Case Western Reserve Law Review

Volume 70 | Issue 3 Article 8

2020

# Reflections on *Moving Toward Integration* and Modern Exclusionary-Zoning Cases Under the Fair Housing Act

Robert G. Schwemm

# REFLECTIONS ON *MOVING TOWARD INTEGRATION* AND MODERN EXCLUSIONARY-ZONING CASES UNDER THE FAIR HOUSING ACT

*Robert G. Schwemm*†

CONTENTS



## INTRODUCTION

This Article has two parts: Part I presents my views on *Moving Toward Integration*,[1] and Part II examines one of the book's policy recommendations for furthering residential integration—exclusionary-zoning litigation—along with some of the roadblocks to this and other pro-integration efforts erected by the Trump Administration.

## I. REFLECTIONS ON *MOVING TOWARD INTEGRATION*

*Moving Toward Integration* is an impressive and challenging book about America's most important problem: the enduring racial divisions

† Ashland-Spears Distinguished Research Professor, University of Kentucky College of Law. I thank Tim Moran and Alex Polikoff for their helpful insights and Sarah Welling for her editorial suggestions and constant support.

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

generated by over a century of segregated housing. There is much to praise about the book and also some questions to raise.

First, the praise. The book provides a great deal of sophisticated analysis about difficult legal and social science concepts, presented in clear prose and with helpful graphics. The authors have done a herculean job in gathering and presenting the relevant data, cases, and studies. Their greatest achievement, however, is in offering new ways of understanding this material through original research and fresh analytic methods. Virtually every one of the book's 500-plus pages contains a novel idea or insight, making it the most thought-provoking work in this field since the classic Massey & Denton study of 1993.[2]

The book recognizes some fundamental problems about race-based housing segregation.[3] These include that, despite the passage of the 1968 Fair Housing Act ("FHA"),[4] such segregation remains severe in many parts of the country[5] and that blacks who live in racially segregated neighborhoods suffer a variety of life-limiting, even life-threatening, conditions likely to harm them far into the future.[6] The book also shows

2. DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID (1993).

3. The book's focus is racial segregation, although it does occasionally comment on national-origin segregation. *See, e.g.*, SANDER ET AL., *supra* note 1, at 279 (noting that Hispanic and Asian segregation levels "are almost everywhere dramatically lower than they were in 1970, and . . . in 2010 [were] a full tier below that of African-Americans"); *id.* at 354 (addressing the question of "how the rising racial multi-polarity of metropolitan America affects black segregation").

4. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801–19, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)).

5. *See* SANDER ET AL., *supra* note 1, at 43, 174, 414 (showing various metropolitan areas' segregation levels from 1880–1930, 1970–1980, and 1990–2010); *id.* at 10 (showing the average segregation levels for the sixty largest metropolitan areas in 1970, 1980, 1990, 2000, and 2010).

   The book generally relies of the "index of dissimilarity" method for measuring segregation. This index uses a scale of 0.0–1.0 that is based on the percentage of blacks who would have to move to make their neighborhood exactly reflect the racial make-up of the overall metropolitan area. *See id.* at 37–38. Using this index, the authors define "very high" levels of segregation as communities with dissimilarity scores of above .75, "high" as .65–.74, "moderate" as .50–.64, and "low" or "integrated" as below 0.50. *See id.* at 2–4, 39.

6. *See id.* at 2 (noting that "high metropolitan levels of segregation [have] a powerful depressing effect on black outcomes" and describing some of these outcomes); *id.* at 335–52 (describing recent research showing that segregation causes a variety of bad outcomes for blacks including worse health, stress levels, death rates, employment opportunities, earnings, and poorer access to healthy food and good public services); *id.* at 350, (concluding that lower segregation rates have "very large benefits for [blacks] while having a neutral effect upon [whites]"); *id.* at 394–97 (noting

that the generally slow national trend of de-segregation over the FHA's lifetime masks varying progress at different times (e.g., rapid progress in the 1970s; much less since 1980) and in different parts of the country (e.g., substantial progress in the West and Southwest; much less in the North and Midwest).[7] The authors also make the point that, once a metropolitan area does move from heavily segregated to less so, it never reverts back.[8]

The book's main conclusions are that housing discrimination is no longer a major impediment to integration[9] and that, despite a slow and

---

that the higher rate of black versus white unemployment is much worse in highly segregated than moderately segregated areas); *id.* at 403–08 (describing the higher levels of public spending and school integration that occur in less segregated areas and concluding that "[o]n nearly every measurable dimension, relative black outcomes are impressively different—and better—in metropolitan areas on the lower end of the segregation spectrum" and that far better outcomes for blacks flow from even a "small change in segregation").

7. *See id.* at 175–98 (contrasting San Diego's sharp reduction in segregation with Chicago's continuing high segregation levels in the post-FHA era and suggesting reasons for these differences); *id.* at 188 (noting generally that "housing segregation declined significantly more in the South during the 1970s than in the North"); *id.* at 301 (noting that, after much progress in the 1970s, "[b]eginning in the 1980s, the [racial transition dynamic] began to slow . . . and by the 2000s it had, for all intents and purposes, ground to a halt"); *id.* at 394 (noting that "metro areas with very high segregation . . . are evolving at a snail's pace [and that] the rate at which African-Americans in these metro areas move to outlying areas . . . seems stuck at levels that are not likely to produce much desegregation on their own"); *id.* at 414 (providing a table showing three sets of five metropolitan areas whose segregation declines are characterized, respectively, as large (e.g., San Diego and Seattle), moderate (e.g., Atlanta and Dallas), and small (e.g., New York and Chicago)).

8. *See id.* at 413 (noting that no urban area whose black–white segregation index has dropped below .70 or .65 "then experienced an increase in segregation").

9. *See id.* at 164–65 (arguing that, due to some excellent FHA enforcement in the early 1970s, discrimination levels had fallen "dramatically by 1977," with blacks by then "more likely to encounter a good deal of fair [rather than discriminatory] treatment"); *id.* at 295–99 (concluding, based on HUD's four national tester-based studies from 1977 through 2012, that "discrimination rates continued to fall more or less steadily . . . , in some cases to levels . . . practically equivalent to zero," showing "in our view, a spectacular change in behavior over a relatively short period of time" and that "the anti-discrimination effort has been a remarkable – and largely unheralded – success"); *id.* at 409 (arguing that fair housing litigation "over the past fifty years has . . . succeeded in dramatically reducing many forms of discrimination"); *id.* at 411 (concluding that vigorous enforcement of the FHA in the 1970s "largely ended collective practices of discrimination by brokers and other real estate institutions").

erratic record, the U.S. is winning the battle against housing segregation.[10] The book's positive message and optimistic tone contrast with the pessimism that, as the authors note, pervades much of the other work in this field.[11]

The book takes a chronological approach, with four parts covering, respectively, the post-Civil War period through the FHA's passage in 1968; the first decade of the FHA's enforcement; the remainder of the twentieth century; and the current century. A final part, "Solutions," identifies twelve policy prescriptions to further reduce residential segregation,[12] which, all being financially and politically realistic,[13] reinforce the authors' sense that the progress that has been made in achieving integration can be substantially enhanced in the coming years. One of these proposals, banning source-of-income discrimination, I address at length elsewhere in this volume.[14] The last one, FHA-based challenges to exclusionary zoning, I discuss in Part II of this Article.

The book's weakest points are in some of its interpretations of the history of fair-housing litigation. For example, the gushing treatment of the Justice Department's early FHA enforcement efforts is unfathomable and inconsistent with my experience during that time.[15]

10. *See id.* at 421 (referring to "several propitious demographic trends that should facilitate and sustain higher rates of desegregation" in high-segregation areas); *id.* at 423 (asserting that there are "remarkably favorable conditions" in most high-segregation metro areas today that "tend to insure that increased integration will be stable and self-reinforcing").

11. *See id.* at 7 (noting that "[f]rom the 1970s until recent years, both scholarship and politics on housing segregation have tended toward pessimism"); *id.* at 458 (describing the book's "story [as] a cautiously optimistic one"); *id.* at 11 (noting that, while the authors "think the fair housing glass is half-full," they see a number of reasons for being "very optimistic about the potential for new, carefully designed policies to have powerful and beneficial effects upon black segregation levels").

12. *See id.* at 423–44.

13. *See id.* at 409 (describing these suggested policies as "eminently achievable" and "consistent with the social and political temper of the times"); *see also id.* at 449–54 (providing a modestly priced blueprint for a particular metropolitan area's pursuit of these policies).

14. *See* Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573 (2020).

15. *See* SANDER ET AL., *supra* note 1, at 145, 158 (arguing that "the most important (and most overlooked) enforcement component [in the FHA's early years was] the Department of Justice" and concluding that the "remarkable efforts of DOJ" led to "a dynamic fair housing enforcement effort" "[d]espite HUD's poor performance and a mixed record among private groups"); *see also id.* at 173, 285, 411, 463 (describing the Justice Department's early enforcement efforts as "aggressive," "highly effective,"

I also find unpersuasive the book's effort to elevate the importance of *Shelley v. Kraemer*,[16] the Supreme Court's 1948 decision outlawing court-enforcement of racially restrictive covenants.[17]

---

"vigorous," and "creative"). This view is based almost entirely on an interview with the then-leader of DOJ's civil rights housing section, Frank Schwelb (*see id.* at 516 n.4, 517 nn.8–9), whose insights the authors consider "invaluable." *Id.* at 561.

Mr. Schwelb's DOJ team did bring a number of successful FHA cases, but these tended to be sure winners that reflected a timid, rather than a "dynamic" or "remarkable" approach. *Id.* at 158. Schwelb himself once remarked to me that his Justice group had never lost a case, a comment made with pride, but one I saw as damning of any vigorous prosecutorial effort.

The real enforcement story of the early FHA belongs to private individuals and groups, who were responsible for most of the early FHA cases, including many that established key precedents and *all* that reached the Supreme Court. Indeed, in the Court's first FHA decision in 1972—a case brought by private plaintiffs represented by private lawyers—the Justice Department as *amicus* conceded that "complaints by private persons are the primary method of obtaining compliance with the Act." *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972). Other important early examples included Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 93 (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363, 367 (1982); *see also* Hills v. Gautreaux, 425 U.S. 284, 286 (1976) (constitutional claim); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254 (1977) (same), *on remand*, 558 F.2d 1283, 1285–86 (7th Cir. 1977) (FHA claim). This early trend has held throughout the FHA's history, with the major cases continuing to be brought almost exclusively by private groups. *See, e.g.*, cases cited *infra* notes 38, 42, 54, 60, 75, 110, and 120.

Disclosure: In the 1970s, I was a staff attorney for Chicago's Leadership Council for Metropolitan Open Communities, an organization mentioned in the book. *See* SANDER ET AL., *supra* note 1, at 156–57. My years at the Leadership Council led to participation in a number of important fair housing cases, including *Arlington Heights* and *Gladstone Realtors*.

16. 334 U.S. 1 (1948).

17. *See* SANDER ET AL., *supra* note 1, at 76 (concluding, based on *Shelley*, that "[t]he landscape of urban segregation almost everywhere in America changed dramatically after 1948 [*Shelley*]"). The Court had essentially upheld racial covenants in *Corrigan v. Buckley*, 271 U.S. 323, 331–32 (1926); by the time *Shelley* reversed this position, the damage was done, and real estate agents and others could easily maintain segregation by racial steering, blockbusting, and other discriminatory practices. Indeed, the authors acknowledge that segregation levels remained high from 1950 through 1970 (i.e., in the two decades after *Shelley*). *See* SANDER ET AL., *supra* note 1, at 76, 174, 470. For a more detailed critique of the book's treatment of *Shelley*, see Stephen Menendian & Richard Rothstein, *Putting Integration on the Agenda*, 28 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 147, 165–69 (2019).

These bumps in the book's historical story, however, are not central to its main themes. As to these themes, the points I would raise, which challenge somewhat the authors' optimism, include:

- Given the book's recognition that most of the nation's black population still lives in "very-high-segregation areas"[18] and that it will "take generations for segregation levels in these urban areas to fall to [moderate levels],"[19] I am skeptical about the authors' conclusion that these high-segregation areas are assured of "increased [and self-reinforcing] integration" based on "propitious demographic trends" and other "remarkably favorable conditions."[20]
- Given the authors' view that much of today's segregation is attributable to a concept they call "market failure,"[21] I would have

18. SANDER ET AL., *supra* note 1, at 421; *see also id.* at 412 (noting that most of the metropolitan areas with the largest black populations (e.g., New York, Chicago, Washington, D.C., Detroit) have seen only small declines in segregation since 1970).

19. *Id.* at 421; *see also id.* (noting that segregation levels are likely to decline only "incrementally" in very-high-segregation urban areas).

20. *See supra* note 10. The book could have provided clearer descriptions of what these "propitious demographic trends" are and of how they are likely to ensure future integration. SANDER ET AL., *supra* note 1, at 421. For more on demographic trends that may bode well for future integration, see John R. Logan & Wenquan Zhang, *Global Neighborhoods' Contribution to Declining Residential Segregation*, 70 CASE W. RES. L. REV 675 (2020).

    A countervailing trend, not accounted for in the book, is that, because integration requires households to move, *see supra* note 5, para. 2, it may take longer than the authors envision now that Americans are moving at a much slower pace than in the past. *See* Sabrina Tavernise, *Moving Vans Idle as Migration Stalls in a Reshaped Economy*, N.Y. TIMES, Nov. 21, 2019, at A1 (reporting Census Bureau data showing that Americans move far less frequently than in the past: 9.8% of Americans moved in 2019 (the lowest rate since the Bureau started tracking this figure in 1947) compared to roughly 20% each year in the 1950s).

21. *See* SANDER ET AL., *supra* note 1, at 301 (noting the authors' "theme that much black/white housing segregation comes about because of market failure"); *id.* at 174, 414, 421 (arguing that, in urban areas like Chicago where segregation declines have been small, the "essential problem [is] market failure" and concluding that, based on this problem, it will "take generations for segregation levels in these urban areas to fall to [moderate levels]"); *id.* at 421 (referring to "very slow desegregation rates [in certain metro areas that are] linked to market failure"); *id.* at 464 (asserting that "modern housing segregation is primarily a dead end of market failure"); *see also id.* at 13 (arguing that in those metropolitan areas with few integrated neighborhoods, this "is not a function of choices and preferences, but of *market failure* in the areas that remain highly segregated").

welcomed a stronger explanation of this concept and of why they conclude it deserves such causal significance.[22]

- Given that the book was mostly written during the heady days of the Obama Administration, is a re-evaluation now required after three years of Trump's presidency?

As to the last point, a key theme of the rest of this Article is how reactionary the Trump Administration has been toward fair-housing and de-segregation efforts. Its Departments of Housing and Urban Development ("HUD") and Justice—the agencies primarily responsible for enforcing the FHA[23]—have actively worked to turn back many of the Obama years' most progressive housing efforts;[24] Trump has appointed many federal judges hostile to civil rights;[25] and he has encouraged racial divisions that have coincided with an increase in race-based hate crimes.[26]

The book discounts these negative developments, arguing that "the 2016 election . . . has left long-term [pro-integration] trends

22. The book describes an "inverted dual housing market" in which "the relative housing surplus in black areas deters blacks from pioneering into expensive, outlying white areas [while] the high levels of segregation deter non-blacks from moving into black areas," resulting in the "market fail[ing] to produce the wide range of stably integrated areas that a vast number of blacks and whites would like to live in." *Id.* at 309; *see also id.* at 421 (describing the problem of "market failure" as "the inverted dual housing market"). A related question is why, given that "market failure" means that black neighborhoods tend to be poor, *see id.* at 4, 394–97, the authors are so optimistic that this—and the resulting segregation—will change.

23. *See* 42 U.S.C. §§ 3608(a), 3610–12, 3614a, 3616 (2012) (HUD); *id.* §§ 3612(o), 3614 (Justice); *see also infra* note 39 (describing HUD's authority to issue FHA regulations).

24. *See infra* notes 75–77 and accompanying text.

25. *See, e.g.*, Carl Hulse, *Trump and Senate Republicans Celebrate Making the Courts More Conservative*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/06/us/trump-senate-republicans-courts.html [https://perma.cc/E9LK-44XU] (reporting that, in its first three years, the Trump Administration placed forty-five conservative judges on the U.S. courts of appeals, amounting to one-quarter of all such appellate judges, and that the "the effect of [these] appointments in making decisions is already being felt"). For a recent FHA example, see *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019) (Trump-appointee Kurt D. Engelhardt wrote the majority opinion), *petition for reh'g en banc denied*, 930 F.3d 660 (5th Cir. 2019), *cert. denied*, 140 S. Ct. ___ (2020).

26. *See, e.g.*, Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, F.B.I. Reports*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html [https://perma.cc/CX4V-6QMA].

undisturbed."[27] The authors reason that enforcement of the FHA and other anti-discrimination laws is no longer the key to progress in this field,[28] which instead they view as virtually guaranteed by positive demographic forces and an ever-growing acceptance of integration by the American people.[29] We shall see.

## II. REFLECTIONS ON MODERN EXCLUSIONARY-ZONING CASES

### *A. Background: The Book's Strategy #12 and an Overview of Relevant FHA Law*

The book's last of twelve proposed integration strategies deals with "[d]isparate impact litigation on zoning."[30] Here, the authors identify the basic Supreme Court and appellate precedents that have addressed zoning and other local land-use practices used to limit affordable housing projects in white areas;[31] describe in detail a 2000 Texas district court case;[32] suggest that the Justice Department "could become more involved in bringing [such] suits," at least if "political conditions change" (i.e., after the Trump Administration);[33] and conclude that, although such litigation is often contentious and protracted and its potential efficacy should not be over-estimated, "the stick of disparate impact litigation" can be helpful in challenging particular "exclusionary barriers within a metropolitan area."[34]

The book is correct that exclusionary-zoning cases have been an important part of FHA litigation ever since the statute's earliest years. Three theories of liability ultimately emerged in FHA-based cases accusing municipalities of racial discrimination in blocking affordable

27. SANDER ET AL., *supra* note 1, at 458.

28. *See supra* note 9 and accompanying text.

29. *See supra* note 10; SANDER ET AL., *supra* note 1, at 307–08 (describing the "[r]ising white tolerance for integration" as a "recurring theme of this book" and as growing significantly stronger since the FHA's enactment in 1968); *see also id.* at 398–402 (describing the steady increase in interracial marriage since the 1960s and the growth in the number of Americans that self-identified as multiracial in the recent decennial censuses).

30. SANDER ET AL., *supra* note 1, at 442. Much of an early chapter on "Exclusionary Zoning and Structural Segregation" is devoted to state "fair share" programs, *see id.* at 238–43, and the book's eleventh suggested policy strategy deals with this topic. *See id.* at 440–41.

31. *See* SANDER ET AL., *supra* note 1, at 442, 554 n.34.

32. *Id.* at 442–43.

33. *Id.* at 444.

34. *Id.*

housing projects.[35] Obviously, a FHA claim could be based on intentional discrimination, with the required proof of the defendant's illicit motivation being essentially the same as would violate the Fourteenth Amendment's Equal Protection Clause under the Supreme Court's 1977 decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[36] In addition, two separate types of discriminatory-effect claims—disparate-impact and segregative effect—soon came to be recognized, primarily as a result of decisions by the Seventh and Eighth Circuits in the 1970s[37] and the Second Circuit's 1988 decision in *Huntington Branch, NAACP v. Town of Huntington*.[38] Neither of these discriminatory-effect claims requires a showing of illegal intent, and both were endorsed in a 2013 regulation promulgated by HUD ("Current Rule").[39] Under the Current Rule, which was

35. The three theories of liability described in the rest of this paragraph are available in all FHA cases, not just those involving exclusionary-zoning claims. There is, however, a distinction between these land-use cases and all others under the FHA, at least insofar as HUD's authority is concerned. This is because Congress's 1988 amendments to the FHA, while mandating that the agency issue general FHA regulations, *see* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,231, 3,234 (Jan. 23, 1989), also required HUD to defer to the Justice Department in handling exclusionary-zoning complaints. *See* 42 U.S.C. § 3610(g)(2)(C) (2012) (barring HUD from issuing a charge in any FHA administrative complaint that "involves the legality of any State or local zoning or other land use law or ordinance" and requiring that HUD "immediately refer [such] matter to the Attorney General for appropriate action under [§ 3614(b)(1)]"); *see also* 24 C.F.R. § 103.400(a)(3) (2019) (setting forth HUD's procedures for complying with this provision). As a result, HUD's FHA regulations have generally shied away from making substantive pronouncements about this type of FHA case.

36. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–71 (1977).

37. *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288–94 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

38. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam).

39. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500). As the agency primarily responsible for administering the FHA, *see* 42 U.S.C. § 3608(a) (2012), HUD's regulations interpreting the FHA are entitled to substantial deference. *See* Meyer v. Holley, 537 U.S. 280, 287–88 (2003). HUD's commentary on its 2013 discriminatory-effect regulation noted that the agency had long recognized both types of discriminatory-effect claims under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,461–62.

designed in part to provide national uniformity in evaluating FHA-effect claims,[40] both theories are subject to the same three-step burden-shifting proof scheme, with the plaintiff having the initial burden of proving that the defendant's challenged practice causes a discriminatory effect.[41]

In 2015, the Supreme Court endorsed FHA disparate-impact claims in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[42] concluding that the disparate-impact theory is a way of bolstering the FHA's "continuing role in moving the Nation toward a more integrated society."[43] Although *Inclusive Communities* was not a traditional exclusionary-zoning case,[44] the Court recognized that FHA-outlawed practices "include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[45] According to *Inclusive Communities*, "[s]uits targeting such practices reside at the heartland of disparate-impact liability," a proposition for which the Court cited *Huntington* and two other cases.[46] Again citing *Huntington*, the Court noted that the disparate-impact

HUD is currently considering amendments to its discriminatory-effect regulation. *See infra* Part II.C.2.

40. *See infra* note 93.

41. *See* 24 C.F.R. § 100.500(c). For a description of this three-step process, see Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462.

42. 135 S. Ct. 2507 (2015).

43. *Id.* at 2526. This conclusion was made in *Inclusive Communities*' penultimate paragraph, which also recognized the FHA's role "in our Nation's continuing struggle against racial isolation [and in] striving to achieve our 'historic commitment to creating an integrated society'" and stated: "The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.'" *Id.* at 2525 (citations omitted).

44. *See id.* at 2522–25 (expressing skepticism about the plaintiff's "novel" claim in this case, which alleged that a state agency approved housing proposals under the Low Income Housing Tax Credit program in a way that resulted in most Dallas-area projects being located in poor, predominantly black inner-city neighborhoods as opposed to white suburban communities and which the Court characterized as challenging new developments "in one location rather than another").

45. *Id.* at 2521–22.

46. *Id.* at 2522; *see also id.* at 2519–20 (citing *Huntington*, *Black Jack*, and the Seventh Circuit's remand decision in *Arlington Heights* among the appellate decisions that Congress in the FHA's 1988 amendments "accepted and ratified").

theory has allowed plaintiffs to vindicate the FHA's objectives "by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."[47]

The Court in *Inclusive Communities* did not base its ruling on HUD's 2013 regulation, but the opinion did cite that regulation and HUD's commentary on it with apparent approval on three occasions.[48] *Inclusive Communities* also set forth certain "cautionary standards" to guard against improper FHA impact claims,[49] which were similar to the standards established in HUD's regulation.[50]

### *B. Post-Inclusive Communities Commentary and Cases*

After the Court decided *Inclusive Communities*, I wrote articles on both the disparate-impact and segregative-effect theories of FHA liability in light of that decision.[51] Both articles included sections on how the respective theories would apply to future exclusionary-zoning cases,[52] and indeed the segregative-effect article made the point that this theory has been used almost exclusively in such cases.[53]

Within a year after *Inclusive Communities*, the Second and Ninth Circuits produced major decisions involving FHA exclusionary-zoning claims. The first was *Mhany Management, Inc. v. County of Nassau*,[54] where the Second Circuit affirmed much of the plaintiffs' victory in challenging a white city's opposition to a proposed 300-unit, mixed-income development whose likely tenants would include a substantial

47. *Id.* at 2522.

48. *See id.* at 2514–15, 2522–23.

49. *Id.* at 2522–24.

50. Both the *Inclusive Communities* opinion and the HUD regulation suggest that FHA disparate-impact claims should be judged according to a three-step, burden-shifting analysis similar to the process for evaluating Title VII employment-discrimination claims. *See id.* at 2522–24; 24 C.F.R. § 100.500(C). For more on whether the standards set forth in *Inclusive Communities* differ from those in HUD's 2013 regulation, see *infra* note 84 and accompanying text.

51. *See* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709 (2017); Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685 (2016).

52. *See* Schwemm, *supra* note 51, at 749–51; Schwemm & Bradford, *supra* note 51, at 751–60.

53. *See* Schwemm, *supra* note 51, at 715, 735.

54. 819 F.3d 581 (2d Cir. 2016).

number of minorities.[55] The trial court in *Mhany* had ruled in favor of the plaintiffs' discriminatory intent claim and also found that the defendant-city's action had both a disparate impact on minorities and a segregative effect.[56] The Second Circuit upheld liability on the intent claim,[57] affirmed the findings below on the first two steps of the discriminatory-effect analysis,[58] and remanded for further proceedings on the effect claim's third element (i.e., whether the city's legitimate interests could be achieved by a "less discriminatory alternative").[59]

Two days after *Mhany*, the Ninth Circuit issued its opinion in *Avenue 6E Investments, LLC v. City of Yuma,*[60] which upheld the plaintiffs' intent-based claim challenging the defendant's refusal to rezone land for a moderately priced, predominantly Hispanic development and also ruled that summary judgment should not have been entered against their disparate-impact claim.[61] With respect to the former, the Ninth Circuit relied primarily on allegations that the city was influenced by neighbors' race-based statements of opposition,[62] a

55. *Id.* at 590, 608–09, 624–25. *Mhany* was decided a few months after another post-*Inclusive Communities* Second Circuit exclusionary-zoning decision, *Anderson Group, LLC v. City of Saratoga Springs*, 805 F.3d 34 (2d Cir. 2015). In *Anderson Group*, the Second Circuit reinstated a jury verdict in favor of an affordable housing developer that accused the defendant of impact-based discrimination in blocking the plaintiff's proposed project. *Id.* at 38, 56. According to *Anderson Group*, the governing FHA legal framework was based on the Second Circuit's 1988 decision in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam). *See Anderson Group*, 805 F.3d at 49.

56. *See Mhany*, 819 F.3d at 599, 617.

57. *Id.* at 605-16.

58. *Id.* at 616–20.

59. *Id.* at 617-19. On remand, the district court ruled for the plaintiffs on this point, *see* Mhany Management, Inc. v. County of Nassau, No. 05-CV-2301, 2017 WL 4174787, at *1 (E.D.N.Y. Sept. 19, 2017), after which the case ended with a multi-million-dollar settlement. *See* Settlement Agreement at 3, Mhany Management, Inc. v. County of Nassau, No. 05-CV-2301 (E.D.N.Y. Mar. 15, 2019), ECF 626-1; *Recent Settlements*, FAIR HOUSING-FAIR LENDING REP., at ¶4.7 (Apr. 2019) (reporting settlement agreement that included $5,400,000 for the plaintiff-developer, $450,000 for other developers, $120,000 for a fair housing organization, and attorney's fees).

60. 818 F.3d 493 (9th Cir. 2016).

61. *Id.* at 496–97. The Ninth Circuit did, however, affirm the district court's granting of the defendant's summary judgment motion as to the plaintiffs' segregative-effect claim. *Id.* at 513.

62. *Id.* at 504–07.

factor that had also been persuasive in the *Mhany* case.[63] As for the impact claim, the appellate court held that the court below should not have rejected this claim based on the availability of other modestly priced housing in the area.[64]

These post-*Inclusive Communities* decisions provide further support for using the FHA's disparate-impact theory—and, to a lesser extent, its segregative-effect theory—to challenge exclusionary-zoning practices. Neither appellate court saw any significant difference between how such a claim is evaluated under *Inclusive Communities* and the HUD regulation,[65] and indeed *Mhany* held that the HUD regulation should supplant prior Second Circuit precedent governing the burden of proof in an effect claim's third step.[66] Also, both decisions served as reminders that intent-based claims can also succeed in this type of case,[67] in part because evidence of impact discrimination is relevant in proving illicit intent[68] and also because both the Second and Ninth Circuits were willing to interpret hostile comments by neighbors about the proposed development as code phrases for anti-minority sentiments.[69] Many of these same themes were also reinforced by district court decisions in post-*Inclusive Communities* exclusionary-zoning cases.[70]

63. *See Mhany*, 819 F.3d at 606–10.

64. *See Ave. 6E*, 818 F.3d at 509-13. On remand, the trial court found sufficient evidence to deny the defendant's motion for summary judgment as to the plaintiff's disparate-impact claim, *see* Ave. 6E Investments, LLC v. City of Yuma, 217 F. Supp. 3d 1040, 1058 (D. Ariz. 2017), after which the case was settled. *See* Conditional Settlement and Release Agreement at 2, 4, Ave. 6E Investments v. City of Yuma, No. 2:09-CV-00297-JJT (D. Ariz. June 11, 2019), ECF 343-1 (providing for settlement that included $2,850,000 for the plaintiff-developer and rezoning of specified parcels for future development of affordable housing).

65. *See Mhany*, 819 F.3d at 618; *Ave. 6E*, 818 F.3d at 512–13. The Ninth Circuit did not discuss this issue in its analysis of the plaintiff's disparate-impact claim, but the district court on remand regularly relied on the HUD regulation in upholding this claim. *See Ave 6E*, 217 F. Supp. 3d at 1047 n.28, 1048 nn.34–35, 1050 n.50, 1051 n.55.

66. *Mhany*, 819 F.3d at 617–19.

67. *See also* 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 678–85 (D.C. Cir. 2006) (holding, in a pre-*Inclusive Communities* decision, that plaintiffs' intent-based claim could proceed while their impact-based claim failed); *Mhany*, 819 F.3d at 624.

68. *See Mhany*, 819 F.3d at 606; *Ave. 6E*, 818 F.3d at 507–08.

69. *See Mhany*, 819 F.3d at 606–11; *Ave. 6E*, 818 F.3d at 503–07.

70. *See, e.g.*, Gilead Cmty. Servs., Inc. v. Town of Cromwell, No. 3:17-cv-627 (VAB), 2019 WL 7037795, at *21–25 (D. Conn. Dec. 20, 2019); *Ave. 6E*, 217 F. Supp. 3d at 1047–48.

### *C. The Trump Administration's Attack on Fair Housing and Exclusionary-Zoning Cases*

#### 1. Overview

As noted in Part I, *Moving Toward Integration*'s optimistic conclusions take little account of the steps taken by the Trump Administration to undercut fair-housing enforcement generally and to limit race-based integration efforts and exclusionary-zoning suits in particular.[71] Along with the appointment of many federal judges hostile to civil rights,[72] these steps include:

- the Justice Department's virtual refusal to file any race-based or exclusionary-zoning cases under the FHA,[73] and its general hostility to the disparate-impact theory of liability under all civil-rights statutes;[74]
- HUD's attempt to delay its 2016 rule adjusting fair-market-rent standards for the Housing Choice Voucher program, which was enjoined

71. Critiques of the Trump Administration's civil-rights record abound. For an example focused on fair housing, see Stephen M. Dane, *Fair Housing Policy Under the Trump Administration*, HUM. RTS., May 2019, at 18.

72. *See supra* note 25 and accompanying text.

73. In the Trump Administration's first three years, the Justice Department filed about forty FHA cases, only three of which alleged anti-black discrimination (two involving mortgage redlining by Midwest banks and one (based on a HUD investigation and charge) challenging a California town's biased enforcement of its rental ordinance). *See Civil Rights Division Press Releases*, DEP'T OF JUST., https://www.justice.gov/crt/civil-rights-division-press-releases-speeches [https://perma.cc/A2Y2-NYWF] (last visited May 27, 2020) (providing press releases for all filed cases). As for race-based exclusionary-zoning cases, the Justice Department's only reported activity during this three-year period was to settle a case against a Chicago suburb that had been filed during the Obama Administration. *See Justice Department Obtains $410,000 Settlement of Housing Discrimination Lawsuit Against Tinley Park, Illinois, for Refusing to Approve Low-Income Housing Development*, DEP'T OF JUST. (Aug. 24, 2018), https://www.justice.gov/opa/pr/justice-department-obtains-410000-settlement-housing-discrimination-lawsuit-against-tinley [https://perma.cc/P5GV-6B5A].

74. *See* Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules*, WASH. POST (Jan. 3, 2019, 7:00 AM), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/H6WR-UM57] (reporting on a Justice Department memo that directed senior civil rights officials to examine how decades-old disparate-impact regulations might be changed or removed in their areas of expertise and noting that similar action was being considered at HUD and other agencies).

for violating the Administrative Procedure Act ("APA") as a result of privately initiated litigation;[75]

- HUD's reversal of its 2015 regulations governing local jurisdictions' responsibilities to foster housing integration by affirmatively furthering fair housing ("AFFH"), an effort that was unsuccessfully challenged in court;[76]
- HUD's proposed—and currently pending—changes to its FHA discriminatory-effect regulation, which would substantially restrict effect-based claims, as described below.[77]

The only potentially positive action taken by the Administration in this field is a mostly rhetorical effort to reduce local-government restrictions on affordable housing that, as of early 2020, had only produced HUD's announcement of a proposed regulation.[78]

---

75. *See* Open Cmtys. All. v. Carson, 286 F. Supp. 3d 148, 156–61, 179 (D.D.C. 2017). For a detailed description of the Housing Choice Voucher program (also known as "Section 8"), see Schwemm, *supra* note 14, at 10–16.

76. *See* Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14, 36, 66 (D.D.C. 2018) (ruling against APA-based challenge to HUD's delay in implementing its 2015 AFFH regulations). In early 2018, HUD suspended until 2025 the obligation of most jurisdictions to submit the fair-housing assessments mandated by the 2015 AFFH regulations.

    In mid-2019, HUD announced its intent to "streamline" the AFFH regulations, *see* Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 84 Fed. Reg. 40,713, 40,715 (Aug. 16, 2019), and in early 2020, HUD published proposed new regulations. *See* Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041, 2,041 (Jan. 14, 2020) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903, 905). Among other things, this proposed rule would effectively eliminate consideration of race and residential segregation from HUD's assessment of whether its grantees are fulfilling their FHA-affirmative obligations, see *id.* at 2,042, 2,044, and local jurisdictions, though free to "undertake changes to zoning or land-use policies as one method of complying with the AFFH obligation," would not "have their certification questioned because they do not choose to undertake zoning changes." *Id.* at 2046.

77. *See infra* notes 79–112 and accompanying text.

78. *See* White House Council on Eliminating Regulatory Barriers to Affordable Housing; Request for Information, 84 Fed. Reg. 64,549, 64,549–50 (Nov. 22, 2019) (requesting, pursuant to a mid-2019 Executive Order, public comment by early 2020, "on Federal, State, local, and Tribal laws, regulations, land use requirements, and administrative practices that artificially raise the costs of affordable housing development and contribute to shortages in housing supply"). For a critique of this effort by two senior officials of the National Fair Housing Alliance, see Debby Goldberg & Morgan Williams, *Zoning Is Not the Answer to All Our Housing Problems*, THE HILL (Nov. 7, 2019, 3:00 PM), https://thehill.com/opinion/civil-rights [https://perma.cc/C28L-GPFU].

2. HUD's Proposed Changes to its Discriminatory-Effect Regulation

On August 19, 2019, HUD proposed major amendments to its discriminatory-effect regulation ("Proposed Rule").[79] The proposed amendments would eliminate any reference to the segregative-effect theory of liability[80] and, with respect to disparate-impact claims, would require plaintiffs to allege five new elements in their complaint[81] while providing additional protections for defendants, including a series of "safe harbors"[82] and more favorable burdens of proof.[83] HUD's principal rationale for these amendments was "to bring HUD's disparate impact rule into closer alignment with the analysis and guidance provided in *Inclusive Communities* as understood by HUD."[84]

79. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,857 (Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100). The Proposed Rule also included changes to certain other HUD-FHA regulations. *See id.* at 42,857 (noting that this rule also proposes to "incorporate minor amendments to [24 C.F.R.] §§ 100.5, 100.7, 100.70, and 100.120").

80. *See infra* notes 103–110 and accompanying text.

81. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858. The five elements are:

> (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective;
>
> (2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class;
>
> (3) That the challenged policy or practice has an adverse effect on members of a protected class;
>
> (4) That the alleged disparity caused by the policy or practice is significant; and
>
> (5) That there is a direct link between the disparate impact and the complaining party's alleged injury.

*Id.* at 42,858–59.

82. *See id.* at 42,859 (to be codified under 24 C.F.R. § 100.500(c)) (proposing three new methods of defense).

83. *See id.* at 42,860 (to be codified under 24 C.F.R. § 100.500(d)) (proposing higher burden of proof for plaintiffs while giving defendants easier burden to rebut plaintiff's case).

84. *Id.* at 42,857; *see also id.* at 42,854 (noting that the proposed amendments are designed to "better reflect the Supreme Court's 2015 rule in [*Inclusive Communities*]"); *id.* at 42,861 (opining that the Current Rule needs extensive changes because courts and the public are "forced to reconcile how to implement HUD's regulations consistent with *Inclusive Communities*" and a new rule would provide clarity and allow entities to avoid "the need to research and compile case law since *Inclusive Communities*").

The Proposed Rule provided for a two-month comment period,[85] during which HUD received over 45,000 comments, many critical.[86] HUD is obligated under the Administrative Procedure Act to consider these comments,[87] which means that the agency will be hard pressed to issue a final rule for many months.[88] Still, a Trump Administration priority has been to narrow the FHA's effect theory,[89] and HUD seems likely to adopt a final rule by the end of 2020.[90] To the extent that the final rule is similar to the Proposed Rule, it will likely face an APA-based court challenge[91] and, depending on the results of the 2020

---

HUD's view that the Current Rule is substantially inconsistent with *Inclusive Communities* is at odds with most post-*Inclusive Communities* cases. *See* National Fair Housing Alliance, Comment Letter on HUD's Proposed Rule 49–56 (Oct. 18, 2019), *available at* https://www.regulations.gov/document?D=HUD-2019-0067-3079 (gathering cases); *see, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 618 (2d Cir. 2016) (stating that "[t]he Supreme Court implicitly adopted HUD's [Current Rule]" in *Inclusive Communities*); Nat'l Fair Hous. All. v. Bank of America, N.A., 401 F. Supp. 3d 619, 631 (D. Md. 2019) (describing *Inclusive Communities* as "[h]ewing closely" to the Current Rule); Prop. Cas. Insurers Assoc. of Am. v. Carson, No. 12-cv-10456, 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017) (noting that "the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's [Current Rule] that required correction").

85. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,854.

86. *See Businesses, Policymakers, Advocates, Experts Submit Thousands of Comments Opposing HUD's Attack on Core Civil Rights Tool*, NAT'L FAIR HOUSING ALLIANCE (Oct. 23, 2019), https://nationalfairhousing.org/2019/10/23/businesses-policymakers-advocates-experts-submit-thousands-of-comments-opposing-huds-attack-on-core-civil-rights-tool/ [https://perma.cc/4WTH-AAJJ].

87. *See, e.g.,* Prop. Cas. Insurers Ass'n of Am. v. Donovan, 66 F. Supp. 3d 1018, 1048–51 (N.D. Ill. 2014) (citing, *inter alia*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

88. By way of comparison, it took HUD about fifteen months to finalize its discriminatory-effect rule after it proposed the rule, a process that included having to consider less than 100 public comments. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,463–64 (Feb. 15, 2013).

89. *See supra* note 74 and accompanying text.

90. HUD's latest regulatory plan called for final action on the Proposed Rule in April 2020. DEPT. HOUS. & URBAN DEV., RIN NO. 2529-AA98, HUD'S IMPLEMENTATION OF THE FAIR HOUSING ACT'S DISPARATE IMPACT STANDARD, https://www.reginfo.gov/public/do/eAgendaMain [https://perma.cc/PJA4-JMEZ] (last visited Feb. 5, 2020).

91. *Cf.* Open Cmty. All. v. Carson, 286 F. Supp. 3d 148 (D.D.C. 2017) (ruling on APA-based challenge to new HUD rule dealing with housing program);

presidential election, may be revoked or substantially changed by HUD in a new administration.

### 3. The Proposed Rule's Potential Effect on Exclusionary-Zoning Litigation

If something like the Proposed Rule does become final, what effect will it have on future FHA exclusionary land-use litigation? As noted above, HUD has generally avoided any attempt to regulate such litigation on the ground that the statute gives enforcement authority in these cases to the Justice Department,[92] but both the Proposed Rule and its predecessor purport to govern all types of FHA claims[93] and thus apply to FHA claims in court as well as in administrative actions before HUD.[94]

Clearly, the Proposed Rule would make exclusionary-zoning cases much more difficult for plaintiffs to win. As commentators on this rule have noted, its new disparate-impact pleading requirements might have

Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018) (same). For more on these cases, see *supra* notes 75-76 and accompanying text.

92. *See supra* note 35.

93. For examples of exclusionary-zoning cases that have relied on the Current Rule, see Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 618–619 (2d Cir. 2016); Ave. 6E Invs., LLC v. City of Yuma, 217 F. Supp. 3d 1040, 1050 (D. Ariz. 2017). *See also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,472 (noting that one of the purposes of the Current Rule was to establish "uniform standards" for FHA discriminatory-effect cases in order to "simplify this type of litigation").

94. Both rules explicitly purport to apply to the parties in a court case ("plaintiff" and "defendant") as well as those in an administrative proceeding ("charging party" and "respondent"). *See* Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,855, 42,862–63 (Aug. 19, 2019) (proposing 24 C.F.R. § 100.500(b)–(d)); *id.* at 42,859 (commenting that the defenses proposed in amended 24 C.F.R. § 100.500(c) may be raised "through a variety of procedural motions," such as a motion to dismiss or a motion for summary judgment under, respectively, FED. R. CIV. P. 12(b)(6) and 56)); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,482 ("The charging party, with respect to a claim under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of [proving Step One]"); *id.* at 11,474 (commenting on the ability of "plaintiffs or complainants" to demonstrate Step Three through Rule 26(b)(1) discovery); *see also supra* notes 65, 70 (giving examples of court cases that have applied the Current Rule).

derailed even some of the classic "heartland" exclusionary-zoning cases cited with approval by the Supreme Court in *Inclusive Communities*.[95]

The Proposed Rule would also negatively affect these cases in other ways, two of which are particularly noteworthy.[96] First, in limiting disparate-impact claims to those that challenge "policies or practices" as opposed to "single events," HUD explicitly identifies "a local government's zoning decision" as being in the latter, inappropriate category.[97] The basic "policy" requirement is derived from dicta in

95. *See* Justin Steil et al., M.I.T. Dep't of Urban Studies and Planning, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 7 (Oct. 18, 2019), https://www.regulations.gov/document?D=HUD-2019-0067-3331 [https://perma.cc/6D75-Q28C]; *see also* 154 Law Professors, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 2 (Oct. 18, 2019) (concluding that, with respect to "exclusionary land use rules and other policies that perpetuate segregation, . . . [HUD's Proposed Rule] strips plaintiffs of this necessary, congressionally-intended tool by making disparate impact claims nearly impossible to bring"); Calvin Bradford, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 35 (Oct. 18, 2019), https://www.regulations.gov/document?D=HUD-2019-0067-3437 [https://perma.cc-9DZZ-HJX5] (concluding, in comments by an experienced expert witness in disparate-impact cases, that the Proposed Rule's imposition of "new and unjustified burdens of proof on the plaintiffs" and "safe harbors" for defendants amounts to "an attack on the very theory [of disparate-impact liability as] supported in the case law and in the [*Inclusive Communities*] decision").

96. In addition to the two examples described in the text, the Proposed Rule would limit disparate-impact claims to challenging practices that "actually" (as opposed to "actually or predictably") result in a discriminatory effect, by deleting the portion of the Current Rule stating that a practice has a discriminatory effect "where it actually or predictably results" in a disparate impact. *See* 24 C.F.R. § 100.500(a) (2017); *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,468 (finding that actions that "predictably" result in discriminatory effects should be covered). The Current Rule's position is supported by many exclusionary-zoning decisions, including one then cited by HUD to support this point that was later described by the Supreme Court as a "heartland" disparate-impact case. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2522 (2015) (citing United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974)).

97. *See* Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858 (stating that the plaintiff's burden of identifying a "particular policy or practice that causes the disparate impact" will generally not be met by "alleging that a single event—*such as a local government's zoning decision* or a developer's decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice") (emphasis added).

*Inclusive Communities*,[98] but HUD's gratuitous extension of it to immunize most zoning decisions[99] is actually inconsistent with *Inclusive Communities*' endorsement of key exclusionary-zoning precedents,[100] with post-*Inclusive Communities* cases,[101] and with modern land-use practices.[102]

98. *See Inclusive Communities*, 135 S. Ct. at 2523 (noting that "a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all").

99. The only example given in *Inclusive Communities* of a plaintiff inappropriately challenging a "single decision" as opposed to a "policy" was "the decision of a private developer to construct a new building in one location rather than another." *See id.* at 2523.

100. *See id.* at 2519 (citing with approval exclusionary-zoning decisions that involved FHA challenges to municipalities' refusal to rezone a specific parcel for a particular project).

101. *See, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) (holding that the complaint here "about a [rezoning] decision affecting one piece of property . . . falls well within a classification of a 'general policy'" susceptible to a disparate-impact challenge); Ave. 6E Invs., LLC v. City of Yuma, No. 2:09-CV-00297 JWS, 2018 WL 582314, at *6–7 (D. Ariz. Jan. 29, 2018) (noting, in upholding disparate-impact challenge to a one-time zoning decision, that "not all one-time decisions are equal" and that "[i]t is the type and effect of the decision that dictates whether it can be subject to a disparate impact claim").

    HUD's commentary on this point does not acknowledge *Mhany* or *Ave. 6E*, but instead relies on a single non-zoning trial-court decision. *See* Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858 n.37 (citing Barrow v. Barrow, No. 16-11493-FDS, 2017 WL 2872820, at *2–3 (D. Mass. July 5, 2017) (dismissing *pro se* plaintiff's disparate-impact claim in dispute among siblings over the terms of a will and the devise of their mother's property)).

102. For a detailed exposition of this point, see N.Y.U. Furman Center, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard at 17–23 (Oct. 18, 2019), https://www.furmancenter.org/files/2019-10-17_Disparate_Impact_Comments_FINAL.pdf [https://perma.cc-894D-P8MK] (describing contemporary land-use regulation as "a highly discretionary process characterized by individualized decisions," noting that the federal government has regularly recognized that most land-use decisions "now include a discretionary component involving individual decisions," and concluding that the Proposed Rule's exclusion of single-zoning decisions from the FHA's disparate-impact coverage "would foreclose review of many, and perhaps most, land use decisions—no matter how arbitrary or unjustified").

Second, the Proposed Rule deletes any reference to the FHA's "segregative-effect" theory of liability,[103] whose primary value has been in challenging exclusionary-zoning practices.[104] Although HUD provides no justification for this change, it is presumably intended to align the discrimination-effect regulation with *Inclusive Communities*,[105] which only dealt with and endorsed the disparate-impact theory.[106] Whatever HUD's motivation here, its abandonment of the segregative-effect theory reverses the agency's long-held position.[107] Moreover, it ignores decades of cases recognizing this theory,[108] not to mention *Inclusive*

103. *Compare* Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,855 (Aug. 19, 2019) (providing, at 24 C.F.R. § 100.500, that FHA liability may be established "based on a specific policy's or practice's discriminatory effect on members of a protected class"), *with* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (providing, at 24 C.F.R. § 100.500(a), that FHA liability may exist where a practice results in "a disparate impact on a group of persons *or creates, increases, reinforces, or perpetuates segregated housing patterns* because of race [or other prohibited factor]") (emphasis added).

104. *See supra* note 53 and accompanying text. Among the advantages of the segregative-effect theory in exclusionary-zoning cases is that it, unlike the disparate-impact theory, may challenge a particular action or one-time decision as well as a "policy." *See* Schwemm, *supra* note 51, at 736–38; *supra* notes 97–102 and accompanying text.

105. *See supra* note 84 and accompanying text. According to HUD's commentary on this aspect of the Proposed Rule, the key part of the regulation "would be slightly amended to reflect the removal of a definition for discriminatory effect." Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

106. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2516–25 (2015) (dealing only with the question of whether disparate-impact claims are cognizable under the FHA).

107. *See* Implementation of the Fair Housing Act's Disparate Impact Standard, 78 Fed. Reg. at 11,469. When an agency makes such a change, the APA requires that it "display awareness that it is changing position" and provide a "detailed justification" for the change. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *accord* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2120 (2016).

108. *See, e.g.*, United States v. Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974) (recognizing that practices leading to the "perpetuation of segregation" violate the FHA); Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (affirming that the Second Circuit properly found disparate impact when a town's practices "significantly perpetuated segregation in the Town"); *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469 & n.102 (noting FHA cases endorsing this theory spanning nearly five decades). *See generally Schwemm*, *supra* note 51, at 715–36 (describing cases).

*Communities*' endorsement of many of these cases[109] and post-*Inclusive Communities* cases that have continued to rely on this theory.[110]

More generally, this aspect of the Proposed Rule reflects HUD's current indifference to the FHA's role in fostering integration. In deleting all but one tangential reference to segregation,[111] the Proposed Rule ignores the agency's and the courts' longstanding recognition of the FHA's integration goals and *Inclusive Communities*' powerful statements about the FHA's importance as a tool for combating residential segregation.[112]

---

109. *See Inclusive Communities*, 135 S.Ct. at 2519, 2522 (citing these cases regularly and recognizing "perpetuating segregation" as a basis for FHA liability).

110. *See, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619–20 (2d Cir. 2016); Nat'l Fair Hous. All. v. Bank of Am., N.A., 401 F. Supp. 3d 619, 640–41 (D. Md. 2019); Nat'l Fair Hous. All. v. Travelers Indem. Co., 261 F. Supp. 3d 20, 34 (D.D.C. 2017); *see also* Ave. 6E Invs. v. City of Yuma, 818 F.3d 493, 503 (9th Cir. 2016) (noting that, after *Inclusive Communities*, the FHA "forbids actions by private or governmental bodies that create a discriminatory effect upon a protected class or perpetuate housing segregation without any concomitant legitimate reason").

111. *See* Implementation of the Fair Housing Act's Disparate Impact Standards, 84 Fed. Reg. 42,854, 42857 (Aug. 19, 2019) (proposing to amend an example of unlawful behavior in the FHA steering-and-services regulation adopted by HUD in 1989 [24 C.F.R. § 100.70(a)]). The Proposed Rule would add to this regulation's final example "procedures, building codes, [and] permitting rules," so that the new version outlaws "[e]nacting or implementing land-use rules, ordinances, *procedures, building codes, permitting rules*, policies or requirements" that restrict housing opportunities on a prohibited basis. *See id.* at 42,862 (proposing 24 C.F.R. § 100.70(d)(5)) (emphasis added). It thus would extend the current regulation's prohibitions to include the italicized techniques to the land-use rules, ordinances, and other elements that are already included in § 100.700(d)(5). According to HUD, this proposed addition is simply "for clarity in connection with the changes HUD is making" in its discriminatory-effect regulation. *Id.* at 42,857.

112. *See* Stacy Seicshnaydre, Comment Letter on Proposed Rule for HUD's Implementation of the Fair Housing Act's Disparate Impact Standards 2 (Oct. 18, 2019). According to Professor Seicshnaydre's analysis, HUD's 2013 commentary on the Current Rule made thirty-eight references to segregation and ten references to integration and the *Inclusive Communities* opinion made six references to segregation, three references to integration, and additional references to racial isolation. *See id.*; *see also Inclusive Communities*, 135 S.Ct. at 2522 (noting that the FHA's disparate-impact theory curbs practices that "arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation"); *id.* at 2550–51 (Alito, J., dissenting) (noting, in the principal dissent, that the "the 'purpose' driving the Court's analysis" is "[t]he desire to eliminate the 'vestiges' of 'residential segregation by race'"); *supra* note 43 and accompanying text (providing additional examples of the *Inclusive Communities* opinion's

Given the strong judicial support for the segregative-effect theory, HUD's abandonment of it in the Proposed Rule may simply be ignored by the courts. There is also reason to suppose that courts will not follow HUD's proposed restrictions on pleading disparate-impact claims, because federal agencies do not have the authority to set such standards.[113]

For example, the Proposed Rule purports to establish a heightened pleading standard for FHA disparate-impact claims by setting forth five new "elements" of a prima facie case that a plaintiff must plead,[114] but HUD lacks the power to do this. Federal-court pleading standards are set by the Federal Rules of Civil Procedure, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief."[115] Courts do not have authority to impose more exacting

recognition of the FHA's integration goal). By contrast, the Proposed Rule makes only one reference to segregation and no references to integration. *See* Seicshnaydre, *supra*.

113. *See generally* Olatunde Johnson et al., Comment Letter on Proposed Rule for HUD's Implementation of the Fair Housing Act's Disparate Impact Standards 1 (Oct. 18, 2019) (opining that the Proposed Rule may violate the APA by, *inter alia*, addressing "matters beyond the FHA; specifically, to evidentiary and procedural issues as they may arise in cases brought under the FHA in federal or state courts"). The judiciary need not defer to HUD's position on such matters, because they involve areas of law (e.g., court procedural rules) for which the agency has no authority to administer. *Cf.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 843 n.9 (1984) (limiting judicial deference to an "agency's construction of the statute which it administers").

114. *See supra* note 81 and accompanying text (setting forth these elements); Implementation of the Fair Housing Act's Disparate Impact Standards, 84 Fed. Reg. at 42,859 (proposing that defendants may assert the absence of any of these elements in a Rule 12(b)(6) motion to dismiss).

115. FED. R. CIV. P. 8(a)(2). Satisfying this standard requires a plaintiff to assert facts that make the claim "plausible." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This is generally not difficult in FHA cases. *See, e.g.*, City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1271, 1295 (11th Cir. 2019), *vacated on other grounds*, 140 S. Ct. 1259 (2020); Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 428–29 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2026 (2019); Swanson v. Citibank, N.A., 614 F.3d 400, 403–07 (7th Cir. 2010); cases cited *infra* note 120.

requirements beyond this standard,[116] and certainly agencies do not.[117] Nor does HUD have any power to govern pleading requirements in state courts, which may entertain FHA claims,[118] including those involving effect-based challenges to exclusionary zoning.[119] In addition, the Proposed Rule conflates prima-facie and burden-shifting standards with pleading standards, which courts have consistently not allowed in post-*Inclusive Communities* discriminatory-effect cases.[120]

The fact that much of the Proposed Rule may ultimately be ignored by the courts, however, does not mean that HUD's effort here will not harm plaintiffs in future exclusionary-zoning cases. Litigants and courts in these cases will, at the least, have to struggle with a burdensome set of preliminary issues created by the Proposed Rule. Thus, unlike the Current Rule, which was designed to bring needed uniformity to FHA

116. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'") (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)). The federal rules may be amended only pursuant to the Rules Enabling Act. *See* 28 U.S.C. §§ 2071–74 (2012).

117. *Cf. In re* Bankers Trust Co., 61 F.3d 465, 470 (6th Cir. 1995) (holding that a federal regulation requiring banks to withhold certain documents from discovery was "plainly inconsistent" with the Federal Rules of Civil Procedure governing discovery and thus "cannot be enforced" in the absence of an enabling statute "more specific than a general grant of authority").

118. *See* 42 U.S.C. § 3613(a)(1)(A) (2012).

119. *See, e.g.*, Suffolk Hous. Servs. v. Town of Brookhaven, 109 A.D.2d 323, 337–39 (N.Y. App. Div. 1985); *cf.* Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 406–14 (Mass. 2016) (dealing with FHA-effect claim in non-zoning context); Villas West II of Willowridge Homeowners Ass'n v. McGlothin, 885 N.E.2d 1274, 1280–85 (Ind. 2008) (same).

120. *See, e.g.*, Nat'l Fair Hous. All. v. Deutsche Bank Nat'l Trust, No. 18 CV 839, 2019 WL 5963633, at *13–14 (N.D. Ill. Nov. 13, 2019); Washington v. United States Dep't of Hous. & Urban Dev., No. 16CV3948ENVSMG, 2019 WL 5694102, at *21–22 (E.D.N.Y. July 29, 2019); Nat'l Fair Hous. All. v. Bank of Am., N.A., 401 F. Supp. 3d 619, 634–38 (D. Md. 2019); Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Assoc., 294 F. Supp. 3d 940, 947–48 (N.D. Cal. 2018); County of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950, 967 (N.D. Ill. 2018); *see also* Winfield v. City of New York, No. C 15-5236, 2016 WL 6208564, at *5–6 (S.D.N.Y. Oct. 24, 2016) (noting that "a prima facie case is an evidentiary standard, . . . not a pleading requirement" and that *Inclusive Communities* "did not alter the plausibility standard for pleading, which requires only the plaintiff plead allegations that plausibly give rise to an inference that the challenged policy causes a disparate impact").

discriminatory-effect claims,[121] the Proposed Rule is likely to split courts and add new uncertainty in this area.[122] *Moving Toward Integration* already notes that FHA exclusionary-zoning litigation has limited "potential efficacy . . . for practical reasons,"[123] and having an oppositional federal government certainly does not make it any easier.

## CONCLUSION

A recurring question in *Moving Toward Integration* is whether the Fair Housing Act and its enforcement through litigation have been of significant value in reducing housing discrimination and thereby increasing residential integration. This question has also animated much of my career. Lawyers tend to assume that law influences behavior. There is, however, surprising little empirical research to support this proposition. There is even less research on why people choose to obey or disobey a particular law, as I discovered some years ago when I examined why rental discrimination rates were continuing at such high levels decades after the FHA's enactment.[124]

The book's basic answer is that early FHA enforcement was effective in ending institutional resistance to race-based housing discrimination, opening the way for substantial increases in integration; thus continued effective enforcement is now less important because the pro-integration forces unleashed in earlier decades virtually ensure future desegregation.[125] I am skeptical about a number of these propositions.

I do agree, however, that the FHA has had a profoundly positive impact on the Nation's integration efforts. Without knowing exactly *how* this has happened, it is clear that the public's acceptance of housing integration has greatly increased over the FHA's fifty years and that

121. *See supra* note 93.

122. *See* Nat'l Fair Housing Alliance, *supra* note 84, at 56 (opposing the Proposed Rule in part because it "would inject inconsistencies and uncertainty into existing law"); *see also* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) (observing, in the course of upholding FHA discriminatory-effect challenge to town's zoning decision, that "other circuits have described the distinction between a single isolated decision and a practice as 'analytically unmanageable [because] almost any repeated course of conduct can be traced back to a single decision'") (quoting Council 31, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. Ward, 978 F.2d 373, 377 (7th Cir. 1992)).

123. SANDER ET AL., *supra* note 1, at 444.

124. *See* Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done about It)?*, 40 J. MARSHALL L. REV. 455, 489–90 (2007).

125. *See supra* notes 9–10 and accompanying text.

this is now a powerful force in itself, wholly apart from legal sanctions. Those of us who were alive when the FHA was passed remember its opponents saying, "You can't legislate morals," and "A law can't change people's minds," but clearly this is not true. Most Americans today have known only a country where fair housing is the law of the land, and most of these people take for granted that the FHA's anti-discrimination mandate is a core principle of our country.

It is sobering to remember, however, that the history of civil rights in the United States is not one of inevitable steady progress. For example, the advances made in the aftermath of the Civil War were soon followed by decades of Jim Crow. Backsliding is always possible. And today, a good deal of race-based housing discrimination remains, not only in practices that negatively impact minorities but in those prompted by intentional bias.[126] Further, as outlined in Part II above, the Trump Administration has actively pursued a reactionary path to civil rights and race relations, blatantly encouraging racial divisions and hostility to integration.[127]

Thus, I believe—in contrast to the book—that vigorous enforcement of the FHA continues to be important, both to expose racism and deter discrimination and to encourage positive public attitudes toward the FHA's integration goals. Such enforcement has always depended primarily on private groups and people. Whatever the post-Trump era brings in terms of federal FHA enforcement, the Nation will continue to have to rely on these private efforts to help ensure future residential de-segregation.

126. *See supra* notes 56–63 and accompanying text. And while some of these intent-based practices are hidden in code words or are otherwise covert, *see supra* notes 67–70 and accompanying text, others are explicit and blatant, *see, e.g.*, U.S. Dep't of Hous. & Urban Dev. v. Graham, HUD Office of Hearings and Appeals No. 19-JM-0014-FH-002 (HUD ALJ Jan. 6, 2020), *modified in part on other grounds*, (HUD Secretary Feb. 5, 2020) (finding FHA violation based on landlord's racist statement to black prospect).

127. *See supra* Part II.C.1; *see also supra* notes 24–26 and accompanying text.