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### The Pieces of Housing Integration

Kristen Barnes

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# THE PIECES OF HOUSING INTEGRATION

*Kristen Barnes*<sup>†</sup>

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## INTRODUCTION: THE PIECES OF HOUSING INTEGRATION

*Moving Toward Integration*<sup>1</sup> is an exceedingly thorough work that is indispensable to searching conversations about how to achieve racial integration in housing in the twenty-first century. The book makes a substantial contribution to the literature concerning housing policies,

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

racial relations, the history of black and white segregation in the United States, and the potential for racial integration in residential housing. It adopts an impressive interdisciplinary approach to the subject matter and has several main purposes and goals. First, it affirms the value of racial integration and how impactful it is on individual lives. Second, it seeks to identify and understand patterns of migration of racial populations within the United States. The primary emphasis is on African Americans and whites. Third, it draws upon historical and current data from a variety of resources and time periods to examine contributing factors to segregation, resegregation, and integration. Fourth, the work offers a productive analysis of policies, programs, and laws adopted in the past concerning housing, lending, segregation, and integration, with a view towards extracting lessons. Fifth, the book offers well-considered solutions and strategies.

The solutions such as mobility grants and community banks are intriguing, thoughtful, and worth exploring. I examine those strategies herein. I argue that it is necessary to be mindful that, with new initiatives, the old issues of implementation, lack of political will, and graft may arise. There are numerous places where I agree with the book's analysis and recommendations; there are also important places where we differ. My comments fall under several headings: definition of structural discrimination and structural segregation; troubling issues with respect to courts, developers, and banks; reflections on disparate impact theory; and the public's will to integrate.

## I. STRUCTURE AND APPROACH

The book's authors, Richard Sander, Yana Kucheva, and Jonathan Zasloff, adopt a constructive strategy in tackling integration as a puzzle. That approach is efficacious because it allows for a more comprehensive explanation of the dynamics leading to the status quo, which is the unintegrated state of many communities across the United States. The authors recognize that identifying the root causes of segregation and resegregation, as well as effective incentives for integration, are germane components of the analysis. Another aspect of their strategy is referencing key court decisions, such as *Buchanan v. Warley*,<sup>2</sup> *Shelley v. Kramer*,<sup>3</sup> the *Mount Laurel* cases,<sup>4</sup> *Jones v. Mayer*,<sup>5</sup> and essential

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2. 245 U.S. 60 (1917).

3. 334 U.S. 1 (1948).

4. *Southern Burlington Cty. NAACP v. Township of Mount Laurel*, 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972); *Davis Enters. v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

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

legislation such as the Fair Housing Act,<sup>6</sup> as watershed organizing moments. The book examines how each has impacted the terrain.

## II. STRUCTURAL DISCRIMINATION AND STRUCTURAL SEGREGATION

My definitions of structural discrimination and structural segregation differ from that of *Moving Toward Integration*'s authors. Relying upon their definition, the authors conclude that "structural segregation (like housing discrimination) is relatively low."<sup>7</sup> Their definition of "structural segregation" concerns "that portion of racial segregation that results from racial differences in income, wealth, family size, and other sociodemographic characteristics."<sup>8</sup> Although my definition is sufficiently capacious to encapsulate the foregoing elements, my emphasis is on structures and institutions and their respective policies and practices. I am not asserting that there is no value in measuring the racial segregation associated with the characteristics the authors highlight. Rather, I argue that government at all levels—federal, state, and local— and lending institutions were prominent actors in the history of racially segregating communities. Appreciating the complex operations and effects of those structures is indispensable to rendering an accurate account of contemporary racial housing patterns and devising solutions for change. Systemic discrimination, persistently, has functioned to maintain racially segregated cities and neighborhoods.<sup>9</sup> Moreover, systemic discrimination has produced and sustained substantial racial inequality in many areas including income, wealth, employment, and education. These socio-demographic variables profoundly influence housing selection decisions.

As a strategy to highlight the role of structures in accordance with how I conceptualize them, I analyze *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>10</sup> *Bank of America Corp. v. City of Miami*,<sup>11</sup> and the Department of Justice's 2012

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6. 42 U.S.C. § 3601 (2012).

7. SANDER ET AL., *supra* note 1, at 439.

8. *Id.* at 424.

9. Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/> [<https://perma.cc/JNW8-WFW7>].

10. 135 S. Ct. 2507 (2015).

11. 137 S. Ct. 1296 (2017).

settlement with Wells Fargo.<sup>12</sup> These examples illustrate how government, powerful players, such as developers and banks, work to perpetuate socio-economic racial exclusion that continues to harm African-American communities.

### III. TROUBLING ISSUES WITH RESPECT TO LOCAL GOVERNMENT, DEVELOPERS, AND COURTS

The following discussion is a prelude to my analysis of *Moving Toward Integration's* proposal that mobility grants should be utilized as one strategy to foster integration.<sup>13</sup> While I see tremendous positives in proposing such grants as one solution, I am also cautious because of how incentives have been subverted in the past.<sup>14</sup>

#### A. Texas Department of Housing and Community Affairs v. Inclusive Communities (2015)

*Inclusive Communities* exemplifies how a potentially robust tool such as disparate-impact liability can be stripped of its power and effectively neutralized so that the Fair Housing Act is prevented from performing the integrative work it was intended to do. *Inclusive Communities* demonstrates that government, encompassing its various instrumentalities (legislative, administrative, municipal, state, and federal), and courts, can frustrate integration goals. The FHA was the

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12. *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims*, DEP'T OF JUST., <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief> [https://perma.cc/56VV-T98U] (last updated Oct. 8, 2014).

13. SANDER ET AL., *supra* note 1, at 423–29.

14. Although presented by local government as a win-win vehicle to revitalize areas desperately in need of development and economic stimulus, in some areas the financial gains of Tax Increment Financing (TIFs) have been appropriated for other purposes, ultimately harming communities they were purportedly intended to benefit. See Anthony Flint, *The Hidden Costs of TIF*, LINCOLN INST. OF LAND POL'Y, <https://www.lincolnst.edu/publications/articles/hidden-costs-tif> [https://perma.cc/P8RC-6C7B] (last visited June 1, 2020); DAVID MERRIMAN, LINCOLN INST. OF LAND POL'Y, *IMPROVING TAX INCREMENT FINANCING (TIF) FOR ECONOMIC DEVELOPMENT* (2018), available at <https://www.lincolnst.edu/publications/policy-focus-reports/improving-tax-increment-financing-tif-economic-development> [https://perma.cc/3REV-X9SC].

Both Flint's article and Merriman's report discuss TIF issues that impact residential racial integration and the financial well-being of communities. *Moving Toward Integration's* authors also address some of TIFs shortfalls. The lesson I take from TIFs and other incentive programs is that transparency and thoughtful oversight by those committed to the stated objective (e.g., racial integration) are essential.

primary vehicle through which the *Inclusive Communities* plaintiffs formulated their complaint. *Moving Toward Integration* also gives attention to *Inclusive Communities* and expresses optimism regarding the court's ruling on disparate-impact theory.<sup>15</sup> The book's authors appropriately focus on the Fair Housing Act as being fundamental to the work of integration.

Inclusive Communities Project, Inc. ("ICP" or "Inclusive Communities") initiated its case against Texas Department of Housing and Community Affairs ("TDHCA" or "Texas Department of Housing") when it brought suit alleging that TDHCA violated the FHA by distributing low-income-housing tax credits in a manner that perpetuated housing segregation patterns.<sup>16</sup> As a non-profit organization working primarily with African Americans to assist them with identifying affordable rental housing that would accept Section 8 vouchers,<sup>17</sup> Inclusive Communities was frustrated by the paucity of housing choices available to its clients. According to ICP, too often the limited options were situated in over-concentrated urban areas in Dallas, Texas.<sup>18</sup> These neighborhoods typically lacked decent school choices and did not have adequate municipal services, such as road maintenance, waste management, fire and police protection, parks, and other safe public spaces.

Administration of the Low-Income Housing Tax Credit ("LIHTC") was the central focus of the case.<sup>19</sup> *Moving Toward Integration* examines LIHTC in detail, drawing important lessons regarding how to structure incentives for encouraging racially-integrated affordable housing options.<sup>20</sup> The LIHTC program is federally authorized. It operates to monetarily incentivize developers to build affordable housing. Initiated by the federal government in 1986, it is the "largest single source of funding for the development of low-income rental housing."<sup>21</sup> The

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15. SANDER ET AL., *supra* note 1, at 442–44.
16. *Tx. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514 (2015).
17. Section 8 vouchers are part of a federally authorized housing-subsidy program. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUSING, [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [<https://perma.cc/SQY3-G9QX>] (last visited June 1, 2020).
18. *Inclusive Cmty.*, 135 S. Ct. at 2514.
19. *Id.* at 2513.
20. SANDER ET AL., *supra* note 1, at 319–21, 329.
21. Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1213 n.106 (2011); *see also* *Low-Income Housing Tax Credits*, HUD: OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/SQJ9-E7YG>] (last updated May 24, 2019) (The program provides "nearly \$8 billion in annual budget authority to issue tax credits

Internal Revenue Service awards tax credits to states; LIHTC then permits states or other designated government entities to distribute tax credits to developers. States are required to first develop a plan, listing criteria that they must reference to make decisions about how to allocate tax credits to developers.<sup>22</sup> The allocation of credits impacts where low-income housing is sited. Private developers, in turn, can sell the credits to financial institutions and other investors in order to raise capital to cover the costs of constructing low-income housing, as prescribed by federal statute.<sup>23</sup> The statute defines a “qualified low-income housing project” as “any project for residential rental property” that satisfies the statutory criteria pertaining to the number of units that are “rent-restricted” and occupied by a certain percentage of individuals whose incomes fall within the acceptable parameters of the “area median gross income.”<sup>24</sup> The program has come under fire in recent years because, while it has resulted in substantial profits for developers and banks, it has not sufficiently produced low-income housing in geographically and economically diverse areas,<sup>25</sup> nor have blacks and Latinos been able to equally access LIHTC housing produced in low-poverty areas.<sup>26</sup> The Texas Department of Housing administers its plan according to points it awards based upon criteria the development project satisfies.<sup>27</sup>

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for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households”).

22. This is the Qualified Allocation Plan requirement. 26 U.S.C. § 42(m) (2012).
23. *Id.* § 42(g)(1);
24. 26 U.S.C. § 42(g)(1).
25. Patrice Taddonio, *In America’s Affordable Housing Crisis, More Demand but Less Supply*, FRONTLINE (May 9, 2017), <https://www.pbs.org/wgbh/frontline/article/in-americas-affordable-housing-crisis-more-demand-but-less-supply/> [https://perma.cc/UC6D-NUL6]. *See Poverty, Profit, and Politics*, (PBS: Frontline television broadcast May 9, 2017), *available at* <https://www.pbs.org/wgbh/frontline/film/poverty-politics-and-profit/> [https://perma.cc/XJY3-YJ8].
26. Often when affordable housing is constructed, the federal Section 8 voucher system, along with the imposition of additional requirements, inhibits or altogether precludes racial minorities, such as African Americans, from taking full advantage of the housing. While it is true that LIHTC has been successful in increasing the supply of affordable units, with respect to the FHA’s goal of achieving racially- integrated housing and neighborhoods, LIHTC has not made an impactful difference. *See id.* *See also*, Will Fischer, CENTER ON BUDGET AND POLICY PRIORITIES, *LOW-INCOME HOUSING TAX CREDIT COULD DO MORE TO EXPAND OPPORTUNITY FOR POOR FAMILIES*, 1- 14 (2018), 4.
27. TEX. GOV’T CODE § 2306.6710(b) (West 2019); *see also* Reply Brief for Petitioners at 4–5, *Tex. Dep’t of Hous. & Cmty Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371).

In the underlying case, *Inclusive Communities* argued that the Texas Department of Housing's practices resulted in more low-income housing being built in urban areas heavily populated by blacks in comparison to geographic areas primarily populated by whites.<sup>28</sup> Inclusive Communities maintained that the relatively limited number of tax credit-sponsored affordable housing projects constructed in the suburbs signaled a violation of the FHA:

TDHCA's selection and allocation of LIHTC units in the City of Dallas was the functional equivalent of intentional racial segregation. Whether there was deliberate racial bias or not, TDHCA achieved the same segregated result as if there had been an explicit decision to engage in racial segregation. TDHCA has not just perpetuated but exacerbated the exact discriminatory effects of racial segregation that Congress passed the FHA to remedy.<sup>29</sup>

According to statistical evidence, "state wide TDHCA approved 49.7% of family units in 90% or greater minority census tracts."<sup>30</sup> In contrast, "TDHCA approved 37.4% of all family units in 90% or greater [w]hite tracts."<sup>31</sup> Inclusive Communities further noted that, "even when units were approved in [w]hite areas, it was for locations where the likely tenants were also more likely to be [w]hite."<sup>32</sup> Additionally, the data submitted to the district court revealed that, "92.29% of LIHTC units in the city of Dallas were located in census tracts with less than 50% Caucasian residents."<sup>33</sup> Inclusive Communities maintained that, not only did African Americans suffer disparate harm as a result of TDHCA's actions, but that the company itself was also negatively impacted in its ability to effectively perform its housing-placement and neighborhood-racial-integration missions.<sup>34</sup>

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28. *Inclusive Cmty.*, 135 S. Ct. at 2514.

29. Brief for Respondent at 17–18, *Inclusive Cmty.*, 135 S. Ct. 2507 (2015) (No. 13-1371) (citation omitted).

30. *Id.* at 24.

31. *Id.*

32. *Id.*

33. *Inclusive Cmty.*, 135 S. Ct. at 2514 (quoting *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 499 (N.D. Tex. 2010); see also Brief for Respondent, *supra* note 29, at 24.

34. *Inclusive Cmty.*, 135 S. Ct. at 2514. At the district court, the specific harm Inclusive Communities alleged it suffered concerned difficulties it experienced in placing Section 8 voucher tenants:

To establish causation, [Inclusive Communities] presents evidence that TDHCA disproportionately denies tax credits to proposed developments in Caucasian neighborhoods, making it more difficult for [Inclusive



The plaintiff framed its case in terms of the FHA, alleging that TDHCA's practices violated sections 804(a)<sup>35</sup> and 805(a)<sup>36</sup> and interfered overall with the Act's integrative objectives.<sup>37</sup> Relying upon a disparate-impact theory,<sup>38</sup> *Inclusive Communities* argued that even though there may not be direct evidence showing that TDHCA made solely race-conscious decisions in distributing housing credits, its practices in administering the program worked to racially divide communities and concentrate low-income housing in small geographic areas rather than evenly disperse units throughout Dallas and its suburbs.<sup>39</sup>

The Supreme Court decided the question of whether disparate impact claims may be brought under the Fair Housing Act.<sup>40</sup> In a 5–4 decision, the Court held that disparate-impact liability is within the FHA's scope;<sup>41</sup> not only are such claims cognizable, but they are

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Communities] to find Section 8-participating housing in those areas. Because TDHCA is the sole entity with authority to award tax credits to developers, its decisions directly affect the availability and geographical distribution of low-income housing.

*Inclusive Cmty.*, 749 F. Supp. 2d at 496 (footnote omitted). Persuaded by this evidence, the district court held that *Inclusive Communities* had established causation. *Id.* at 497.

35. See 42 U.S.C. § 3604(a) (2012) (making it unlawful “to *refuse to sell or rent* after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin”) (emphasis added).
36. See *id.* § 3605(a) (“It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”) (emphasis added).
37. *Inclusive Cmty.*, 135 S. Ct. at 2514. It should be noted that at the district-court level, *Inclusive Communities* also alleged that TDHCA engaged in intentional discrimination that violated the Fourteenth Amendment and 42 U.S.C. §§ 1983 and 1984 (2012). *Inclusive Cmty.*, 749 F. Supp. 2d at 491.
38. *Inclusive Cmty.*, 135 S. Ct. at 2513.
39. *Id.* at 2514.
40. *Id.* at 2513.
41. Specifically, the Court held that “disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.” *Id.* at 2525. Justice Kennedy wrote the majority opinion, joined by Justices Ginsburg, Sotomayor, Kagan, and Breyer. *Id.*

“consistent with the FHA’s central purpose”<sup>42</sup> of eliminating discrimination in real-estate and housing transactions. The Court did not reach a decision with respect to the underlying dispute concerning whether TDHCA’s distribution of housing tax credits to developers either resulted in a disparate impact on African-American residents or violated the Fair Housing Act.<sup>43</sup> Instead, the Court focused on outlining the proper approach for reviewing an FHA disparate-impact case and remanded the matter so that the lower court could apply the Department of Housing and Urban Development’s (HUD) burden-shifting framework to this FHA disparate-impact claim.<sup>44</sup>

Although civil-rights advocates cautiously hailed *Inclusive Communities* as a cause for celebration because of the potential for disparate-impact claims to remedy racially harmful patterns and practices, the Court’s holding is still concerning: it constrained how disparate-impact theory can be used in FHA complaints while expanding what counts as a defense to such claims. It is also worth noting that, given that nine courts of appeals had previously concluded that intent was not a requirement to establish an FHA claim, the decision is not as surprising as it initially appears, notwithstanding the Court’s ideologically conservative composition.<sup>45</sup>

*Moving Toward Integration*’s authors express optimism that disparate-impact theory may be a useful mechanism for accomplishing integration in the future.<sup>46</sup> While I share their appreciation of disparate-impact theory’s potential, I note the problematic double-sided nature of the *Inclusive Communities* decision. The case presents itself as a supportive precedent for antidiscrimination litigants, but in fact operates to further narrow the power of disparate-impact liability as a means of achieving racial integration under the FHA. After *Inclusive Communities*, it is clear that although plaintiffs can bring FHA disparate-impact claims, such claims are extremely likely to fail. To understand why, it is necessary to examine the Court’s instructions for how FHA disparate impact-claims should be evaluated.

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at 2512. Chief Justice Roberts and Justices Thomas, Alito, and Scalia dissented. *Id.*

42. *Id.* at 2521.

43. *See id.* at 2513.

44. *Id.* at 2525–26; *see also* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

45. *Inclusive Cmty.*, 135 S. Ct. at 2519, 2525 (“In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims.”).

46. *See* SANDER ET AL., *supra* note 1, at 233–50, 423–44.

1. Referencing ADEA and Title VII as Precedents to Determine the Viability of the Disparate Impact Claim and Its Parameters

*a. Relevance of the ADEA and Title VII to Both the Court's Inclusive Communities Decision and Disparate-Impact Analysis*

Two anti-employment-discrimination statutes figured prominently in the Court's reasoning in *Inclusive Communities*, and both are germane to the elaboration of my critique. The first statute was section 703(a) of Title VII of the 1964 Civil Rights Act.<sup>47</sup> The second was Section 4(a) of the Age Discrimination in Employment Act of 1967.<sup>48</sup> While these statutes were relevant to the Court's quest to find precedent for its ultimate holding—that disparate-impact claims may be brought under the FHA<sup>49</sup>—the Court went too far in its interpretation of their relevance for purposes of identifying restraints on the application of disparate-impact theory.

The Court referenced the ADEA in connection with examining its plurality decision in *Smith v. City of Jackson*.<sup>50</sup> In *Smith*, the Court interpreted the “otherwise adversely affect” language of Section 4(a)(2) of the ADEA<sup>51</sup> to mean that, regardless of an employer's expressed or unexpressed intentions or motivations, it may be liable where its actions and policies (with respect to age) have a disproportionate negative effect on employees (or potential employees). The *Inclusive Communities* Court compared the “otherwise adversely affect” language of Title VII and the ADEA, and determined that the phrase was “equivalent in function and purpose to the FHA's ‘otherwise make unavailable’ language.”<sup>52</sup>

Referencing *Griggs v. Duke Power*,<sup>53</sup> the Court identified other supportive statutory language and concluded that intent was not a

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47. *Inclusive Cmty.*, 135 S. Ct. at 2516.

48. *Id.* at 2517.

49. *Id.* at 2518 (“Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of action and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”).

50. 544 U.S. 228 (2005).

51. See 29 U.S.C. § 623 (2012) (“It shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age.”).

52. *Inclusive Cmty.*, 135 S. Ct. at 2519.

53. 401 U.S. 424 (1971).

requisite element of liability under the FHA.<sup>54</sup> Based upon the similarities in language and objectives, and the interpretation of Title VII in *Griggs*,<sup>55</sup> the Court reasoned that, just as disparate-impact claims are allowed under the ADEA and Title VII, they are contemplated by the FHA.<sup>56</sup> The FHA, like those other statutes, “was enacted to eradicate discriminatory practices within a sector of our Nation’s economy.”<sup>57</sup>

The Court’s reliance upon the ADEA and Title VII yielded a positive result with respect to recognizing the legal viability of FHA disparate-impact cases. The damaging aspect of the Court’s analysis emerges with the restrictive frame it imposes on this type of claim.

*b. The Inappropriateness of Employment-Discrimination Law  
as a Model for Fair Housing Claims*

Having established the precedential value of the Court’s readings of the ADEA and Title VII to its interpretation of the FHA, the Court then further considered *Smith v. City of Jackson* and the Title VII disparate-impact cases of *Griggs* and *Ricci v. DeStefano*<sup>58</sup> to identify limitations that courts should impose when evaluating cases relying upon disparate-impact theory.<sup>59</sup> It is in this part of its reasoning that the Court took steps to substantially weaken the power of disparate-impact claims. The Secretary of Housing and Urban Development’s new guidelines<sup>60</sup> to interpret the FHA furnished additional grounds to essentially disarm disparate-impact cases. Take, for instance, the business-necessity defense.<sup>61</sup> The defense grants employers substantial latitude to justify their actions, even when those actions have discriminatory effects. In entertaining the defense, courts are deferential to employers because they see employers as being better positioned to make decisions about what is necessary for their profitability and the smooth functioning of their businesses. The Court concluded that the same rationale for the business-necessity defense in employment-discrimination cases also offers reasonable parameters for limiting

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54. *Inclusive Cmtys.*, 135 S. Ct. at 2518.

55. *Id.* at 2518–19.

56. *Id.* at 2518.

57. *Id.* at 2521 (citations omitted).

58. 557 U.S. 557 (2009). *Griggs* and *Ricci* are employment-discrimination decisions. Thus, their paradigmatic value for FHA disparate impact claims is limited.

59. *Inclusive Cmtys.*, 135 S. Ct. at 2517–18, 2522–23.

60. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

61. *Inclusive Cmtys.*, 135 S. Ct. at 2522.

disparate-impact liability under the FHA.<sup>62</sup> It reasoned that the employment cases “teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”<sup>63</sup>

The Court’s analysis is faulty in several respects. When the Court referenced the business-necessity defense, it cast housing-entity decision-makers and private developers as employers, even though the analogy does not fit in the FHA context. The reasoning the Court offers for resorting to this paradigm is seriously impoverished:

Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a ‘reasonable measure[ment] of job performance,’ so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.<sup>64</sup>

This conclusion is not logically sound. It does not follow that housing authorities and developers should escape further scrutiny simply because they can state a valid interest, particularly when their practices cause a racially discriminatory harm.

The practices that *Inclusive Communities* challenged were not those taken by employers with respect to employees; the decisions concerned the development and placement of affordable housing. The Texas Department of Housing’s role as employer was not being called into question *per se*. That is, *Inclusive Communities*’ lawsuit recognized that when the department makes decisions about LIHTC it is not simply a hiring decision. Rather, the decisions pertain to locating appropriate sites for low-income housing, the application of criteria for project selection, and the selection of developers to partner with to build the housing. Thus, the employer–employee paradigm is inappropriate. Instead, the relevant inquiries are whether housing agencies and public servants are performing their duties to the public, and whether they are pursuing the integration goals of the FHA in maintaining adherence to fair-housing laws.<sup>65</sup> Similarly, to the extent

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62. *Id.* at 2518.

63. *Id.*

64. *Id.* at 2523 (alteration in original) (citation omitted) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

65. The FHA emerged out of the government’s recognition that an “integrated society” was needed to respond to “the explosive concentration of Negroes in urban ghettos.” Brief for Constitutional Accountability Center as Amici Curiae Supporting Respondents at 3–4, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (Nos. 15-1111, 15-1112) (quoting 114 CONG. REC. S3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale), and 114 CONG. REC. H9589 (daily ed. Apr.

that private developers partner with public entities, courts' analyses should concentrate on whether developers demonstrated the requisite public concern when proposing, advocating, and completing low-income housing projects. The relevant questions include whether the projects were sufficiently diversified along racial and geographic lines. Despite the inappropriateness of the employer–employee lens for analyzing discriminatory practices in housing, the Court drew upon the logic of the former to impose a straitjacket on FHA disparate-impact-liability plaintiffs.

Texas's LIHTC program was under scrutiny in *Inclusive Communities*.<sup>66</sup> That program's primary objective is to increase low-income housing. The state and local administrators of the program must accomplish that objective in conformity with the FHA. It is not an either–or endeavor. That is, unlike situations involving businesses, profit is not the driving motivation. While profit is usually the sine qua non of companies, this is not necessarily the case when they are enlisted to fulfill public goals, as they are with LIHTC programs; in those situations, they are subject to other requirements. Thus, it is improper for courts to adopt a hands-off policy when they scrutinize how government entities perform their duties in connection with furthering the FHA's objectives. Where racial discrimination is alleged, the agency's selection of low-income housing sites and developers, the weighing of the criteria for the administration of the LIHTC, and the diversity of development proposals should all be subject to strict scrutiny.

The Court, contrary to the FHA's mandate to diminish housing discrimination through integration efforts, elevated the business justifications it predicted government entities and developers would likely offer to defend their site and project selections for low-income housing. From the Court's lens, “market factors,” such as “cost and traffic patterns . . . preserving historic architecture,”<sup>67</sup> and “compliance with health and safety codes”<sup>68</sup> are all potentially acceptable reasons

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10, 1968) (statement of Rep. Ryan)); *see also* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 8 (1968).

66. *Inclusive Cmty's.*, 135 S. Ct. at 2513. There are other government affordable-housing programs. *See* Daria Daniel, *Affordable Housing Federal Programs and Legislation*, NAT'L ASS'N OF COUNTIES (May 14, 2018), <https://www.naco.org/articles/affordable-housing-federal-programs-and-legislation> [<https://perma.cc/8TRT-TFZP>] (listing other such programs).

67. *Inclusive Cmty's.*, 135 S. Ct. at 2523.

68. *Id.* at 2524. The Court concluded that if “housing authorities and private developers” can “prove” that their practices are “necessary to achieve a valid interest,” they “must” be permitted to keep such practices in place. *Id.* at 2523.

that would insulate these housing-market actors from FHA disparate-impact liability. In articulating the list of exculpatory factors, the Court expressed its concern over “a community’s quality of life,”<sup>69</sup> but it did not demonstrate the same concern towards the communities who are subjected to more than their “fair share” of low-income housing.<sup>70</sup> Moreover, the Court’s logic loses sight of the FHA’s anti-discriminatory purposes. The involvement of other intervening actors and events in the decision-making process should not disqualify the governmental housing agency (in this instance, the TDHCA) from being recognized as the entity that caused the discriminatory harm.

## 2. The Burden Shifting Framework

HUD imposed a new analytical construct for the evaluation of FHA disparate-impact claims.<sup>71</sup> The burden-shifting framework, in the housing context, lacks historical foundation. Stacey Seicshnaydre has observed that “none of the judicially created, burden shifting methods of proof generated over the history of Title VII and Title VIII can be found in the text of the FHA.”<sup>72</sup> The cumbersome framework significantly enhances the burden on disparate impact plaintiffs:

- (1) The plaintiff “has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect”;<sup>73</sup>
- (2) Once a plaintiff makes a prima-facie showing of disparate impact, “the burden shifts to the defendant to ‘prov[e] that the

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69. *Id.*

70. Here, I am borrowing the term “fair share” from the *Mount Laurel* cases which imposed the requirement on New Jersey communities to accept their fair share of affordable housing. *See* South Burlington Cty. NAACP v. Mount Laurel Township, 336 A.2d 713, 743–44 (N.J. 1975); South Burlington Cty. NAACP v. Mount Laurel Township, 456 A.2d 390, 411 (N.J. 1983); Hills Dev. Co. v. Somerset, 510 A.2d 621, 631 (N.J. 1986).

Sander, Kucheva, and Zasloff also engage in a productive examination of the *Mount Laurel* cases. *See* SANDER ET AL., *supra* note 1, at 239–43.

71. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013).

72. Stacey E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 410 (2013).

73. *Inclusive Cmty.*, 135 S. Ct. at 2514 (quoting 24 C.F.R. § 100.500(c)(1) (2014)).

challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests”;<sup>74</sup> and

(3) If the defendant meets the requirements of step 2, then the “plaintiff may ‘prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.’”<sup>75</sup>

Not only is HUD’s imposition of the foregoing scheme problematic from the standpoint of vigilant enforcement of the FHA, but the Court’s recommendations concerning the requisite kind of proof and its suggestions for evaluating the proof reveal how the *Inclusive Communities* holding, when taken in its entirety, is detrimental to FHA plaintiffs. The Court offered the following supplementary instructions in connection with remanding the case.<sup>76</sup>

*a. Establishing a causal connection*

Establishing a causal link between the defendants’ actions and the harm claimed is the initial hurdle that plaintiffs must overcome.<sup>77</sup> The Court advised that “[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.”<sup>78</sup> A fair reading of the Court’s formulation is that it requires a plaintiff to establish his claim before being granted a trial on the entirety of his case. The Court’s approach forecloses opportunities to elicit evidence in the context of a full hearing. Prior to having the benefit of an extensive due-diligence investigation or being able to evaluate the defendant’s evidence and subject it to the rigors of interrogation, the Court essentially requires the plaintiff to prove its case—that is, the plaintiff must establish that the reason for the alleged racial disparity is an isolated government action (policy, practice, or law). Interestingly, as discussed below, the plaintiff cannot successfully assert that the racial disparity is due to the failure of the government to take action.<sup>79</sup>

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74. *Id.* at 2514–15 (alteration in original) (quoting 24 C.F.R. § 100.500(c)(2) (2014)).

75. *Id.* at 2515 (quoting 24 C.F.R. § 100.500(c)(3) (2014)).

76. *Id.* The district court improperly placed the burden on the defendant to devise alternatives rather than on plaintiff. *Id.*

77. 24 C.F.R. §100.500(c)(1) (2014).

78. *Inclusive Cmty.*, 135 S. Ct. at 2523.

79. *See id.* (pointing out that a plaintiff fails to make a prima facie disparate-impact case if she does not allege facts at the pleading stage demonstrating a causal connection between the governmental action and the disparate impact).



The Court outlines the contours of the causal requirement that a disparate-impact plaintiff must satisfy without providing the substance of what the requirement entails. Instead of constructing a fairly lenient standard that would permit the plaintiff to present some facts supporting a claim that the government's practice has a racially harmful impact in tension with the FHA, the Court engages in a lengthy discussion that achieves little more than emphasizing the impossibility of satisfying the causation requirement for cases of this type. In the end, rather than articulate a precise standard, the Court leaves open the question of what constitutes a sufficient nexus between government action and harmful racial effects to establish a *prima facie* case. What is clear is that courts must subject any *prima facie* evidence submitted by plaintiffs to rigorous scrutiny; further, this evidence must do more than establish a racial disparity.<sup>80</sup> Even if a plaintiff is able to furnish evidence connecting housing racial disparities to governmental actions, such evidence will be heavily discounted. This is clear from the Court's statements which essentially inoculate agencies, like TDHCA, from disparate impact liability where "federal law substantially inhibits [the agencies'] discretion."<sup>81</sup> The Court offers federal involvement, via regulations and rules, as an appropriate limit on liability without considering the actual impact of that involvement on state and local agencies, as they make LIHTC siting decisions. Federal requirements have more latitude than the Court suggests. Disparate impact analysis, properly applied, should allow for figuring out the effects resulting from the application of relevant criteria, embedded in rules and laws, and should allow for identifying legal solutions that have less discriminatory effects.

The *Inclusive Communities* Court configured the causation requirement in a manner that is unduly onerous on plaintiffs. The approach affords decision-makers substantial deference while undercutting the evidence plaintiffs are likely to offer. The framework is counter to the very systemic operations that disparate-impact liability is designed to apprehend. In other words, it overlooks the structures that work to create discriminatory impacts. Other than pointing to the authority (i.e., the exercise of discretion) of the designated agency to make the final decisions regarding placement of housing, it is impossible to isolate a singular practice that violated the FHA. Instead, it is the culmination of practices—the selection of the criteria, the priority given to some requirements over others, the willingness to entertain community resistance ("NIMBY"-ism)—cohering in the decision-making body that creates the problem. Rather than appreciating that the governmental decision-making process is

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80. *Id.* at 2523.

81. *Id.* at 2523–2524.

interlinked with others, in that it prevails upon subordinate entities and agents, the Court concludes that if the plaintiff cannot isolate a policy or practice in connection with the statistical evidence, then his disparate impact claim must fail.<sup>82</sup>

The Court's perspective fails to appreciate that decision-making authority is ultimately resolved in one entity to determine which LIHTC projects will be funded and where they will be located. Here, the ultimate decider for administering the LIHTC program, as designated by state statute, is the Texas Department of Housing.<sup>83</sup> Courts should not be permitted to disregard the department's statutorily conferred role and replace it with a characterization of the Texas LIHTC program's decision-making process that insulates the designated decider from liability. Furthermore, the federal government's involvement in levying requirements on the state and local administration of such programs does not negate the TDHCA's actions in rendering decisions regarding low-income housing placement.<sup>84</sup> As the Court itself observed, neither the FHA<sup>85</sup> nor other federally imposed criteria mandate that low-income housing always be placed in overcrowded urban centers. The TDHCA has discretion regarding the approval of sites; it could exercise its discretion to give a greenlight to affordable housing in the suburbs and in other parts of the municipality to which racially diverse low-income populations seek access.

The Court fetishizes the notion of singularity, making the identification of a sole action a requirement for establishing a *prima facie* case.<sup>86</sup> For example, the Court reasoned:

[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 disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the multiple

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82. *Id.* at 2523 (“[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant policy or policies causing that disparity.”).

83. 10 TEX. ADMIN. CODE § 11.1 (2019); *see also* Brief for Respondent, *supra* note 29, at 37 (“TDHCA was the only agency in the state that could allocate LIHTC.”).

84. *Inclusive Cmty.*, 135 S. Ct. at 2524 (“[I]f [Inclusive Communities] cannot show a causal connection between the Department’s policy and a disparate impact—for instance, because federal law substantially limits the Department’s discretion that should result in dismissal of this case.”).

85. *Id.* at 2523.

86. *Id.* at 2514.

factors that go into investment decisions about where to construct or renovate housing units.<sup>87</sup>

The Court imposes the requirement of exact precision with respect to identifying a singular cause and measuring its harm.<sup>88</sup> Disparate-impact theory, however, distills patterns. Where there are disturbing correlations between government action and race that result in a denial of federal constitutional rights, (e.g., protection from racially discriminatory treatment in procuring housing), disparate-impact theory facilitates the flagging of occurrences and outcomes and compels courts to inquire further into the sources responsible for engendering the conditions that perpetuate inequality. While it is important, for reasons of fairness and rigorous judicial inquiry, that the analysis does not end with highlighting a racial disparity, it is imperative that the Court does not construct the rubric for testing such claims in a manner that ensures their defeat. Contrary to the Court's view, the fact that there are differing components that contribute to a decision should not mandate the preclusion of plaintiff's disparate-impact claim.<sup>89</sup> When statistical racial disparities are caused by a series of practices or policies that cohere in an entity's decisions, and that entity is imbued with ultimate decision-making authority, disparate-impact liability should be triggered (i.e., the prima facie threshold is met).

On remand,<sup>90</sup> the District Court for the Northern District of Texas adopted a substantially different posture towards Inclusive Communities' case from when it was first presented with the facts.<sup>91</sup> It opted to re-evaluate whether Inclusive Communities satisfied the first prong of the burden-shifting framework—the causation requirement—which proved to be the plaintiff's undoing.<sup>92</sup> Subjecting the plaintiff to

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87. *Id.* at 2523–24.

88. *Id.*

89. The Court warns that if “a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability.” *Id.*

90. The U.S. Supreme Court remanded the case to the Fifth Circuit. *See Inclusive Cmty.*, 135 S. Ct. at 2526. A Fifth Circuit panel then remanded the case to the district court. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 795 F.3d 509, 510 (5th Cir. 2015) (per curiam).

91. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, \*4 (N.D. Tex. Aug. 26, 2016). In a prior decision, the court granted partial summary judgment in favor of Inclusive Communities, ruling that “[it] had established a prima facie case on its disparate impact claim.” *Id.* at \*3.

92. *Inclusive Cmty.*, No. 3:08-CV-0546-D, 2016 WL 4494322, at \*10 (N.D. Tex. Aug. 26, 2016) (“[Inclusive Communities] has not satisfied the robust causality requirement.”).

what the Supreme Court had characterized as a “robust causality requirement,”<sup>93</sup> the court found Inclusive Communities’ evidence of disparate-impact discrimination lacking.<sup>94</sup> In articulating the plaintiff’s duty, the district court stated that Inclusive Communities “must affirmatively identify a specific policy that produced a disparate impact rather than point to a lack of policy that caused it.”<sup>95</sup> Thus, the district court inquired about “whether TDHCA’s exercise of discretion in deciding how to allocate 9% tax credits is a specific, facially neutral policy sufficient to establish a prima facie case of disparate impact liability.”<sup>96</sup>

Based on its analysis of the foregoing, the district court dismissed the case,<sup>97</sup> concluding that the decisions to place low-income housing in certain neighborhoods and to choose sites in minority-populated areas rather than predominantly Caucasian-populated areas (which were signified by the awarding of tax credits) did not constitute a “specific practice that caused the disparity in the location of low-income housing.”<sup>98</sup> Inclusive Communities could not show that Texas, in making decisions about how tax credits were distributed, *caused* a discriminatory impact that was detrimental to African Americans.<sup>99</sup>

*b. Prongs Two and Three of the Burden-Shifting Framework*

There are also significant problems with the Court’s interpretation of prongs two and three of the burden-shifting framework. Assuming that a plaintiff is able to survive the first level, in the second phase, the government is permitted to proffer legitimate rationales to refute the allegations of discrimination. The business-justification defenses discussed in the previous section are relevant here. The Court went further in offering recommendations for how to evaluate the proffered reasons in relationship to the plaintiff’s claim of disparate impact discrimination, commenting that, “on remand, [the plaintiff’s case] may

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93. *Inclusive Cmty.*, 135 S. Ct. at 2523.

94. *Inclusive Cmty.*, No. 3:08-CV-0546-D, 2016 WL 4494322, at \*6.

95. *Id.* In addition to drawing upon the Supreme Court’s decision, the court looked to Fifth Circuit Judge Jones’s concurring opinion as a blueprint for analyzing the plaintiff’s claim. *Id.* at \*5.

96. *Id.*

97. *Id.* at \*13.

98. *Id.* at \*6. Inclusive Communities argued that the governmental decisions of site selection, zoning laws, and tenant selection harm low-income minorities in that they “exclude” them “from predominantly nonminority areas—cities, towns, neighborhoods or specific portions of apartment complexes.” Brief for Respondent, *supra* note 29, at 36.

99. *Inclusive Cmty.*, No. 3:08-CV-0546-D, 2016 WL 4494322, at \*6.

be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.”<sup>100</sup> Missing from the Court’s reasoning is an anchor from which to evaluate what is reasonable. The Court does not carve out space for the FHA’s purpose or for the realization of the FHA’s goals. The impetus for bringing a lawsuit of this type is to challenge the government’s conduct in housing-development schemes and in its administration of housing laws and policies. It is appropriate, therefore, for plaintiffs to question those practices when they permit an intolerable racially disparate effect. There is a grander constitutionally informed template according to which courts should evaluate the government’s responses and plaintiff’s claims, notwithstanding the Court’s assertion that “[t]he FHA does not decree a particular vision of urban development.”<sup>101</sup> Contrary to the Supreme Court’s assertion that the “FHA is not an instrument to force housing authorities to reorder their priorities,”<sup>102</sup> the FHA is intended to accomplish exactly that in the name of racial equality. The FHA promotes and prioritizes desegregation and integration as fundamental goals.<sup>103</sup> It is inspired by the Kerner Commission’s recommendation urging the country to change its troubling trajectory of “moving towards two societies, one black, one white—separate and unequal.”<sup>104</sup> Congress adopted the FHA shortly following the assassination of Dr. Martin Luther King, Jr. on April 4, 1968,<sup>105</sup> and on the heels of the Kerner Commission’s damning report.<sup>106</sup> The Court’s misapprehension of the work that the FHA was intended to perform with respect to eliminating racial disparities in housing is evident:

Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.<sup>107</sup>

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100. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

101. *Id.* at 2523.

102. *Id.* at 2522.

103. 42 U.S.C. § 3601 (2012). *See* *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 211 (1972).

104. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 65, at 1.

105. Brief for Respondent, *supra* note 29, at 2.

106. Exec. Order No. 11,365, 3 C.F.R. § 647 (1966–1970).

107. *Inclusive Cmty.*, 135 S. Ct. at 2524.

Plaintiffs will assert that certain housing policies have led to racial disparities. Their claims will necessitate that courts consider matters of race in order to properly address those claims. But the Court's language here seeks to foreclose that process by expressing anxiety that it cannot judicially perform this task, and that such claims in themselves are improper. The claims already reference race. Therefore, courts will need to take race into consideration to analyze the cases presented.

With respect to the third prong, the burden is unfairly placed on plaintiffs to devise alternatives to the challenged practice. Decisions like *Inclusive Communities* (and its resolution on remand) make it more difficult for plaintiffs to draw upon anti-discrimination tools, such as the FHA, to shape government policies and practices for the purpose of attaining equality in housing, achieving racial integration, and improving the access of low-income racial minorities to communities that are socio-economically, racially, and geographically diverse. *Inclusive Communities* is exemplary of the multi-faceted problems emerging from missed opportunities related to the FHA.

#### *B. Developers*

*Inclusive Communities* also raises an issue with respect to developers and the role they play in both facilitating racial integration in housing and constructing affordable housing. Developers are substantial contributors to the problem in terms of the proposals they submit for the siting of residences. If they fail to present geographically diverse projects, and they are not incentivized or mandated to do so by government agencies, then the construction of affordable housing is relegated to the usual sectors (i.e., overcrowded urban cores, impoverished suburbs, isolated and economically-challenged ex-urbs). In a true public-private partnership, it is appropriate to ask developers to perform in certain ways or to satisfy particular objectives in conjunction with being granted the privilege of constructing multi-family affordable housing. On this point, I am at odds with *Moving Toward Integration's* authors, who characterize the imposition of certain requirements on developers undertaking this type of development as "inefficient" and as impediments to getting the projects built.<sup>108</sup> Depending on what the requirements are, and assuming that they do not cross into impermissible-exactions territory, the time to engage in negotiating the construction deal is at the beginning of the planning process. Cities should seek the best deals for their residents and work to equitably disperse the benefits. If anything, cities often do not ask for enough on behalf of their constituents.<sup>109</sup> There is ample

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108. SANDER ET AL., *supra* note 1, at 440.

109. Too often city officials enter into imprudent contracts with vendors and other corporate entities without fully accounting for the ramifications of

evidence documenting the substantial gains developers realize in association with the LIHTC projects.<sup>110</sup> As long as developers can make a sufficient level of profit to motivate them to construct affordable housing, they will do so.

*C. Mobility Grants and Their Relationship to Inclusive Communities*

One of the strategies that *Moving Toward Integration* recommends is the distribution of mobility grants in accordance with certain criteria.<sup>111</sup> There is much that I like about this proposal. It restores agency to renters and homebuyers by empowering them to make racially integrating housing decisions. The proposal seeks to avoid some of the problematic bureaucratic, middle-person issues that arose in *Inclusive Communities* regarding governmental administration of the LIHTC and the resistance of white suburbs to having low-income housing constructed in their areas. Mobility grants would subsidize movers through a reduced interest rate or housing-allowance awards.<sup>112</sup>

My caution is that it would be necessary to monitor the distribution of the mobility grants, as well as the results. It is necessary to ensure that they, in fact, operate in both directions—allowing for blacks to integrate white areas and whites to integrate black areas—not just in the latter direction, subsidizing whites gentrifying areas populated by blacks and, ultimately, displacing them by driving up costs. Where individuals and agencies are involved, *Inclusive Communities* teaches that there is always the possibility for disparities in program implementation.<sup>113</sup> Just as the Texas Department of Housing was criticized for failing to administer the LIHTC in a way to foster racial integration, there is a risk that the structures (i.e., courts, institutions, agents, and decision-makers) responsible for the administration of the mobility grants may not adhere to the purposes and objectives of plan. I note that *Moving Toward Integration* is sensitive to this latter possibility and recognizes the need to guard against it.<sup>114</sup>

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the deal. The assets may be improperly valued given the market, the length of the contract may be too long, etc.

110. Chris Edwards & Vanessa B. Calder, *Low-Income Housing Tax Credit: Costly, Complex, and Corruption-Prone*, CATO INST. TAX & BUDGET BULL., Nov. 13, 2017, at 1, 3; Laura Sullivan, *Affordable Housing Program Costs More, Shelters Fewer*, NPR (May 9, 2017), <https://www.npr.org/2017/05/09/527046451/affordable-housing-program-costs-more-shelters-less> [<https://perma.cc/8VWM-EWAH>].

111. SANDER ET AL., *supra* note 1, at 423–29.

112. *Id.* at 425.

113. I raise this point because the authors envision that a “metropolitan council” would be charged with the details of program design. *Id.*

114. *Id.* at 423–24.

*Inclusive Communities*, both at the Supreme Court and on remand, illustrates how courts and government can thwart, rather than advance, integration objectives. Local government can undermine and subvert the good intentions of federal laws and statutes. Individual actions, with the assistance of local government, can hinder (or decelerate) well-intended judicial decisions designed to advance racial integration. *Buchanan v. Warley*,<sup>115</sup> *Shelley v. Kraemer*,<sup>116</sup> the *Mount Laurel* cases,<sup>117</sup> and, in the realm of education, *Brown v. Board of Education*,<sup>118</sup> are illustrative of this problem.<sup>119</sup>

#### IV. BANKS: PROMISES AND PROBLEMS

For good reasons, *Moving Toward Integration* devotes substantial attention to banks. Like the book's authors, I recognize that banks are essential to addressing issues of racial integration and housing inequality; banks have played an integral part in the financial well-being of individuals, neighborhoods, and cities. They are extraordinarily powerful entities that create and preserve wealth. As lenders, they facilitate access to housing. I also agree with the authors that the type of banking institution can make a tremendous difference. The authors make the important distinction between the megabank, on the order of Wells Fargo or Bank of America, and exceptional community banks, like the now-defunct South Shore Bank.<sup>120</sup> Noting that distinction is relevant to my comments on the authors' fifth strategy of turning to

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115. 245 U.S. 60 (1917).

116. 334 U.S. 1 (1948).

117. See, e.g., *Southern Burlington Cty. NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983). For an enlightening discussion of the *Mount Laurel* cases, see Paula A. Franzese et al., *Mount Laurel and the Fair Housing Act: Success or Failure?*, 19 FORDHAM URB. L.J. 59 (1991).

118. 347 U.S. 483 (1954).

119. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2005). Another example is the lack of compliance with the federal "affirmatively furthering fair housing" ("AFFH") rule. Notwithstanding the legal mandate to affirmatively further fair housing, federal agencies, including HUD, have not always worked to integrate communities or alter segregation patterns. See e.g., *NFHA, et al. v. Carson*, Civ. Action No. 1:18-cv-01076, filed May 8, 2018 (the National Fair Housing Alliance and others filed suit against HUD alleging that HUD improperly suspended "key requirements of the AFFH Rule"), para. 78.

120. See *FDIC Failed Bank Information*, FDIC <https://www.fdic.gov/bank/individual/failed/shorebank.html> [<https://perma.cc/3SNQ-YPXC>] (last updated Jan. 29, 2019) ("On Friday, August 20, 2010, ShoreBank, Chicago, IL was closed by the Illinois Department of Financial & Professional Regulation, and the Federal Deposit Insurance Corporation (FDIC) was named Receiver.").



community development banks to help improve the financial profiles of under-served banking populations and promote the asset growth necessary for enhancing the likelihood of transitioning to racially-integrated neighborhoods. The authors propose that “the role of the bank would not only be to improve the credit records and access to credit for households in segregated communities, but also to assist in supervising and guiding the neighborhood initiative.”<sup>121</sup> I further agree with the authors that a “key problem in inner-city communities is . . . the absence of financial institutions engaged in community building.”<sup>122</sup> I differ from them, however, in their assessment of lending practices in the African-American community. The authors suggest that the problems experienced are not attributable to an absence of “fair lending per se.”<sup>123</sup> I disagree. Blacks have faced sustained discriminatory, unscrupulous, and predatory-lending practices.<sup>124</sup> There is substantial scholarship and evidence to support that position.<sup>125</sup> I disagree with the authors regarding the extent of the damage that lending institutions, historically, have caused African-American communities, the continued harms that banks (including their agents) perpetrate, and the potential for productive future transactional relationships that will serve racial integration goals.<sup>126</sup> Redlining and reverse redlining practices have left indelible marks.<sup>127</sup>

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121. SANDER ET AL., *supra* note 1, at 434.

122. *Id.* at 230.

123. *Id.*

124. THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (2014); JONATHAN SPADER ET AL., *FOSTERING INCLUSION IN AMERICAN NEIGHBORHOODS* (2017), *available at* [https://www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_fostering\\_inclusion.pdf](https://www.jchs.harvard.edu/sites/default/files/a_shared_future_fostering_inclusion.pdf) [<https://perma.cc/SC3J-HSSQ>]; KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019); BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009).

125. RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017).

126. *See* SANDER ET AL., *supra* note 1, at 251–68.

127. Redlining refers to a set of discriminatory loan practices. Redlining takes its name from the maps drawn by the Home Owners' Loan Corporation (HOLC), a federal agency no longer in existence. At its inception, redlining entailed HOLC demarcating various regions of a city, identifying those neighborhoods that were deemed creditworthy and those that were deemed poor credit risks. The red refers to the coloring indicating the designated poor or high risk sections on the maps. Based upon those designations, lenders, appraisers, and other officials have made decisions regarding mortgage loans and property valuation. Historically, redlining has operated to deny African Americans equal access to mortgage loans on fair terms. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 59–64 (2017). Reverse redlining refers to the targeting of specific racial groups for

In this section, I reference two examples to reflect on *Moving Toward Integration*'s suggestions concerning banks.

*A. The Racial Surtax: Department of Justice Settlement with Wells Fargo Bank, NA*

In 2012, Wells Fargo entered into a \$175 million settlement agreement with the Department of Justice (DOJ).<sup>128</sup> The DOJ had alleged that Wells Fargo committed numerous violations of the Equal Credit Opportunity Act and the Fair Housing Act.<sup>129</sup> The suit alleged, among other things, that mortgage brokers affiliated with Wells Fargo "steered" minority borrowers into higher priced and riskier loans than whites with similar credit profiles.<sup>130</sup> According to the government's proposed consent decree, in 2009, the Office of the Comptroller of the Currency (OCC) "determined that it had reason to believe that Wells Fargo engaged in a pattern or practice of discrimination on the basis of race or color, in violation of the FHA and the EOCA"<sup>131</sup>:

"Specifically, the OCC found that, after controlling for credit factors, there was reason to believe that Wells Fargo placed African-American applicants in the subprime mortgage lending channel in the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV Combined Statistical Area ("Washington CSA") more frequently than similarly-situated white applicants during the period from 2004–2008."<sup>132</sup>

The DOJ also conducted its own investigation into the bank's practices, in May 2009, and found similar disparities.<sup>133</sup>

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predatory lending practices and risky loans, such as subprime mortgages with extraordinarily high interest rates or other unfavorable terms.

128. Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES (July 12, 2012), <https://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html> [<https://perma.cc/S5MY-4LBX>].

129. *Id.*

130. *Id.*; Rick Rothacker & David Ingram, *Wells Fargo to Pay \$175 Million in Race Discrimination Probe*, REUTERS (July 12, 2012), <https://www.reuters.com/article/us-wells-lending-settlement/wells-fargo-to-pay-175-million-in-race-discrimination-probe-idUSBRE86B0V220120712> [<https://perma.cc/DK84-9YT5>].

131. Consent Order at 2, *United States v. Wells Fargo Bank, NA*, Case 1:12-cv-01150, (D.D.C. July 12, 2012), *available at* <https://www.justice.gov/iso/opa/resources/14201271211384881962.pdf> [<https://perma.cc/VX5X-A6CJ>].

132. *Id.*

133. *Id.*

The import of the government's allegations, supporting evidence, and resulting settlement agreement should not be overlooked. This hefty settlement is a sign of the wide-ranging predatory-lending practices that banks engaged in with respect to primarily black and Latinos communities. It is also a troubling sign of the dedication of some major lending institutions to flouting laws aimed at ensuring fairness and equity in loan transactions in order to extract as much capital as possible from targeted minority groups.<sup>134</sup> An assistant attorney general working on the case referred to the differential treatment as a "racial surtax."<sup>135</sup> A lingering question remains when incorporating banks into the plan for racial diversification of neighborhoods: How can the racial surtax be avoided?

*B. Bank of America Corp., et al. v. City of Miami (2017)*

Turning now to *Bank of America, Corp., et al. v. City of Miami*.<sup>136</sup> This case offers an example of how powerful structuring institutions, like banks, can complicate the success of integration and fair-housing initiatives. The case also highlights the permissive environment that municipalities facilitated for banks. In this insufficiently regulated space, banks were able to inflict substantial harm on certain neighborhoods in the years leading up to the Great Recession.

At the Supreme Court, the *Miami* case involved standing.<sup>137</sup> Specifically, the Court decided whether the City of Miami had standing to bring an FHA case against Wells Fargo and Bank of America.<sup>138</sup> Scrutinizing the "aggrieved-person" standard under the FHA, the Court

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134. Perhaps, Sander, Kucheva, and Zasloff's call for more detailed testing—completing loan application data rather than merely paired testing, combined with vigilant enforcement of the FHA and other important laws like the Equal Credit Opportunity Act (ECOA), etc.—will allow for more substantial strides to be achieved. *See generally* SANDER ET AL., *supra* note 1, at 423–66.

135. Savage, *supra* note 128.

136. 137 S. Ct. 1296 (2017). The behavior towards minority borrowers that Miami alleged was apparently not limited to that city, judging from the cases that have been filed in Philadelphia, Oakland, and other cities; it appears that banks engaged in these practices in numerous black and Latino communities throughout the country. *See e.g.*, *City of Philadelphia v. Wells Fargo & Co.*, No. CV 17-2203, 2018 WL 424451, at \*5 (E.D. Pa. Jan. 16, 2018); *Cook County v. HSBC N. Am. Holdings Inc.*, 314 F. Supp. 3d 950 (N.D. Ill. 2018); *City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 3008538, at \*1 (N.D. Cal. June 15, 2018).

137. *Miami*, 137 S. Ct. at 1301.

138. *Id.* Bank of America was involved by virtue of its acquisition of Countrywide Financial.

concluded that Miami had standing (under Article III)<sup>139</sup> to bring its civil claim for monetary damages.<sup>140</sup> The Court also recognized that the economic harms that Miami asserted were “arguably within the zone of interests” targeted by the FHA.<sup>141</sup> The Court remanded the case on the causation element, holding that in order to prevail, a plaintiff needs to do more than assert that its injuries were the “foreseeabl[e]” result of the defendant’s alleged statutorily prohibited conduct.<sup>142</sup> Instead, a plaintiff must demonstrate that “the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”<sup>143</sup> The Court left the task of delineating the proper proximate cause and application standards to the lower courts.<sup>144</sup>

The underlying case concerned the City of Miami’s complaint that the banks violated the FHA by “intentionally” engaging in predatory banking practices aimed at African-American and Latino neighborhood residents,<sup>145</sup> such as charging higher interest rates on loans, levying unreasonably high fees and penalties, and denying minority borrowers opportunities to refinance or modify their loans.<sup>146</sup> The city further alleged that the banks’ practices: (i) led to higher rates of foreclosure for minority borrowers when compared to nonminority borrowers; (ii) the behavior disproportionately created pockets of “foreclosures and vacancies,” which precipitated “stagnation and decline in African-American and Latino neighborhoods”;<sup>147</sup> and (iii) the conduct brought about a decrease in property values in numerous neighborhoods populated by these racial groups.<sup>148</sup> But what is really interesting about this case is that the city is the entity seeking to collect for the harm: Miami argued that the harms suffered by black and Latino communities were also detrimental to the city itself.<sup>149</sup> Specifically, the city

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139. In order to satisfy the Article III standing requirement, the plaintiff “must show an ‘injury in fact’ that is ‘fairly traceable’ to the defendant’s conduct and ‘that is likely to be redressed by a favorable judicial decision.’” *Id.* at 1302 (quoting *Spokeo, Inc., v. Robins*, 135 S. Ct. 1540, 1547 (2016)).

140. *Id.* at 1303.

141. *Id.* (“lost tax revenue and extra municipal expenses—satisfy the ‘cause of action’ (or ‘prudential standing’) requirement”).

142. *Id.* at 1301.

143. *Id.* at 1305.

144. *Id.* at 1305–06.

145. *Id.* at 1304.

146. *Id.* at 1301.

147. *Id.* at 1304 (quoting Joint Appendix, at 225, 409, *Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112)).

148. *Id.*

149. *Id.* at 1302.

maintained that the banks' practices "adversely impacted the racial composition of [Miami]";<sup>150</sup> sabotaged Miami's goal to accomplish "racial integration and desegregation";<sup>151</sup> interfered with Miami's objectives concerning "promoting fair housing and securing the benefits of an integrated community";<sup>152</sup> diminished the city's property tax revenues;<sup>153</sup> and caused Miami to allocate more money for "municipal services . . . to remedy blight and unsafe and dangerous conditions."<sup>154</sup>

This case is significant to my discussion in several respects. It highlights the roles of two primary structuring entities—cities and banks—in the housing-integration puzzle. It exposes the damage that banks can cause when given essentially free reign (meaning unregulated) to operate in neighborhoods. Although this a matter of conjecture, I propose that the city was unguarded and expansive in detailing the alleged harms in a way that it would not have been in another context. Imagine, for example, a negotiation between the city and African-American and Latino residents concerning the city's failure to utilize all of its protective tools and anti-discrimination mechanisms to prevent the decimation of neighborhoods by deleterious lending practices. In that context, the city may not have been so candid and revealing of the harms caused.

It is also important to consider the impetus for cases of this type and whether the driving factors need to be taken into account when proposing solutions to deal with housing segregation. Many cities are suffering from fiscal strangulation.<sup>155</sup> Not having a deep revenue stream to attend to infrastructure and provide public health and safety resources is a significant problem. Clearly, many banks have deep pockets. They are a logical target for municipalities seeking to recuperate lost revenue and to replenish their fiscal reserves. Some entity needs to pay; the banks have been enriched by their actions, so, local governments may logically reason, why not seek a share of

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150. *Id.* at 1301 (quoting Joint Appendix at 232, 416, *Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112)).

151. *Id.* (quoting Joint Appendix at 232, 416, *Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112)).

152. *Id.* (quoting Joint Appendix at 232–33, 416–17, *Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112)).

153. *Id.*

154. *Id.* at 1309 (quoting Joint Appendix at 417, *Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112)).

155. Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1140 (2014); *The Fiscal Landscape of Large U.S. Cities: Local Governments Still Recovering Long After Great Recession's End*, PEW (Dec. 13, 2016), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/12/the-fiscal-landscape-of-large-us-cities> [<https://perma.cc/V53A-A3NN>].

their profits? *Moving Toward Integration* undertakes a probing analysis that prompts readers to scrutinize, intensely, whether cities have been actively engaged in behaviors and policies to promote integration. In their lawsuits, Miami and other cities asserted that their integration actions were impeded by banks' predatory actions. It is worth examining these claims in more detail and acquiring information about the particular integrative efforts taken. Cities should be prepared to identify the specific initiatives underway that were aimed at achieving integration.<sup>156</sup> They should also be required to report on their progress.

The *Miami* case should also prompt cities to re-evaluate their public-private relationships with banks and developers. When municipalities provide inadequate protections and resources to neighborhoods populated by historically marginalized racial minorities, it leaves those communities susceptible to exploitative practices. Before a crisis unfolds, municipalities should be more proactive about designing policies aimed at racially integrating its communities and making them economically sound. Alas, on remand, even though the Eleventh Circuit held that Miami properly established a connection between the harms claimed and the banks' actions,<sup>157</sup> Miami requested that the case be dismissed.<sup>158</sup> It is unclear whether Miami's decision was prompted by any concessions on the part of the banks.<sup>159</sup> Regardless of the motivations prompting the dismissal request, the litigation has significance. Cases of this type illustrate that the municipality's welfare is interconnected with that of its residents. If cities, like Miami, are able to leverage their power, it should be to set guidelines and goals regarding business conduct within municipal borders. To the extent that future lawsuits in this vein result in favorable settlements or

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156. Miami's claims raise a question of whether the heavily impacted neighborhoods that they based the lawsuit on were integrated with black and white residents or integrated with black and Latino residents, etc.

157. The Eleventh Circuit, on remand, constructed a proximate-cause standard that litigants could conceivably satisfy. In addition to foreseeability, the court observed: "Proximate cause asks whether there is a direct, logical, and identifiable connection between the injury sustained and its alleged cause. If there is no discontinuity to call into question whether the alleged misconduct led to the injury, proximate cause will have been adequately pled." *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1264 (11th Cir. 2019), *cert. granted, vacating as moot* 140 S. Ct. 1259 (2020) (mem.). In applying that standard, the Eleventh Circuit held that: "the City has adequately pled proximate cause when it comes to a tax-base injury because the Banks' redlining and reverse-redlining practices bear some direct relation to the City's fiscal injuries." *Id.* at 1294.

158. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1264 (11th Cir. 2019), *cert. granted, vacating as moot* 140 S. Ct. 1259 (2020) (mem.).

159. Evan Weinberger, *Miami Drops Fair Housing Cases Against Wells Fargo, BofA* (2020), <https://news.bloomberglaw.com/banking-law/miami-drops-fair-housing-cases-against-wells-fargo-bofa>.

favorable court decisions, cities should be required to allocate some of the money to help those communities that were harmed in the first place; they should not be able to simply pocket the gains.

## V. COMMUNITY BANKS

I concur with *Moving Toward Integration*'s authors that because banks are salient to solving the segregation–integration puzzle, they are worthy of extensive study. Of course, they have been a substantial part of the problem, but select banks like the extraordinary exception of South Shore Bank, should be studied in detail to extract lessons. The book's chapters detailing the genesis of South Shore Bank and its successes are fascinating and well worth extended examination. After reading that material, I had two main interrelated questions. The authors identify key successful ingredients in the establishment of South Shore Bank, but I query whether a South Shore Bank can be replicated in today's times. I also question whether community banks can thrive in this economic and political climate.

## VI. THE WILL OF THE PUBLIC

It is not my intention to evaluate the soundness of the empirical models that appear throughout *Moving Toward Integration*, but rather to interrogate some of the assumptions the authors make. They underestimate the resistance to integration exhibited by white communities. Some of their claims about white flight are undercut by the details. Drawing heavily upon the scholarship of Ingrid Gould Ellen in reaching certain conclusions, the authors often resort to the phrase “white avoidance” as opposed to “white flight.”<sup>160</sup> White avoidance is, arguably, a less polemical phrase than white flight, but it describes the same phenomenon. That is, it refers to the phenomenon of whites relocating to other areas (e.g., the suburbs) coinciding with the influx of African Americans to the areas whites are relocating *from* (or neighboring ones). Relying upon Ellen's work, the authors state that “whites move into racially integrated neighborhoods in large numbers.”<sup>161</sup> They further comment that while “[r]acial composition certainly matters to whites assessing a neighborhood, and very few whites move into predominantly black neighborhoods; . . . there is no pervasive tendency for whites to avoid more modestly integrated neighborhoods.”<sup>162</sup> I have two questions in response. First, what was the racial composition of the racially integrated neighborhoods that whites

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160. SANDER ET AL., *supra* note 1, at 116. (commenting that the “dominant metaphor for the process of white-to-black neighborhood transition is ‘white flight’”).

161. *Id.* at 208.

162. *Id.* at 207.

moved into that served as the basis for Ellen's conclusion? Knowing the racial composition of those neighborhoods is important to gauging the latter's comfort level with experiencing neighborhood cohabitation with African Americans. Second, to what extent can the movement into racially integrated neighborhoods be characterized as gentrification, ultimately involving the displacement of blacks?

The authors further note that "there is no doubt that [the] short distance moves from black districts into nearby, mostly middle-class white neighborhoods occurred in the 1970s on a vast scale, amounting in the aggregate to more than a million housing units shifting from white to black occupancy."<sup>163</sup> The authors do not attribute this shift in the complexion of the neighborhoods to white flight. Instead, they explain that numerous other factors were at work, including "normal turnover," a higher level of black demand when compared to whites for those properties, and the emphasis of whites on non-racial factors.<sup>164</sup> Regarding the latter explanation, the authors conclude that while white avoidance cannot be entirely dismissed from the analysis, "[Ingrid Gould] Ellen shows persuasively that whites generally will not be much interested in minority neighborhoods if they perceive crime, bad schools, and housing deterioration to be concomitants of a large minority presence."<sup>165</sup> Without more explanation, citing these non-racial reasons as evidence that whites are not acting out of racial intolerance or animus is problematic. If the whites in Gould's study often made the association between blacks and the negatives stated, then the conclusion that they were not acting out of racial bias and fleeing based upon that bias is questionable. What is true, however, is that no racial group is interested in residing in areas with high crime, bad schools, and dilapidated housing.

## CONCLUSION

*Moving Toward Integration* asks the necessary complex, searching questions to engage in difficult conversations regarding how African Americans and whites live together—and apart—in the United States. It compiles crucial data to provide some answers to those questions. The arguments advanced, the historical background, and the empirical data provide the implements for progress in the area of residential racial integration. There is much I agree with in the book, but there are also significant areas of disagreement.

I agree with the authors that the FHA, with the tool of disparate-impact liability, is a potentially powerful instrument that could achieve substantial gains in the area of racially integrating housing. I note,

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163. *Id.* at 221.

164. *Id.* at 227.

165. *Id.*



however, that its potential has been dulled at times by various levels of government actors as well as the courts. Changes need to be made in the way in which disparate-impact theory is formulated to allow it to do the work of rooting out discriminatory effects that are offered in benign packages. In sum, the United States Supreme Court has interpreted disparate-impact liability in a manner that makes it unlikely that litigants will prevail; thus, without some other interventions, the status quo of racial segregation will be preserved.

I share the authors' assessment that the FHA has accomplished significant progress in promoting integration by raising the racial consciousness of decision-makers as they make decisions concerning housing—who to rent to (landlords), where to rent or buy (realtors, brokers), who to sell to (owners, neighbors). Raised consciousness sometimes translates into less invidious racial discrimination in housing. My analysis highlights: (i) the need to exert pressure on local entities (municipalities, agencies, developers) to help diversify housing choices and integrate neighborhoods; (ii) the need to rethink HUD's burden-shifting framework for FHA disparate-impact claims and, perhaps, discard it altogether; (iii) the need to assist plaintiffs, where FHA litigation is necessary, with the first and third prongs of the burden-shifting framework to establish connections between the actions and policies implemented by government and other entities and the damage inflicted on communities, and to devise equally effective alternatives to challenged practices; and (iv) the need to regulate banks and to refocus their attention on the interests of communities rather than merely on profit for shareholders. The task is to strike the right balance so that the well-being of communities is foregrounded, while at the same time allowing banks sufficient profitability to sustain themselves.

I view *Moving Toward Integration* as a reminder that there are many who wish to have more integrated communities across the nation, and that strategies are needed to make those desires a reality. The authors are to be applauded not only for their articulation of noteworthy integration techniques and initiatives, but also for recognizing the value of integration and the benefits it brings to America's multiracial society.<sup>166</sup>

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166. The Authors identify numerous positive outcomes, stating that, "racial integration tends to improve educational and job opportunities for young African-Americans, producing higher incomes and shrinking the black/white income gap." *Id.* at 243.