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Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis

Rigel C. Oliveri*

“What’s past is prologue.”¹

I. INTRODUCTION

The St. Louis Metropolitan area, which includes St. Louis City and St. Louis County (which itself contains ninety-one separate municipalities), is one of the most racially segregated places in the United States.² One common measure of segregation is called a dissimilarity index, which refers to the evenness with which two groups are spread across component geographic areas that make up a larger geographic entity.³ An index score of greater than 60 is considered high or extreme.⁴ In 2010, St. Louis’s black-white index score was 70.6, the ninth highest in the country.⁵ Another way to assess segregation is through the isolation index, which measures the extent to which members of a particular group are exposed only to each other.⁶ The black-white isolation score for St. Louis in 2010 was 62, the eleventh highest in the country.⁷

This is not an accident. A century’s worth of discriminatory policies and practices have gone into making St. Louis City and its surrounding com-

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1. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

2. Research & Statistics Div. of the St. Louis Cty. Dep’t of Planning, *2007–2012 Fact Book*, ST. LOUIS CTY., MO. i, <http://www.stlouisco.com/Portals/8/docs/Document%20Library/Maps%20and%20GIS/Fact%20Book/Fact%20Book%202007-2012/introduction.pdf>.

3. See Douglas S. Massey et al., *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 76 (2009). The index score can also be described as the percentage of one of the two groups that would have to move from one geographic component to another geographic area in order to produce a distribution that matches that of the larger area. *Id.*

4. *Id.* at 77.

5. John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US2010 PROJECT 1, 6 (Mar. 24, 2011), <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

6. Massey et al., *supra* note 3.

7. Logan & Stults, *supra* note 5, at 8. Thus, the average black person in the metro area lived in a neighborhood that was 62% black. *See id.*

munities look the way they do today. Nor is this without consequence – hypersegregation and the discriminatory forces that cause it lead to a host of other problems, including wealth disparity, school segregation and inequality, and tensions between citizens and law enforcement. Perhaps most importantly, we become a nation of “two societies, one black, one white—separate and unequal.”⁸ Those famous words were written in 1968 by the National Advisory Commission on Civil Disorders, which was formed to address the urban riots of the late 1960s. Those riots occurred in highly segregated communities across the United States and, in many, the triggering event was an act of police brutality against black residents. The Commission warned that more violence would ensue if segregated living patterns, racialized policing, and overall inequality persisted. And though much has changed in the ensuing decades, the recent events in Ferguson, Missouri, demonstrate that too much has remained the same.

It might be tempting to view what happened in Ferguson as a policing problem, one of the many tragic instances of white police officers shooting unarmed black men and boys. Certainly, this is an important piece of the story and one which will be explored elsewhere in this Symposium. Some have described the response – weeks of peaceful protests, but also rioting, looting, arson, and property damage – as a symptom of community dysfunction, blaming poverty, poor schools, and lack of employment prospects. There may be truth to this description as well, but it remains an oversimplification. To truly understand the events of the fall of 2014, I submit that we have to look further back, to what might seem an unlikely source: housing discrimination.

The history of St. Louis is replete with discriminatory housing laws, policies, and practices: racially restrictive covenants, redlining, blockbusting and white flight, and exclusionary zoning. While these were common in virtually every part of the United States, they were particularly egregious, widespread, and pervasive in industrial Midwestern cities like Chicago, Detroit, and St. Louis – which saw a large influx of blacks migrating from the south at the close of the nineteenth century. In fact, three of the most foundational housing cases originated in St. Louis. When we look closely at these cases – not just the legal principles that they established but the physical, racial geography of the homes, neighborhoods, and cities that were contested – we can see how they reflected the racist forces that shaped the reality of modern metropolitan St. Louis. This can give us insight into what happened in Ferguson and why.

8. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, NAT’L CRIMINAL JUSTICE REFERENCE SERV., REPORT 1 (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>.

II. A STORY OF SEGREGATION, IN THREE CASES

A. *Act I: Shelley v. Kraemer (1948)*

The story begins a century ago, in 1915, when a group of St. Louis realtors created an organization, the United Welfare Association, in order to advocate for a racially exclusionary zoning ordinance.⁹ The ordinance would bar blacks from living on blocks that were more than 75% white (and vice versa).¹⁰ They succeeded in getting the measure placed on the ballot the following year.¹¹ The measure passed easily, and St. Louis became one of a handful of areas around the nation with such a law.¹² An identical law was struck down by the Supreme Court the following year as a violation of due process and property rights, in *Buchanan v. Warley*.¹³

In the absence of explicit laws, the widespread practice of racially-restrictive covenants began, in which developers and neighborhood associations placed deed restrictions on properties, preventing them from being occupied by blacks.¹⁴ This practice was promoted by realtors nationwide, but in St. Louis, the local real estate industry – which had pressed for the racial zoning measure – was particularly enthusiastic and organized in its support of covenants.¹⁵ An association called the St. Louis Real Estate Exchange created a “Committee on the Protection of Property” whose purpose was to promote the use of covenants and to help with their enforcement.¹⁶ This Committee provided a “Uniform Restriction Agreement” with model covenant language that was used in approximately 85% of the restrictive agreements in force.¹⁷ Members went door-to-door to help organize neighborhood associations for the purposes of enacting restrictive covenants.¹⁸ The Exchange was also a formal party to most of the covenants, and it provided legal assistance

9. COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 70* (Glenda Gilmore et al. eds., 2008).

10. *Id.*

11. *See id.*

12. *Id.* at 71.

13. 245 U.S. 60, 80–81 (1917). Interestingly, the *Buchanan* case involved a white homeowner who wished to sell his house to a black buyer, in violation of the zoning law. *Id.* at 72–73. Thus, the Court approached the issue as a matter of the *white man’s* rights to dispose of his property, which were infringed by the law, and not as a matter of the black man’s rights to purchase that property. *Id.* at 73.

14. GORDON, *supra* note 9, at 73.

15. *Id.* at 79.

16. *Id.*

17. *Id.*; Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of Its Troubles*, ECON. POL’Y INST. 1, 13 (Oct. 15, 2014), <http://s3.epi.org/files/2014/making-of-ferguson-final.pdf>.

18. GORDON, *supra* note 9, at 79.

to the neighborhood associations when it came time to enforce the covenants in court.¹⁹

Restrictive covenants also became part of federal mortgage policy, as carried out by the Home Owners Loan Corporation (“HOLC”) and the Federal Housing Administration (“FHA”).²⁰ From their creation in the mid-1930s through the Second World War, these agencies backed the financing of between one-quarter to one-half of all new home sales.²¹ The FHA underwriting manual stated that “protection against some adverse influences,” such as “the ingress of undesirable racial or nationality groups,” must be obtained by “proper zoning and deed restrictions.”²² “Restrictive covenants should strengthen and supplement zoning ordinances,” the manual suggested, and are “apt to prove more effective than a zoning ordinance in providing protection from adverse influences.”²³ The FHA specifically recommended restrictions against “occupancy of properties[,] except by the race for which they were intended.”²⁴

Meanwhile, the HOLC drafted a series of “residential security maps” which were intended to guide mortgage lending activity.²⁵ While these maps took into account factors such as the age of housing stock, they were primarily guided by the racial composition of the neighborhoods.²⁶ In St. Louis, the existence of restrictive covenants helped an area gain a highly favorable A or B rating.²⁷ Majority black neighborhoods were given the lowest rating – D, for Hazardous – and colored red.²⁸ Racially transitional neighborhoods were given a C, for “definitely declining,” and colored yellow.²⁹

All of these actions reflected the racist belief that the presence of blacks in a neighborhood would lower property values and bring with it crime and other nuisances. The result was that virtually all of St. Louis’s black population was confined to just a few neighborhoods in the center of the City.³⁰ As these neighborhoods grew increasingly crowded, there was nowhere that

19. *Id.*

20. *Id.* at 89.

21. *Id.* at 88.

22. Rothstein, *supra* note 17, at 15; GORDON, *supra* note 9, at 91.

23. GORDON, *supra* note 9, at 91.

24. *Id.*

25. *Id.* at 92.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* See also DOUGLAS S. MASSEY AND NANCY A. DENTON, AMERICAN APARTHEID 52 (1993) (citing a confidential HOLC survey of St. Louis real estate that warned about the “rapidly increasing Negro population” and the problem this would cause for the maintenance of property values).

30. See GORDON, *supra* note 9, at 94.

black families could move.³¹ The unavailability of mortgage capital in these neighborhoods further contributed to the plummeting of property values. With overcrowding and falling property values came the deterioration of housing stock, rising crime, and substandard city services.³² The racist belief thus became a self-fulfilling prophecy.

By 1945, roughly 300 neighborhood covenants were in force throughout the City.³³ That same year, J.D. and Ethel Shelley, a black couple, purchased a small rowhouse at 4600 Labadie Avenue in the Fairground District of St. Louis.³⁴ The houses in the neighborhood were subject to a covenant, which had been agreed upon by thirty out of the original thirty-nine property owners.³⁵ The covenant prohibited any house from being occupied “by any person not of the Caucasian race” and specifically stated that it was intended to prevent “the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.”³⁶ Louis and Fern Kraemer, a white couple who lived in the neighborhood, sued to enforce the covenant.³⁷

The Supreme Court of Missouri sided with the Kraemers, determining that the covenant was a valid agreement and that its enforcement by the court did not violate the Fourteenth Amendment, which only applied to “a state action exclusively.”³⁸ Indeed, to hold otherwise, the court reasoned, would be “to deny the parties to such an agreement one of the fundamental privileges of citizenship, access to the courts.”³⁹

31. *Id.* at 78 (citing a 1947 report of the St. Louis Urban League, which found that approximately 97% of the black population of St. Louis lived in the city center and that they faced a critical lack of housing).

32. *See id.* at 223 (“As a rapidly growing African American population crowded into hastily but strictly circumscribed blocks or neighborhoods, the immediate consequence was not only extreme stress on the housing stock but also an easy equation of overcrowding, crime, poor sanitation, and poor health with black occupancy itself.”).

33. *Id.* at 75.

34. *Id.* at 82.

35. *Id.*

36. *Kraemer v. Shelley*, 198 S.W.2d 679, 681 (Mo. 1946) (en banc), *reversed*, 334 U.S. 1 (1948).

37. GORDON, *supra* note 9, at 82. Significantly, tax-exempt religious organizations joined in this fight – on the side of the Kraemers. Rothstein, *supra* note 17, at 15. Richard Rothstein reports that the Cote Brillante Presbyterian Church and the Waggoner Place Methodist Episcopal Church South (also a covenant signatory) provided funds to support the Kraemers’ lawsuit. *Id.*

38. *Shelley*, 198 S.W.2d at 683.

39. *Id.* Interestingly, the court did express some sympathy for the plight of the black residents of St. Louis who were unable to move out of their overcrowded neighborhoods because of restrictive covenants:

The [lower court] found the negro population in St.Louis [sic] has greatly increased in recent years, and now numbers in excess of 100,000; and that some

The U.S. Supreme Court overturned the Missouri Supreme Court's decision, ruling that the coercive power of the courts to enforce the covenant was clearly state action, and thus subject to the Fourteenth Amendment.⁴⁰ *Shelley v. Kraemer*, which made restrictive covenants unenforceable throughout the United States, was thus one of the earliest and most important decisions in favor of the cause of fair housing.⁴¹

B. Act 2: Jones v. Mayer (1968)

While *Shelley v. Kraemer* was an unquestionable civil rights victory, nothing about the case stopped people and institutions from engaging in private acts of housing discrimination. Racially restrictive covenants were no longer enforceable by law, but people were still free to enter into such voluntary agreements, a point made clear by the Supreme Court opinion.⁴² Sellers could – and did – simply refuse to sell their homes to minority buyers.⁴³

St. Louis real estate agents continued to refuse to sell homes in white neighborhoods to blacks.⁴⁴ They drew up their own “restricted” (black) and “unrestricted” (white) zones on the map.⁴⁵ They aggressively steered black homeseekers away from unrestricted neighborhoods and often outright lied to them about the availability of houses in unrestricted areas.⁴⁶ In the 1920s, both the Real Estate Exchange and the Missouri Real Estate Commission had adopted a code of ethics that prohibited “introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detri-

of the sections in which negroes live are overcrowded, which is detrimental to their moral and physical well being.

Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast. But their correction is beyond the authority of the courts generally, and in particular in a case involving the determination of contractual rights between parties to a law suit [sic]. If their correction is sought in the field of government, the appeal must be addressed to its branches other than the judicial.

Id. (citations omitted).

40. *Shelley*, 334 U.S. 1, 20.

41. *Id.*

42. “[T]he restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to [the Shelleys] by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.” *Id.* at 13.

43. GORDON, *supra* note 9, at 82.

44. *Id.* at 84.

45. *Id.*

46. *Id.* at 84–87.

mental to property values in that neighborhood.”⁴⁷ Thus, selling a home in a white neighborhood to a black buyer would constitute professional misconduct and cause a realtor to lose his or her license.⁴⁸ In the wake of *Shelley*, St. Louis realtors doubled down on their adherence to this standard.⁴⁹ The Exchange immediately approved a recommendation that no realtor sell to blacks or assist in the financing of any sale to black buyers for property “outside of the established unrestricted districts.”⁵⁰ In 1955, the Exchange sent a notice to its members warning that “no Member of our Board may . . . sell to Negroes . . . unless there are three separate and distinct buildings in such block already occupied by Negroes.”⁵¹

Again, these practices were motivated by the belief that the presence of blacks in a neighborhood would ruin property values and that once black families gained entry into a place, it would quickly lead to neighborhood turnover. Nevertheless, with the unenforceability of covenants and a growing number of private sales, black residents slowly began to make inroads into new neighborhoods within the City. Some realtors then engaged in the practice of blockbusting – stirring up racial anxiety in a neighborhood at the notion of black encroachment and inducing the white residents to sell.⁵² Realtors sometimes purchased the properties themselves at a “panic sale” discount and then re-sold them at a much higher price to black families moving in.⁵³ Again, the realtors and white residents caused their fears about neighborhood instability to become self-fulfilling prophecies.

At the same time, urban renewal and redevelopment projects demolished some existing black neighborhoods in the City and led to the dislocation of thousands of black residents.⁵⁴ Those residents who were fortunate enough to get relocation assistance were often placed in large-scale public housing projects, such as the infamous Pruitt-Igoe complex.⁵⁵ The vast majority of these projects were concentrated within black neighborhoods in the City – virtually none were built outside of the City limits.⁵⁶ The effect was to entrench both poverty and segregation in these neighborhoods, while allowing the St. Louis County suburbs to develop as middle-class white enclaves.

Although *Shelley* caused the FHA to officially eliminate its insistence on racially-restrictive covenants and to refuse to insure properties covered by new covenants, this policy did not apply to those covenants already in

47. *Id.* at 83.

48. *Id.* at 84.

49. *Id.*

50. *Id.*

51. *Id.* at 85–86; Rothstein, *supra* note 17, at 26.

52. Rothstein, *supra* note 17, at 25.

53. *Id.*

54. GORDON, *supra* note 9, at 99–100. Professor Gordon points to the enormous Mill Creek renewal project, which displaced over 16,000 people, nearly all of whom were black. *Id.* at 99.

55. *Id.* at 100.

56. *Id.*

place.⁵⁷ Moreover, the local FHA office continued to rely on the racially-driven neighborhood ratings developed by HOLC, which continued to give C ratings to the City neighborhoods that blacks were moving into and D ratings to all of St. Louis's predominantly black neighborhoods.⁵⁸ Well into the 1950s and 1960s, FHA manuals continued to prioritize neighborhood homogeneity, and the St. Louis FHA office warned against changes in the "social characteristics" of neighborhood occupants.⁵⁹ As a practical matter, this meant that the vast majority of FHA-backed mortgages went to the rapidly developing all-white neighborhoods in St. Louis County. Between 1934 and 1960, 84% of FHA mortgages in the area went to properties outside the City.⁶⁰ And because black buyers were prevented by discrimination from accessing these markets, virtually none of them were able to obtain an FHA-backed mortgage. Out of 400,000 FHA mortgages made in the St. Louis metro area between 1962 and 1967, only 3.3% went to black borrowers.⁶¹ For black borrowers in St. Louis County, that figure dropped to below 1%.⁶²

Bolstered by FHA mortgages, whites began to flee the City in record numbers, and developers were there to meet this growing demand. One of the most successful was Alfred H. Mayer, whose eponymous company acquired a large parcel of land next to the Paddock Country Club and golf course in North St. Louis County.⁶³ Mayer subdivided the property and named the subdivision Paddock Woods.⁶⁴ In 1965, Joseph Lee and Barbara Jo Jones, a married couple, were seeking to move out of their overcrowded neighborhood in the City and into the suburbs.⁶⁵ They viewed a display house at Paddock Woods and liked it enough to put in an offer for a lot on Hyde Park Drive.⁶⁶ They were informed by a Mayer sales agent that Mayer would not consider their purchase offer because Joseph Jones was black, and it was Mayer's "general policy not to sell houses and lots to Negroes."⁶⁷

The Joneses filed suit, alleging violations of the Thirteenth and Fourteenth Amendments to the Constitution, as well as violations of the Civil Rights Act of 1866, which was later re-codified at 42 U.S.C. §§ 1981–82.⁶⁸ Section 1981 holds in part that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . .

57. *Id.* at 91.

58. *Id.* at 93.

59. *Id.* at 91–92.

60. MASSEY & DENTON, *supra* note 29, at 54; GORDON, *supra* note 9, at 96.

61. GORDON, *supra* note 9, at 96.

62. *Id.* This figure represented just 56 borrowers. *Id.*

63. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 118 (E.D. Mo. 1966), *reversed*, 392 U.S. 409 (1968).

64. Brief for Petitioner, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, (No. 645), 1968 WL 129310 at *5.

65. *Id.* at *7.

66. *Jones*, 255 F. Supp. at 118.

67. *Id.*

68. *Id.*

as is enjoyed by white citizens.”⁶⁹ Section 1982 states simply that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁷⁰

The sticking point for the Joneses’ claim was the issue left untouched by *Shelley v. Kraemer*: the fact that the Thirteenth and Fourteenth Amendments and the Civil Rights Act, which was meant to enforce them, had historically been viewed as applying only to government actions. Indeed, the District Court dismissed the Joneses’ complaint on this basis, which was upheld by the Eighth Circuit.⁷¹

The Supreme Court, however, reversed and found that § 1982 was in fact intended to reach private acts of race discrimination.⁷² From a legal standpoint, this decision was extraordinary. Never before had the Supreme Court interpreted the Reconstruction-era civil rights statutes as reaching purely private conduct – the dissent pointed out how implausible it is that the Congress which passed these statutes in 1866 would have ever intended them to reach so far.⁷³

The *Jones* decision would have been truly monumental if other events had not overshadowed it. Two days after the oral argument before the Supreme Court, Dr. Martin Luther King was assassinated, and riots engulfed several American cities.⁷⁴ One week later, President Johnson signed the Fair Housing Act – the nation’s first comprehensive remedial civil rights law directed to housing – into law.⁷⁵ The Fair Housing Act prohibited all manner of discrimination in housing, and thus provided all the protections that the holding in *Jones v. Mayer* did and then some, a fact that the Court acknowledged when it handed down its opinion two months later.⁷⁶

Although the Joneses ultimately won their case, they were never able to buy a house in the Paddock Woods development.⁷⁷ While their lawsuit wound its way through the courts, the couple instead settled on a more modestly-priced ranch house a few miles away in Florissant.⁷⁸ A week after the Supreme Court’s decision came down, the *St. Louis Post-Dispatch* reported

69. 42 U.S.C. § 1981 (2012).

70. *Id.* § 1982.

71. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968).

72. *Id.* at 480.

73. *Id.* at 436.

74. *Jones v. Alfred H. Mayer Company*, OYEZ PROJECT, <https://www.oyez.org/cases/1967/645> (last visited Oct. 14, 2015); *Martin Luther King, Jr.*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Martin-Luther-King-Jr> (last visited Oct. 14, 2015).

75. *Fair Housing Act*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Fair-Housing-Act> (last visited Oct. 3, 2015).

76. *Jones*, 392 U.S. at 413–14.

77. Darrell A.H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1038 (2008).

78. *Id.* at 1038–39.

that all of the Paddock Woods homes had been sold and that the market price of the homes had “risen considerably from the \$28,500 that the Jones were prepared to pay in 1965.”⁷⁹

C. Act 3: United States v. City of Black Jack (1974)

As important a turning point as the year 1968 was for the fair housing movement, it also marked the beginning of the true exodus of whites from St. Louis City. The City’s population fell by almost 170,000 between 1970 and 1980, as whites abandoned the City for the outlying areas.⁸⁰ The most egregious of discriminatory practices by private sellers, banks, and real estate brokers had been made illegal. Although discriminatory attitudes were still prevalent, and private acts of discrimination continued to occur, it was no longer safe to engage in overt discrimination, or to discriminate as an official policy.

Exclusionary zoning was one method of preventing black families from moving into the virtually all-white municipalities in St. Louis County.⁸¹ In contrast to the explicitly racial zoning of fifty years earlier, these racially neutral zoning ordinances did things like require single family homes on large lots that would be out of the price range for many black families – who were either renters or the owners of houses in the City with comparatively little value – and bar the construction of public housing, low-income housing, and even multi-family housing (i.e., apartment buildings) that would be likely to attract black occupants.⁸²

The desire for exclusionary zoning also contributed to the proliferation of tiny municipalities around the City of St. Louis. Until recently, there were few rules for municipal incorporation in Missouri. Developers continued creating subdivisions in unincorporated areas outside of the City, primarily catering to the fleeing whites.⁸³ These subdivisions would then incorporate.⁸⁴ There were a number of benefits to incorporation, one of which was that they could enact exclusionary zoning ordinances with the purpose of excluding lower income people and blacks from the City.⁸⁵ This led to a patchwork quilt of ninety-one separate municipal entities in St. Louis counties, some less than one square mile in area and many with fewer than 2000 residents.⁸⁶

79. *Id.* (quoting *Couple’s House Hunt Is Still On*, ST. LOUIS POST-DISPATCH, June 23, 1968, at 13A).

80. GORDON, *supra* note 9, at 25.

81. *Id.* at 131.

82. *See id.*

83. *See id.*

84. *Id.* at 152.

85. *Id.* at 147.

86. *Municipalities*, ST. LOUIS CTY., MO., <http://www.stlouisco.com/YourGovernment/Municipalities> (last visited Oct. 3, 2015).

Black Jack was one such newly-formed community.⁸⁷ In 1970, it was part of a large, unincorporated area governed by St. Louis County.⁸⁸ The population was 99% white.⁸⁹ In the area that would later become the City of Black Jack, virtually all of the land was either occupied by single family homes or undeveloped.⁹⁰ In 1969, a nonprofit organization called the Inter Religious Center for Urban Affairs (“ICUA”) began planning a development called Park View Heights in the area, which was “to create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis.”⁹¹ The ICUA located a suitable parcel of land and put in an option for it.⁹² The Department of Housing and Urban Development (“HUD”) issued a feasibility letter in 1970, essentially greenlighting the project for federal funding.⁹³ Opposition by the area residents was both fierce and swift.⁹⁴ They immediately began a drive to incorporate the area, which included the proposed project.⁹⁵ Two months after the feasibility letter, the City of Black Jack was incorporated.⁹⁶ Two months after that, the City’s first official act was to pass a zoning ordinance prohibiting the construction of any new multifamily dwellings.⁹⁷

The Department of Justice (“DOJ”) challenged the zoning ordinance in federal court, alleging that it was motivated by racial animus and was discriminatory in effect.⁹⁸ The District Court for the Eastern District of Missouri ruled in favor of the City, finding that even if some of the officials involved had racist motivations, “[R]acial considerations must be shown as part of the legislation.”⁹⁹ The district court also disputed the DOJ’s statistical showing of disparate impact and concluded that even if the ordinance did keep black families from moving into the City, this fact was not a sufficient enough concern to override local zoning authority.¹⁰⁰

The Eighth Circuit reversed, handing down the first appellate court decision to recognize the validity of the so-called disparate impact theory under

87. GORDON, *supra* note 9, at 147.

88. *Id.*

89. *Id.* at 149.

90. *United States v. City of Black Jack*, 508 F.2d 1179, 1182 (8th Cir. 1974).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1183.

98. *Id.* at 1181. A related challenge was brought by the ICUA and the Park View Heights Corporation. *Park View Heights Corp. v. City of Black Jack*, 335 F. Supp. 899 (E.D. Mo. 1971).

99. *United States v. City of Black Jack*, 372 F. Supp. 319, 329 (E.D. Mo. 1974).

100. *Id.* at 330.

the Fair Housing Act.¹⁰¹ This theory holds that even a facially neutral action can violate antidiscrimination law if it disproportionately affects a particular group without serving a legitimate business reason or compelling government interest.¹⁰² The Eighth Circuit found that a disparate impact was indeed present: “The ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.”¹⁰³ The Supreme Court denied certiorari.¹⁰⁴ Today, this case is one of the most-commonly cited in support of the disparate impact principle in fair housing cases.¹⁰⁵

Although the Eighth Circuit’s opinion was based on the existence of a disparate impact, the court went out of its way to make clear that this did not mean that the ordinance’s supporters were free of racial animus.¹⁰⁶ To the contrary, it found:

There is evidence in the record to support [the] contention [that the purpose of the ordinance was to exclude blacks]. Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone.¹⁰⁷

Despite a victory in the courts, the supporters of mixed income multi-family housing in Black Jack failed to achieve their objective.¹⁰⁸ By the time the Eighth Circuit’s opinion came down, the proposed site had been bought back by the City.¹⁰⁹ HUD’s support for the project had waned, financing was

101. *Black Jack*, 508 F.2d at 1188. The disparate impact standard had first been recognized by the Supreme Court in the context of employment discrimination and Title VII in the case of *Griggs v. Duke Power*. 401 U.S. 424 (1971).

102. *Griggs*, 401 U.S. at 430–32. Even if such an interest is shown, a plaintiff can still prevail by showing that the interest can be met through alternate means that do not create the disparate impact. *Id.*

103. *Black Jack*, 508 F.2d at 1186.

104. *City of Black Jack v. United States*, 422 U.S. 1042 (1975).

105. This year, for the first time, the U.S. Supreme Court considered the viability of disparate impact theory in fair housing cases. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015). The theory was upheld by a narrow majority. *Id.* at 2526.

106. *Black Jack*, 508 F.2d at 1186.

107. *Id.* at 1188 n.3.

108. GORDON, *supra* note 9, at 150.

109. *Id.*

difficult because of rising interest rates, and the hostility toward such projects had only intensified.¹¹⁰

III. TODAY

This depressing history boils down to one basic truth: The black population of St. Louis City and County has a long history of being denied access to one of the most significant sources of wealth accumulation for most Americans – a home, in a stable and functioning neighborhood, purchased on reasonable terms. All of the discriminatory forces that skewed the housing markets decade after decade – and by extension the tax bases, school systems, and development patterns – are evident in the map of the metro area today. Black people in St. Louis are no longer held back by legalized discrimination, but as one commentator notes, “Policies that are no longer in effect and seemingly have been reformed still cast a long shadow.”¹¹¹

Today, the house that the Shelleys purchased in 1948 sits on a run-down block in a neighborhood that is now 100% black.¹¹² Much of the City’s black population has moved northward into the inner-ring municipalities.¹¹³ The Paddock Woods subdivision now has a majority black population¹¹⁴ – ironically, testing in the late 1990s revealed that real estate agents in the area were actually steering black prospective buyers *to* the neighborhood.¹¹⁵ The City of Black Jack is now 81.5% black.¹¹⁶ Whites, meanwhile, have continued to

110. *Id.* Professor Gordon quotes one of the Park View Heights lawyers as saying, “No developer in his or her right mind . . . at this point in time would go into the City of Black Jack and attempt to build low and moderate income housing . . .” *Id.*

111. Rothstein, *supra* note 17, at 4.

112. Google Street View reveals a number of vacant lots and boarded up buildings on the blocks near where the house is located. Google Street View of 4600 Labadie Ave., St. Louis, Mo., GOOGLE MAPS, <https://www.google.com/maps> (search for “4600 Labadie Ave., St. Louis, Mo.” and click “Street View”). A census-mapping website indicates that the neighborhood is over 99% black. See *Justice Map*, ENERGY JUST. NETWORK, <http://www.energyjustice.net/justice/index.php?gsLayer=black&gfLon=-95.3&gfLat=39.6&giZoom=4> (search for “4600 Labadie Ave., St. Louis, Mo.” in the “Address” box then click “Go”). The Trulia website estimates that the average list price for a home in the neighborhood is \$36,416. *Property Details for 4600 Labadie Ave.*, TRULIA, http://www.trulia.com/homes/Missouri/Saint_Louis/sold/999987-4600-Labadie-Ave-Saint-Louis-MO-63115 (last visited Oct. 3, 2015).

113. Rothstein, *supra* note 17, at 68.

114. One website estimates the black population in Paddock Woods as 58%. *Paddock Woods*, FINDTHEHOME, <http://places.findthehome.com/1/278271/Paddock-Woods-Florissant-MO> (last visited Sept. 2, 2015).

115. The case in which the testing data were presented was *Metropolitan St. Louis Equal Housing Opportunity Council v. Grundaker*. 132 F. Supp. 2d 1210 (E.D. Mo. 2001).

116. *Black Jack Demographics*, MO. DEMOGRAPHICS, <http://www.missouri-demographics.com/black-jack-demographics> (last visited Sept. 6, 2015).

move westward and to the south, into middle-class and highly affluent neighborhoods. In fact, three of the wealthiest communities in the United States can be found in this part of St. Louis County: Frontenac, Ladue, and Town & Country,¹¹⁷ each of which has a black population of less than 2.6%.¹¹⁸ Finally, the existence of so many tiny municipal governments, particularly in cash-strapped North County, has led to a number of fiscal and management problems within the region.¹¹⁹ Many of these municipalities had difficulty supporting their own overhead costs – separate police and fire departments, courts, etc. – particularly as their tax bases eroded.¹²⁰

Now let us consider how Ferguson fits into this story and how these events came to shape the Ferguson of today. Incorporated in 1894, Ferguson began as one of the white enclaves outside of the St. Louis city limits.¹²¹ For decades, its black population was virtually zero, although it bordered the small, majority black city of Kinloch.¹²² Until the late 1960s, Ferguson blocked off the main road that connected it to Kinloch with a chain, causing some commentators to speculate that Ferguson was a “Sundown Town” that actually banned black people after dark.¹²³ For many years since the 1930s, Ferguson had a single family zoning ordinance that banned virtually all apartment buildings – a small swath was permitted in the 1930s to create a buffer between the business district and the existing single family homes.¹²⁴

After 1968, with *Jones v. Mayer* and the passage of the Fair Housing Act, black families slowly began to move into Ferguson and other formerly all-white municipalities in North St. Louis County.¹²⁵ As they did so, the

117. Andy Kiersz et al., *The 25 Wealthiest Suburbs in America*, BUS. INSIDER (Nov. 4, 2014), <http://www.businessinsider.com/richest-suburbs-in-america-2014-10>.

118. *Frontenac, Missouri*, CITY-DATA, <http://www.city-data.com/city/Frontenac-Missouri.html#b> (last visited Oct. 3, 2015); John Hoffmann, *Tale of Four Cities and Traffic Stops*, CHESTERFIELD PATCH (June 7, 2012), <http://patch.com/missouri/chesterfield/the-tale-of-four-cities-and-traffic-stops>.

119. See Stephen Deere, *North County Municipalities Talking about Merger of Courts before Reforms are Forced on Them*, ST. LOUIS POST-DISPATCH (Jan. 8, 2015), http://www.stltoday.com/news/local/crime-and-courts/north-county-municipalities-talking-about-merger-of-courts-before-reforms/article_c0ba92ab-3d39-5cb0-a8a3-d55eda0269e2.html.

120. GORDON, *supra* note 9, at 59. Professor Gordon discusses the many problems this fragmented system of local government presents. *Id.* at 39–68.

121. *Ferguson, Missouri*, ABOUT ST. LOUIS, <http://aboutstlouis.com/local/communities/ferguson-missouri> (last visited Sept. 7, 2015); Ronald S. Martin, *Ferguson Shows a nation at War with Itself*, DAILY BEAST (Aug. 16, 2014), <http://www.thedailybeast.com/articles/2014/08/16/ferguson-shows-a-nation-at-war-with-itself.html>.

122. GORDON, *supra* note 9, at 146.

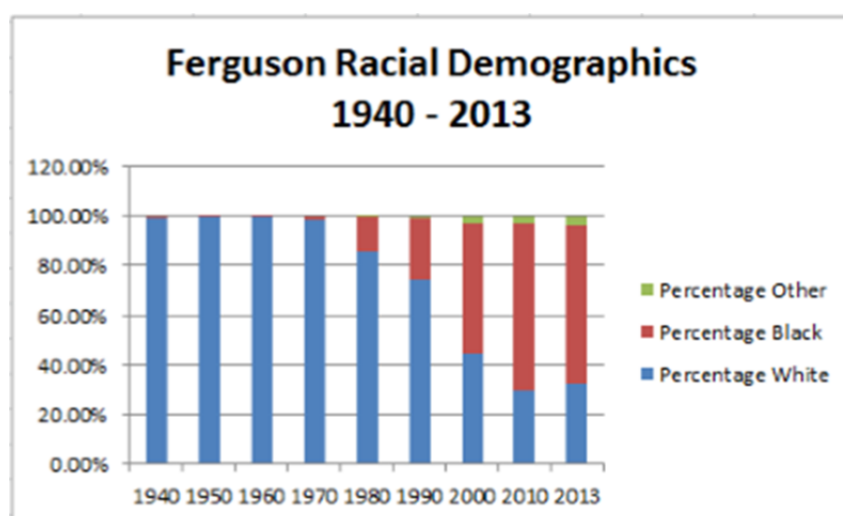
123. *Id.*; Rothstein, *supra* note 17, at 2–3; see JOHN A. WRIGHT, SR., *KINLOCH: MISSOURI’S FIRST BLACK CITY* 127 (2000).

124. GORDON, *supra* note 9, at 137–38.

125. *Id.* at 147–49.

whites fled further west and south. In 1970, Ferguson was still 99% white.¹²⁶ In 1980, as the pace of black mobility increased, the town was 85% white and 14% black.¹²⁷ During the 1980s, the Lambert International Airport sought to expand.¹²⁸ The project involved taking much of the land in Kinloch from its relatively poor black residents.¹²⁹ From 1990 to 2000, Kinloch lost over 80% of its population, and many of the residents displaced by the airport expansion ended up in Ferguson – specifically in Canfield Green, the apartment complex where Michael Brown was killed.¹³⁰ By 2010, Ferguson was 29% white and 67% black.¹³¹ Figure 1 illustrates this rapid demographic shift.

FIGURE 1



126. Paulina Firozi, *5 Things to Know about Ferguson*, USA TODAY (Aug. 19, 2014), <http://www.usatoday.com/story/news/nation-now/2014/08/14/ferguson-police-department-details/14064451/>.

127. *The Death of Michael Brown Racial History Behind the Ferguson Protests*, N.Y. TIMES (Aug. 12, 2014), <http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html>.

128. Jeffrey Smith, *You Can't Understand Ferguson Without First Understanding These Three Things*, NEW REPUBLIC (Aug. 15, 2014), <http://www.newrepublic.com/article/119106/ferguson-missouris-complicated-history-poverty-and-racial-tension>.

129. *Id.*

130. *Id.*

131. *Ferguson (city)*, Missouri, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/2923986.html> (last visited Oct. 3, 2015).

This left an inherently unstable population mix. In Ferguson, as in many of the other previously off-limits areas, the newer black entrants tended to be poorer¹³² and more transient.¹³³ Many were renters or first-time homebuyers.¹³⁴ A disproportionate number of these new homebuyers took out subprime or predatory mortgages.¹³⁵ More than half of the mortgages made in the area from 2004 to 2007 were subprime, and these mortgages were disproportionately taken out by black borrowers.¹³⁶ As a result, Ferguson and other inner-ring North County areas were hit hard by the subprime mortgage crises. By 2014, roughly one of every eleven houses in the area had gone into foreclosure.¹³⁷ Of the remaining owner-occupied homes, 50% were underwater, as compared with a national average of 17%.¹³⁸

The school population also shifted rapidly, leading to a dramatic resegregation of the public schools.¹³⁹ As white families fled, so too did the more experienced teachers and administrators.¹⁴⁰ Black families with the means to

132. According to the 2009–2013 American Community Survey, about 25% of Ferguson’s population lives below the federal poverty level. See *Poverty Status in the Past 12 Months 2009–2013 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/S1701/1600000US2923986 (last visited Oct. 3, 2015).

133. Danielle Cadet, Braden Goyette & Nick Wing, *21 Numbers That Will Help You Understand Why Ferguson Is About More Than Michael Brown*, HUFFINGTON POST (Aug. 8, 2014), http://www.huffingtonpost.com/2014/08/22/ferguson-black-america_n_5694364.html.

134. *Id.*

135. *Id.*

136. Jim Gallagher, *Blame Poverty, Age, For Weak North County Home Market*, ST. LOUIS POST-DISPATCH (Aug. 19, 2013), http://www.stltoday.com/news/local/metro/blame-poverty-age-for-weak-north-county-home-market/article_95c998e5-bb87-5bc0-9054-83e801b357ac.html.

137. *Id.* This mirrors nationwide patterns of subprime lending and foreclosures in segregated areas. *Id.* Jacob S. Rugh and Douglas S. Massey found that the greater degree of black segregation a metropolitan area exhibits, the higher the number and rate of foreclosures it experienced. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 644 (2010). The authors note that “the housing boom and the immense profits that it generated frequently came at the expense of poor minorities living in central cities and inner suburbs who were targeted by specialized mortgage brokers and affiliates of national banks and subjected to discriminatory lending practices.” *Id.* at 634.

138. Matthew Goldstein, *Another Shadow in Ferguson as Outside Firms Buy and Rent Out Distressed Homes*, N.Y. TIMES (Sept. 3, 2014), <http://dealbook.nytimes.com/2014/09/03/another-shadow-in-ferguson-as-outside-firms-buy-and-rent-out-distressed-homes/>.

139. Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), <http://www.propublica.org/article/ferguson-school-segregation>.

140. *Id.* (“[S]chools buckled under their swift demographic shift, beginning a steep decline. Many of the best teachers followed the white and middle-class exodus.

send their children to private or charter schools did so, and the population that remained in the public schools in the area was disproportionately black and poor.¹⁴¹ The percentages of black students in the four school districts that serve Ferguson are 98.8%, 97.8%, 79.9%, and 72.9%.¹⁴² With such rapid demographic and economic shifts, some of the schools went into free-fall. One of the school districts in Ferguson, Riverview Gardens, was performing so poorly that it had lost its accreditation at the time of Michael Brown's death.¹⁴³ The Normandy School District, where Michael Brown attended high school, borders Ferguson.¹⁴⁴ It is among the poorest schools in Missouri, and 97.5% of its students are black.¹⁴⁵ It ranks last in overall academic performance and had also lost its accreditation at the time of Michael Brown's death – which was just a few days after he graduated.¹⁴⁶

These rapid demographic changes also led to strained relationships between Ferguson's growing black population base and its existing white power structure. At the time of Michael Brown's death, Ferguson had a majority black population but a municipal government that was almost entirely white: The mayor was white, the School Board had six whites and one Latino, and the City Council had just one black member.¹⁴⁷ The police force was just 6% black.¹⁴⁸

At the same time, Ferguson, like many of its small neighbors, disproportionately relied on revenue from traffic tickets, fines, and citations in order to help finance municipal operations.¹⁴⁹ City officials worked in concert with the police department to maximize revenue generation through an aggressive system of stopping residents and citing them for as many infractions as possi-

Instruction fell off. The district suffered from a revolving door of leadership, with principals and superintendents seldom sticking around more than a couple of years.”)

141. *Id.*

142. See Mo. Dep't of Elementary & Secondary Educ., *District Report Card*, MO. COMPREHENSIVE DATA SYS., <http://mcds.dese.mo.gov/guidedinquiry/School%20Report%20Card/District%20Report%20Card.aspx?rp:SchoolYear=2014&rp:SchoolYear=2013&rp:SchoolYear=2012&rp:SchoolYear=2011&rp:DistrictCode=096109>.

Another product of the proliferation of tiny governments in the St. Louis Metro area is the fact that school districts bear little relationship to the municipal borders; thus, Ferguson is served by four different school districts, which it shares with other municipalities. *Schools*, CITY OF FERGUSON, <http://www.fergusoncity.com/165/Schools> (last visited Sept. 7, 2015).

143. Charles Jaco, *What's Next for Under Performing Missouri Schools?*, FOX2NOW ST. LOUIS, <http://fox2now.com/2014/01/25/whats-next-for-under-performing-missouri-schools/> (last visited Oct. 3, 2015).

144. Hannah-Jones, *supra* note 139.

145. *Id.*

146. *Id.*

147. Jeff Smith, *In Ferguson, Black Town, White Power*, N.Y. TIMES (Aug. 17, 2014), http://www.nytimes.com/2014/08/18/opinion/in-ferguson-black-town-white-power.html?_r=0.

148. *Id.* Four officers out of fifty-six were black. *Id.*

149. *Id.*

ble.¹⁵⁰ In the period between 2010 and 2014, Ferguson police issued over 90,000 citations and summonses for municipal violations – without any corresponding increase in the actual amount of serious crime.¹⁵¹ The burden of this fell on Ferguson’s black population, whose members were disproportionately stopped, cited, and arrested by a police force that was overwhelmingly white.¹⁵² Although blacks made up roughly 67% of Ferguson’s population in 2013, 85% of vehicle stops, 90% of citations, and 93% of arrests in Ferguson were of black people.¹⁵³ The municipal court – whose employees were virtually all white¹⁵⁴ – operated as part of the police department, overseen by the Chief of Police, and was physically located inside of the police department building.¹⁵⁵ It existed primarily as a mechanism to collect fines from black residents, often from multiple minor offenses that would snowball with fees and penalties if the resident was unable to pay.¹⁵⁶ Ultimately, a resident might face thousands of dollars in fines, a suspended driver’s license, and an arrest warrant, all for minor citations.

The result was an explosive situation, which set the stage both for the death of Michael Brown and the anger and frustration that erupted afterwards. Of course there were many factors that contributed to what happened in Ferguson, but when we consider the history set forth above in the context of the real places involved, as in Figure 2, we can see that Ferguson was literally in the center of some of the most contentious and significant struggles for fair housing in the last century.

150. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10, 11 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

151. *Id.* at 7.

152. *Id.* at 5, 7.

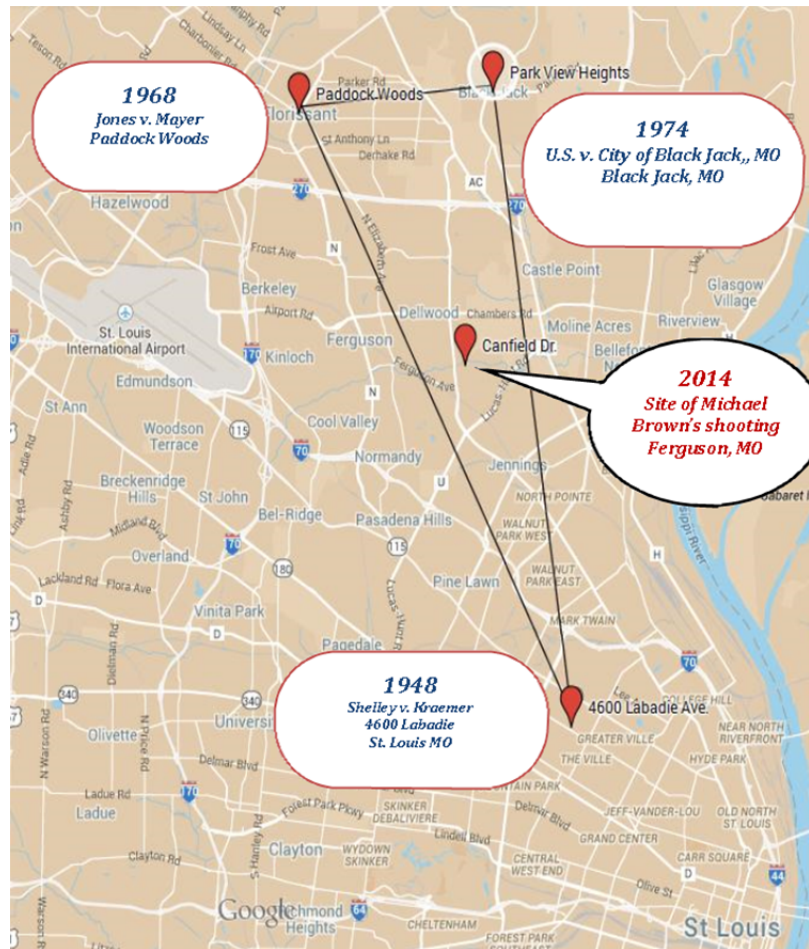
153. *Id.* at 4.

154. The Municipal Judge, Prosecuting Attorney, Court Clerk, and all assistant court clerks were white. *Id.* at 8.

155. *Id.* at 8.

156. *Id.* at 3–4.

FIGURE 2



IV. CONCLUSION

What lessons can we take from this story? To begin, with respect to housing in the St. Louis metropolitan area, the playing field was never level, the market was never free, and housing opportunity was never truly equal. It is simply impossible for a region – and a people – to experience so many years of sustained, systemic interference with such a foundational resource as housing without profound repercussions. To the extent that Ferguson – and the entire metropolitan area – suffers from segregation, a skewed housing market, and dysfunctional local government, such outcomes are the direct byproducts of a century's worth of discriminatory policies and practices in the region. These actions, based on a racist fear of the conflict, depressed property values and social problems that would supposedly come if black

people's housing choices were not restricted, managed to create exactly those effects.¹⁵⁷ The past, indeed, is prologue.

From this, we can draw a conclusion: These problems, so long and deliberate in the making, will not magically fix themselves. Court victories against private and public discrimination are not enough. Neighborhoods will not simply integrate (and a snapshot that looks like integration is more likely to be an area that, like Ferguson, is transitioning). Black residents of St. Louis City and County cannot easily make up the lost opportunity to accumulate wealth over generations that homeownership in a stable, prosperous neighborhood would have provided.

Coming up with solutions is more difficult. In the wake of what happened in Ferguson, a number of measures have already been taken to reform the police department and the municipal reliance on fines for revenue generation.¹⁵⁸ Commentators have proposed consolidation of small local governments, which would help cash-strapped North County communities obtain economies of scale.¹⁵⁹ There are nearly constant calls for changes to the school districting and funding mechanisms.¹⁶⁰

But what can be done now with respect to housing, which created so many of the area's underlying problems to begin with? Here, the solutions are less obvious and more incremental. Predatory and subprime mortgage lending must be aggressively policed, and fair lending enforcement must continue to ensure that black borrowers are not discriminated against. Assistance must continue to be provided to those borrowers whose homes are still underwater, in the form of refinancing programs such as the federal government's Home Affordable Refinance Program ("HARP").¹⁶¹ Fair housing enforcement must be vigilant in Ferguson, where many foreclosed-upon properties are now being held by out-of-state investment firms.¹⁶²

But it is not enough to simply enforce the laws against discrimination. Affirmative steps must be taken to promote integration. In particular, black families in the St. Louis metropolitan area must be empowered to leave segregated areas with concentrated poverty for higher opportunity neighbor-

157. Rothstein, *supra* note 17, at 2.

158. See *Ferguson Approves Reforms, Crowd Wants Answers*, NBC NEWS (Sept. 9, 2014, 9:24 PM), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-approves-reforms-crowd-demands-answers-n199681>.

159. See, e.g., GORDON, *supra* note 9, at 46–49; Smith, *supra* note 147.

160. *Moving Ferguson Forward: Mayor and City Council Goals and Progress*, CITY OF FERGUSON, <http://www.fergusoncity.com/531/Moving-Ferguson-Forward> (last visited Sept. 7, 2015).

161. See *Home Affordable Refinance Program in Ferguson, MO*, FERGUSON HARP PROGRAM, <http://ferguson-mo.harplanprogram.net/> (last visited Sept. 7, 2015).

162. See Matthew Goldstein, *Another Shadow in Ferguson as Outside Firms Buy and Rent Out Distressed Homes*, N.Y. TIMES (Sept. 3, 2014, 8:25 PM), http://dealbook.nytimes.com/2014/09/03/another-shadow-in-ferguson-as-outside-firms-buy-and-rent-out-distressed-homes/?_r=0.

hoods. A recent analysis prepared for St. Louis County found that black and white County residents experience significant disparities in access to opportunity, based on their living patterns and neighborhood conditions.¹⁶³ Access to neighborhood opportunity was measured, in part, by how exposed residents were to poverty, the proficiency of their schools, labor market engagement in the neighborhood, and access to jobs.¹⁶⁴ On all of these measures, blacks were significantly worse off than whites.¹⁶⁵

One way to promote integration and increase access to opportunity is through the administration of programs for low-income and affordable housing. The IRS should alter its formula for Low-Income Housing Tax Credits (“LIHTC”), to incentivize the development of affordable housing in high opportunity areas.¹⁶⁶ This would help provide lower and moderate income black residents with access to better schools and municipal services. Currently, program requirements that LIHTC properties be built in areas with high poverty mean that low income housing continues to be concentrated in minority areas.¹⁶⁷ Among all LIHTC properties in the St. Louis metropolitan area, 62% of properties are in census tracts that are majority black.¹⁶⁸ In St. Louis County alone, over the past five years, seven out of ten developments that have received the most preferred type of tax credit have been in North County, which is heavily minority.¹⁶⁹ In that same vein, Missouri should add source of income protections to its human rights statute, which would require landlords to accept Housing Choice (commonly referred to as “Section 8”) Vouchers. This would allow voucher-holders greater flexibility in choosing where to live and enable some to move out of areas of concentrated segregation and poverty – which are currently where the majority of properties willing to accept the vouchers are located.

In addition, HUD and local Housing Authorities can make improvements to its rental assistance programs so that these programs themselves do not exacerbate racial and economic segregation. The Center on Budget and

163. WFN CONSULTING, ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: ST. LOUIS COUNTY, MISSOURI, CITIES OF FLORISSANT AND O’FALLON, MISSOURI 132 (Dec. 2014), <http://wfnconsulting.com/wp/wp-content/uploads/St-Louis-Co-AI-FINAL.pdf>.

164. *Id.* at 6.

165. *Id.* at 131–33.

166. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1753–54, (2005).

167. Editorial, *Affordable Housing, Racial Isolation*, N.Y. TIMES (June 29, 2015), <http://www.nytimes.com/2015/06/29/opinion/affordable-housing-racial-isolation.html>.

168. See Letter from Metro. St. Louis Equal Hous. Opportunity Council to Mo. Hous. Dev. Comm’n, at 1 (June 9, 2015) http://www.prrac.org/pdf/Comments_on_MHDC_2016_Draft_QAP_Letter_06-09-15.pdf (addressing 2016 Qualified Allocation Plan).

169. *Id.*

Policy Priorities recommends a number of policy changes that will encourage low-income families who use Housing Choice Vouchers to move to lower-poverty communities, which will in many, if not most, cases decrease racial segregation.¹⁷⁰ For example, HUD could reward agencies that help families move to so-called “high opportunity areas” with additional funding and extend the search period allowed for families who seek to make such moves.¹⁷¹ At the same time, HUD could revise its metro-wide fair market rent system and modify its administrative geography to reduce the extent to which existing service area boundaries interfere with agencies’ ability to help families move into high opportunity areas.¹⁷²

Indeed, HUD can, should, and likely will play a more active role in policing municipalities, to ensure that they use federal housing funds in a manner that actively promotes integration and housing choice. HUD is responsible for the distribution and oversight of several key sources of federal housing funds, the most significant of which is the Community Development Block Grant (“CDBG”).¹⁷³ The funds, which totaled \$3 billion for fiscal year 2014, are distributed to roughly 1200 jurisdictions across the country.¹⁷⁴ The federal Fair Housing Act directs HUD to administer its programs and activities “in a manner affirmatively to further the [FHA’s] policies.”¹⁷⁵ Although the term “affirmatively further fair housing” is not defined, the legislative history of the FHA makes clear that Congress intended for the statute both to eradicate housing discrimination and to foster integrated living patterns.¹⁷⁶ After decades of rather moribund enforcement of this requirement,¹⁷⁷ HUD has recently revitalized its efforts to ensure that grant recipients take their

170. Barbara Sard & Douglas Rice, *Creating Opportunity for Children: How Housing Location Can Make a Difference*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 15, 2014), http://www.cbpp.org/research/creating-opportunity-for-children#_3_0_1.

171. *Id.*

172. *Id.*

173. See *Community Development Block Grant Program*, U.S. DEP’T HOUS. & URBAN DEV. (last visited Oct. 4, 2015), http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs.

174. *Id.*

175. Fair Housing Act, 42 U.S.C. § 3608(e)(5) (2012). The statute that created the CDBG also requires grant recipients to certify to HUD that their grant will be administered in conformity with the FHA and that the recipient will use the funds in such a manner to “affirmatively further fair housing.” See *id.* § 5304(b)(2).

176. See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-To-The-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 127–28 (2011–2012) (noting that Congress passed the FHA shortly after the National Commission on Civil Disorders published its famous report describing the United States as increasingly segregated, and calling for “open housing” legislation to remedy this problem).

177. *Id.* at 153–54 (noting that for many years few grants were denied or rescinded, and no noncompliant grantees were threatened with remedial action).

obligations under the Fair Housing Act seriously.¹⁷⁸ In a particularly encouraging move, HUD has recently issued a new rule, which strengthens this mandate and offers concrete tools for HUD to assist communities that receive federal housing funds.¹⁷⁹ In particular, HUD will provide publicly open data and mapping tools to communities so that they can set fair housing goals, provide incentives for regional collaboration and expand access to high opportunity neighborhoods, and facilitate community participation in the planning process.¹⁸⁰

None of these will produce instant results. While the demographics on a map may shift, patterns of segregation are stubborn. Attitudes about race and place may be even more so. The quote at the beginning of this Article refers to the past as prologue, but perhaps the words of William Faulkner summarize it better: “The past is never dead. It’s not even past.”¹⁸¹

178. *Housing Fairness Act of 2009: Hearing on H.R. 476 Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 110 (2010) (statement of John D. Trasvina HUD Assistant Sec’y for Fair Hous. & Equal Opportunity) (“HUD has not always fulfilled its obligation to ensure that our money is spent in ways that affirmatively further fair housing. In this new day, however, there is a Department-wide commitment to incorporate our mandate to affirmatively further fair housing into all of our work so that we can fulfill our shared goal of truly integrated and balanced living patterns.”).

179. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2015). The Rule went into effect on August 17, 2015. *Id.*

180. *HUD Rule on Affirmatively Furthering Fair Housing*, U.S. DEP’T HOUS. & URBAN DEV., http://www.huduser.org/portal/sites/default/files/pdf/AFFH_Final_Rule_Executive_Summary.pdf.

181. WILLIAM FAULKNER, *REQUIEM FOR A NUN*, act 1, sc. 3 (1951).

