks to incorporate environmental and economic equity into the consideration of housing discrimination as a way to improve the quality of urban life for everyone.

The symposium concludes with a brief response by the authors.[26] As that response makes clear, both the book and this symposium represent the continuation of a long-running conversation among scholars, policymakers, advocates, and the public.[27] No one will agree

24. Cathy Lesser Mansfield, *Reverse Redlining in the Subprime Mortgage Market: Comments on* Moving Toward Integration: The Past and Future of Fair Housing, 70 CASE W. RES. L. REV. 747 (2020).

25. Kermit Lind, *Moving Toward Just Sustainability by Integrating Racial Justice and Social Equity*, 70 CASE W. RES. L. REV. 757 (2020).

26. Richard H. Sander & Yana Kucheva, *A Brief Comment on the Symposium Articles*, 70 CASE W. RES. L. REV. 775 (2020).

27. One issue that neither the book nor the commentaries address explicitly is whether there might be disadvantages to residential integration. That issue could arise in connection with supposedly race-neutral alternatives to race-based affirmative-action policies in higher-education admissions. These so-called percentage plans guarantee admission to a public college or university to in-state applicants who graduate in the upper ranks of their high-school class, typically the top 10%. But these policies promote racial diversity only because residential segregation affects the demography of most public high schools and therefore assures that students of color will gain admission under a percentage plan. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting); Gratz v. Bollinger, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). Similar questions might arise in connection with the drawing of so-called majority–minority legislative districts, which even when they are legally permissible depend for their effectiveness on a

with everything the authors have to say, but *Moving Toward Integration* offers important insights as well as provocative ideas and interpretations that should inform that conversation for years to come.

sufficient level of residential segregation to enable such districts to be drawn. Pointing to this omission is not intended as a criticism of either the book's authors or the commentators in this symposium. Rather, it suggests the enormous complexity of the subject.