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## Whither “Fair” Housing: Mediations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal

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# Whither “Fair” Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal

Charles E. Daye\*

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## I. THE OCCASION FOR THIS ESSAY

This essay is a meditation on fair housing to pay tribute<sup>1</sup> to Professor Daniel R. Mandelker for his sustained contribution to the field of housing and community development law and policy. For more than fifty years he has labored with powerful intellect, keen insight, great skill, and enormous energy. He has been a remarkably productive scholar and a true leader by his shining example to the many who share his scholarly and teaching interests in the housing field and related areas.

For twenty years, I have had the good fortune and honor of working with Dan on developing a coursebook for housing and community development.<sup>2</sup> His contribution to that work was the key ingredient in getting the first edition published. He was the inspiration behind the second edition of that coursebook,<sup>3</sup> as well as its current third edition.<sup>4</sup>

Dan was not only a key person in formulating the execution of the book, but he was also instrumental in assembling the cadre of colleagues<sup>5</sup> to produce each edition. Our esteem for Dan is expressed by the fact that his co-authors dedicated the third edition of the book to him with the following statement:

We proudly dedicate this Third Edition of HOUSING AND COMMUNITY DEVELOPMENT to our Senior Editor Emeritus, esteemed colleague, and friend Daniel R. Mandelker, Howard

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1. It goes without saying that the views expressed in this essay are my own, although as expressed later in this essay, I credit Professor Mandelker's analysis for causing me to think deeply about the larger issues at stake in the fair housing and exclusionary zoning area.

2. DANIEL R. MANDELKER ET AL., HOUSING AND COMMUNITY DEVELOPMENT (1st ed. 1981).

3. CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT (2d ed. 1989).

4. CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT (3d ed. 1999).

5. In addition to this writer, Professor Mandelker's co-authors on the Third Edition of the Housing and Community Development coursebook are Otto J. Hetzel, Professor Emeritus, Wayne State University School of Law; James A. Kushner, Professor, Southwestern University School of Law; Henry W. McGee, Jr., Professor, Seattle University School of Law and Professor Emeritus UCLA School of Law; Robert M. Washburn, Professor, Rutgers, The State University of New Jersey School of Law, Camden; Peter W. Salsich, Jr., McDonnell Professor of Justice in American Society, Saint Louis University School of Law; and W. Dennis Keating, Professor, Cleveland State University Cleveland-Marshall School of Law and College of Urban Affairs.

A. Stamper Professor, Washington University School of Law. His deep interest in the subject, extraordinary professional dedication, and outstanding scholarship have influenced all of us. He has inspired us as a role model and has served as our mentor.<sup>6</sup>

## II. "FAIR" HOUSING: THE SEARCH FOR AN ANALYTICAL PARADIGM

As lamented by the Kerner Commission in 1968,<sup>7</sup> and as documented in so many places, America is a nation characterized by segregated housing and living patterns.<sup>8</sup> The extent to which the problem is racially determined or reflects the correlation of deprived economic and minority status confounds analysis.<sup>9</sup> Whatever the analysis, the fact that there are deep racial divisions in living patterns in America cannot be denied.

It is profoundly noteworthy that segregated housing patterns have persisted, or in some respects become more pervasive and intractable,<sup>10</sup> despite the enactment of fair housing legislation.<sup>11</sup> The difficulties might be attributable to the feebleness of our Constitutional analysis,<sup>12</sup> the limitations of our statutory formulations, or the inadequacy of our remedial tools to accomplish housing desegregation.<sup>13</sup> It might be attributable to the way courts have approached the analysis of the problem in private litigation,<sup>14</sup> or to the private litigation model itself as the primary means of

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6. CHARLES E. DAYE ET AL. *HOUSING AND COMMUNITY DEVELOPMENT* (3d ed. 1999).

7. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (Bantam Books 1968). See also *Symposium—The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283 (1993).

8. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993).

9. See, e.g., Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 969 (1997).

10. See, e.g., Paul Boudreaux, *An Individual Preference Approach to Suburban Racial Desegregation*, 27 FORDHAM URB. L.J. 533 (1999).

11. 42 U.S.C.A. §§ 3601-3619, 3631 (West 1999).

12. This matter is discussed further *infra*.

13. See H.R. REP. NO. 100-711 100th Cong. 2d Sess. 16 (1988).

14. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

enforcement.<sup>15</sup> It might be the lack of vigorous governmental enforcement.<sup>16</sup> Perhaps this phenomenon says something about the robustness of forces that deny desegregation of housing or about our half-hearted enforcement efforts and sagging energies for social justice. Perhaps it says something more or something else altogether. Maybe the phenomenon says that we, individually and collectively, do not really want to dismantle racially distinct residential living patterns. Whatever the reason, we know at least this: we have not even come close to dismantling segregated housing patterns for most Americans, and the prospect that we shall do so as a nation is not terribly encouraging.<sup>17</sup>

We, as a society, have not clarified either the immediate or the long-term problem. I have come to see many explanations for the observed phenomenon as focusing on *symptoms* of the deeper underlying reasons, rather than focusing on *the underlying reasons themselves*.

#### A. *The Problem of Deciding What the Problem Is*

A virtually unknown federal district court case, *Coffey v. Romney*,<sup>18</sup> decided nearly thirty years ago still raises one of the most fundamental questions of “fair” housing. This case ostensibly involved an “integrated” set of plaintiffs suing a “white” corporate developer of a low-income housing development (Trinity Gardens), designed to be “integrated,” assisted with federal subsidies, and

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15. See, e.g., John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. Rev. 1573, 1580-90 (1993). See also, Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909 (1991).

16. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998) (discussing limited governmental enforcement and pointing out that private litigation might achieve better results for clients, at least with larger damage awards in some types of cases).

17. See, e.g., John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope From a Mountain of Despair,”* 143 U. PA. L. REV. 1233 (1995); Timothy L. Thompson, *Promoting Mobility and Equal Opportunity: Hollman v. Cisneros*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237 (1996).

18. *Coffey v. Romney*, 1P-H Equal Opportunity in Hous. Rep. ¶ 13,588 (M.D.N.C. 1972). My knowledge of this case and my interest in it are heightened by the fact that, as a young lawyer, I was an associate with the firm that represented the company that was to be the developer and the builder of the housing development that was the subject of the litigation.

sponsored by a “black” church in a Southern city. At one level, the case raised the legal question of whether the federal government should fund a housing development if that development allegedly would cause or accelerate “racial transition.”

At another level exactly what sort of analysis the proposal for Trinity Gardens should get, depended.<sup>19</sup> What the affected area was “depended.” The characteristics of the racial demographics to be analyzed “depended.” What sort of area would be subject to alleged racial transition the development would cause if built “depended.” The answers to these questions quite literally “depended” on where one drew a circle around the proposed Trinity Gardens development. If one drew a circle about one quarter of a mile in diameter around the development, the area could be regarded as a “white area,” and no problem of over-concentration of minorities or assisted housing would be raised. If one drew a circle about one mile in diameter around the development, the area could be considered an “integrated area,” which might give a different view of the potential consequence of building Trinity Gardens. If one drew a three mile long, one mile in diameter, somewhat oblong enclosure southward from the proposed site, the area would include the southeast quadrant of the city—a virtually all black quadrant containing about ninety percent of the blacks in the city and a high concentration of federally-assisted housing. This oblong enclosure would also include a portion of the northeast quadrant of the city. The challenged development would be located within a “white enclave” located within the northeast quadrant, giving the issues and their resolution still a different cast. Finally, if one encircled the entire city, one would see a substantially racially divided city where one quadrant—the northwest—had exclusionary zoning, was characterized by the court as ninety-nine percent white,<sup>20</sup> and had no low-income federally-assisted housing, again transforming the issues in the case.

The court decided that federal funding of the housing development should not be stopped and that the officials of the Department of Housing and Urban Development properly determined

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19. The court discussed what the relevant area was but did not use the term “depended,” which is my characterization. *See id.* at 13,867-72.

20. *Id.* at 13,869.

that the area in which the development was located was a “white area.”<sup>21</sup> The court also decided that the development would not cause or accelerate racial transition and that it did not amount to an over-concentration in the area of multifamily housing for low- and moderate-income families.

The answer the district court gave was wrong on the facts, focused on the wrong law and policy paradigm, and did not address (and could not address) the fundamental problem that the case should have raised, but did not raise.<sup>22</sup> Yet, the decision was right on the narrow legal issue presented and addressed. Paradoxically, I think the court was arguably right on the outcome of the case *in the posture presented*, for reasons other than those articulated. But, if the case could have been presented in a properly developed posture, I am fairly convinced the case was ultimately wrong from the standpoint of national “fair” housing policy.

At a deeper level, the case raised quite perplexing issues. Now, nearly thirty years later, I have come to believe that the contemporaneous manifestation of the same question that perplexed me as a young lawyer working on the *Coffey* case is at the root of issues that today are still perplexing American society. I also have come to believe that the “true,” “right,” or “real” fair housing issue was never actually raised in the case and, of course, was not decided or discussed.

One can ask about the *Coffey* case, what was the fair housing problem? This is *the* question. *Coffey* can be seen as the mirror from which we can see reflected the question of what is the purpose, or are the purposes, of the nation’s fair housing laws and efforts.<sup>23</sup> This is a

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21. *Id.* at 13,866, 13,872.

22. I guess, ethically, I can say this but I should disclose that I worked for the law firm that represented the developer seeking to build the housing development for the church sponsor. I think it is not disloyal to say that I think our client should have won the case based on the context in which it was presented, but after nearly thirty years of reflection, I do not think the case raised the right questions or addressed the fundamental issues.

23. The issue mainly focuses on what is the purpose of the fair housing provisions of the Civil Rights Act of 1968 (popularly called “Title VIII,” or the “Fair Housing Act”) 42 U.S.C.A. §§ 3601-3619, 3631 (West 1999). However, the issue, at least in some manifestations, can be raised under Section 1982. 42 U.S.C.A. § 1982 (West 1999). Issues can also be raised under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. See discussion *infra* of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

question that America has not answered. Conversely, those who do purport to answer the question cannot agree what the right answer is or ought to be.

A highly noticed case, *United States v. Starrett City Assoc.*,<sup>24</sup> seems to raise the same perplexing issues as *Coffey*. Ostensibly, the legal issue in *Starrett City* was whether the operator of a housing development could engage in “integration maintenance” by limiting the percentage of black and minority residents in the development to numbers low enough<sup>25</sup> so as not to trigger “flight” by white residents of the development, with the consequence that the development would lose its “integrated” character.

The circuit court decided that the conduct of the operator violated the Fair Housing Act.<sup>26</sup> Title VIII, the court said, prohibited the defendant from setting ceiling quotas of indefinite duration on the black and other minorities seeking housing at Starrett City.<sup>27</sup> The court said the quota “made unavailable” housing on the basis of race when the maximum number of minorities permitted under the quota was reached.<sup>28</sup> It did not matter that the purpose of the quota was to maintain integration rather than to exclude all minorities.

This case should be troublesome if for no other reason than that the United States Department of Justice was suing the Starrett City development. This was a Justice Department lead by officials of the Reagan Administration—Edwin Meese as Attorney General and William Bradford Reynolds as Assistant Attorney General and head of the Civil Rights Division. These were not officials whose policy positions demonstrated that they were friends of the minority community or advocates for the minority position on any number of issues being advanced by blacks and minorities.<sup>29</sup> This was a case of

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24. 840 F.2d 1096 (2d Cir. 1988).

25. What this number should be was a matter of contention. *See id.* at 1099.

26. *Id.* at 1103.

27. *Id.*

28. *Id.* at 1102.

29. *See, e.g.,* Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 763 (1993) (“Prior to enactment of the FHAA in 1988, the federal government played only a modest role in fair housing enforcement. This was partly due to the limitations on that role written into Title VIII and partly *due to political considerations during the Reagan Administration, which all but abandoned even the limited fair housing efforts of prior administrations.*”) (emphasis added) (footnotes omitted).



“strange bedfellows” and it was about politics—in the sense that the Department of Justice was advancing a political agenda,<sup>30</sup> not befriending the downtrodden or taking up the cause of minorities fighting against racist housing policies.

More troublesome, the case was not presented in a posture that would allow it to raise the “right,” “real,” or “true” issue of fair housing policy. It was decided a-contextually, as an isolated, stand-alone problem. The case was treated as if the Starrett City development somehow existed on an island without being affected by the geographic, demographic, social, or economic environment around it and without reference to any issues as to why there might be “disproportionate demand” from minorities for housing in the particular Starrett City development.

While it is impossible for me to conclude that the conduct challenged did not seem on its face to be prohibited by the Fair Housing Act, I have found it equally impossible to be satisfied with the rationale of the case or its limitations. Yet, again paradoxically, I must concede that the next minority person who applied after the quota was reached would be denied something important and, probably, that such denial ought to be prohibited by law. This is a dilemma seeking a way to reconciliation.

The same dilemma, or critical aspects of it, can be observed in the *Arlington Heights*<sup>31</sup> case in which the plaintiffs raised constitutional issues. In *Arlington Heights* a housing developer and minority plaintiffs sued a virtually all-white municipality alleging that the municipality’s refusal to rezone a tract of land from single family to a multifamily classification to permit the building of a federally-subsidized housing development (Lincoln Green) violated the Equal Protection Clause.<sup>32</sup> The claim was that the refusal to rezone excluded a federally-subsidized housing development for which only

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30. As Civil Rights Division head William Bradford Reynolds testified in 1981:

We no longer will insist upon or in any respect support the use of quotas or any other numerical or statistical formula designed to provide to nonvictims of discrimination preferential treatment.

Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 355 (1989).

31. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

32. *Id.* at 557.

low- and moderate-income persons qualified. This claim was premised on a projection that Lincoln Green would have an integrated occupancy. Minorities comprised a higher proportion of the persons eligible to live in the development than they comprised either within the municipality<sup>33</sup> or within the relevant housing market area.<sup>34</sup> Thus, the refusal to re-zone had a greater impact on minorities than on whites and, therefore, the plaintiffs contended, violated the Equal Protection Clause.

The United States Supreme Court decided that Arlington Height’s exclusionary zoning did not violate the Constitution because it was not shown to have been undertaken with a racial animus against the black and other minorities who would be excluded from the municipality if Lincoln Green could not be built.<sup>35</sup> The key area of focus was not on whether the zoning in fact excluded minorities but rather on whether, regardless of the fact of exclusion, it could be shown that the municipality adopted the ordinance with a probable intent or purpose to exclude minorities. The plaintiffs did not, and presumably could not, show this kind of intent.

Of course, *Arlington Heights*, brought under the Equal Protection Clause of the Constitution, differed in its analytical methodology from the analysis in *Coffey* and *Starrett City*, which were based on the Fair Housing Act. The constitutional methodology limited the analysis to the framework the Court employed for such cases. Nevertheless, once the Court gave uncritical acceptance to the Village’s asserted commitment to single family land uses, the outcome of the case was, for all practical purposes, determined against any successful challenge to the refusal to re-zone. In this respect, as discussed later, the Court was examining the case from too cramped of a perspective to address the “right,” “real,” or “true” issue of “fair” housing policy that the case raised.

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33. Arlington’s population was 64,000, but only 27 of the Village’s residents were black.

34. Minorities constituted 18% of the Chicago area population, and 40% of the income groups eligible to reside in Lincoln Green.

35. 429 U.S. at 27.

*B. Contexts Matter When Trying to Figure Out What the Question Is*

As all analysts know litigation does not come neatly packaged to frame the “right,” “real,” or “true” issue of fair housing policy that a case might raise. Rather, the ultimate contours of a case are determined by the facts that can be proved, the strategic choices advocates make, the interests and objectives of the litigants, the resources litigants and their lawyers bring to the battle, the provisions of relevant applicable law, the limitations imposed by the judicial process, the judge hearing the case, and a host of other matters, some of which, assuredly, are attributable to serendipity.

Nevertheless, the contexts out of which the issues being litigated arise can have a bearing on the “right,” “real,” or “true” issue of fair housing policy that needs to be addressed in a case. In the three cases selected, neither case addresses the issues in context and, therefore, each missed something important about fair housing policy.

Recall that the size of the circle drawn around the proposed development in *Coffey* materially affected the issues of the case. The court decided that the development could go forward because it was located in a “white area” and would not cause or accelerate racial transition in that area. Within months the predicted racial transition happened and the entire area around the development became all black.<sup>36</sup>

The problem was that *Coffey* never focused on the big picture. The city was clearly excluding low- and moderate-income housing from the northwest quadrant of the city, but had rezoned the proposed northeast site to permit the building of Trinity Gardens over the protests of some of the plaintiffs. The northwest quadrant, according to the court, was ninety-nine percent white.<sup>37</sup> The southeast, by contrast, had a high concentration of federally-assisted housing for low- and moderate-income families. The area under litigation in the northeast quadrant was very much susceptible to racial transition. The court mentions that a question might be raised as to whether there were “suitable alternative sites” elsewhere in the city upon which the

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36. See Daye, *supra* note 4, at 578-79.

37. Coffey, *supra* note 18, at 13,869.

development might be built.<sup>38</sup> But, in the posture of the case, there was not an occasion or procedure for taking a city-wide view of the housing demographics. There was not an occasion to examine why there were pressures on the northeast quadrant that made it attractive to blacks seeking to move there. There was not an occasion to consider racial steering in the real estate market or the exclusion of minorities from other areas within the housing market area. There was not an occasion to examine alternatives that the federal government might consider other than either approving or rejecting the housing on the site proposed. These limitations pitted housing need against fair housing policy.<sup>39</sup>

It is not as though that these issues were somehow completely missed. On the contrary, the litigants, the sponsor, the lawyers, and the court were all aware of the limited perspective the case was taking. The church sponsors unabashedly placed a higher priority on housing needs than on residential integration. At a community meeting attended by the author, the view that there was a manifest need for this affordable housing was clearly expressed. If the whites in the area of the project moved out, that might be unfortunate, but the housing need was the paramount interest of the members of the sponsoring black church.

The experts involved in the litigation believed the transition would happen, and Dr. Karl E. Taeuber<sup>40</sup> so testified for the plaintiffs. The lawyers were just trying to either let the project go forward or to stop it. The judge was aware that the court's scope of the inquiry was limited by the issue as framed by the litigants. The court noted in rejecting the plaintiff's expert's conclusions that racial transition would be accelerated that the expert did not have to balance the need for housing against his prediction that Trinity Gardens, if built, would

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38. *Id.* at 13,864.

39. See John O. Calmore, *Fair Housing v. Fair Housing: The Problems with Providing Increased Housing Opportunities through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7 (1980).

40. The court misspelled Dr. Taeuber's name. At the time of the litigation he had recently authored a book on the question of racial change of neighborhoods and was qualified in the case an expert on segregation and neighborhood change. See KARL E. TAEUBER & ALMA F. TAEUBER, *NEGROES IN CITIES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE* (1965).

cause racial transition.<sup>41</sup> In other words the court recognized that housing and fair housing might be in opposition. The court also recognized that federally-assisted housing in the city was predominantly occupied by blacks. The court, however, had no occasion to examine why that might be so. Was it due to “discrimination” in the housing market? Was it due to a lack of economic resources? Why should that produce a disproportionate number of minorities? Nobody in the case had a commission to open up the northwest quadrant to subsidized housing or to challenge the exclusionary zoning that was clearly evidenced there.

The *Starrett City* case has limitations similar to those pointed out in the *Coffey* case. Professor Simon, in his article, pointed out the extent to which *Starrett City* omits the context that would enable one to get a clear focus on the fair housing policy issues at stake.<sup>42</sup> Aspects of this context particularly pertinent to this discussion, as posed by Professor Simon, include the following: The limited rental opportunities for blacks and minorities in the housing market area, federal conditions on assistance that required Starrett City to rent to a substantial number of very low-income families, the lack of a realistic prospect for locating housing projects in the suburbs that would be occupied by substantial numbers of minorities, and the pressures from whites in the area in which Starrett City was being built to limit the number of minorities in the development.<sup>43</sup> These factors placed two clashing pressures on the developers of Starrett City: one from opponents of the project, who claimed that the number of minorities should not become “too great,” and a second from minorities wanting to live in Starrett City because of excessive demand caused by disproportionate housing need.<sup>44</sup>

In this sense the first pressure could be seen as having been generated by racism, seeking to deny minorities both needed housing

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41. Coffey, *supra* note 18, at 13,872.

42. Thomas W. Simon, *Double Reverse Discrimination in Housing: Contextualizing the Starrett City Case*, 39 BUFF. L. REV. 803 (1991).

43. *Id.* at 818.

44. See Neil Shouse, *The Bifurcation: Class Polarization and Housing Segregation in the Twenty-First Century Metropolis*, 30 URB. LAW. 145, 183 (1998) (an allegorical extrapolation pointing out demand for units by poor blacks and Hispanics exceeded the demand of the middle class).

and fair housing. A reasonable person can see a strong argument that such pressures should not be allowed to coerce the developer into imposing ceiling quotas on minority occupancy. Arguably, however, specific pressure to limit minority occupancy is the lesser of the evils presented. The second pressure was the minorities' need-driven demand for units like those in Starrett City. That pressure was created by two conditions. The first condition was the insufficiency of affordable housing in the housing market area. The other was the over-representation of minorities among the lower-income families seeking housing in Starrett City. It does not require prescience to suppose that "excess" minority demand for housing at Starrett City and the over-representation of minorities in the eligible group might have something to do with discrimination in the housing market and a racially-correlated lack of economic opportunity.

It goes without saying that the *Starrett City* court could not conceivably address these mammoth concerns in one piece of litigation. I will make no suggestion here that we modify either the judicial process or the limitations of substance or procedure to allow the judiciary to effect a cure.<sup>45</sup> Yet, on certain days, I come to the firm conclusion that *Starrett City* was extremely wrong as a matter of national fair housing policy. It permitted the destruction of the very opportunity for Americans of different races to work together in a housing environment that the Starrett City development was apparently offering.<sup>46</sup> On other days, I come to the firm conclusion that blacks and other minorities should not be asked to sacrifice their need for housing at the altar of fair housing, by being turned away when badly needed housing is available on the ground that, because of their race, they are diminishing the integration of the development.

Professor Mandelker pointed out similar limitations affecting the *Arlington Heights* case.<sup>47</sup> He pointed out that the Supreme Court in *Arlington Heights* "has foreclosed a finding of racially discriminatory

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45. I have made some modest suggestions in the past. See Charles E. Daye, *Role of the Judiciary in Housing and Community Development*, 52 J. OF URB. L. 689 (1975).

46. I have not seen an analysis of the degree to which there was interaction among the races.

47. Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977).

intent in all but the most blatant cases.”<sup>48</sup> His analysis demonstrated that such a limited basis for scrutinizing exclusionary zoning would permit “equally damaging zoning actions that lie just over the line of provable intent.”<sup>49</sup> Professor Mandelker’s point about “equally damaging zoning actions” takes a broader view of zoning conduct than whether it met some narrow, cramped test of “zoning factors.”<sup>50</sup> The damaging action might be seen as either causing or continuing segregation within the community, or denying housing opportunity in the community to those in need of federally-subsidized housing. The Court’s decision, however, makes no provision for analysis of this fair housing policy perspective.

Professor Mandelker advocates: “An appraisal of the acceptability of municipal zoning in a broader context is required, and necessarily must survey the entire region containing the municipality.”<sup>51</sup> While he recognized that a regional perspective from a broad fair housing policy perspective, rather than a too-limited zoning consistency perspective, would require a more activist judicial role, he doubted the courts were the right forum for doing so, at least not without more explicit statutory guidance from Congress.

*C. The Policy Question Coffey, Starrett City, and Arlington Heights Have in Common: “What is America’s Fair Housing Policy?”*

If one can get the question right either as a matter of a litigation issue or more broadly as a matter of a national fair housing policy issue, then this is just the first step toward solving the dilemma by the cases discussed. One must then move from the question to the answer—one must determine what substance the fair housing policy mandates. One will encounter a serious problem here. America has simply not decided the contents of her fundamental fair housing policy.

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48. *Id.* at 1239.

49. *Id.* at 1244.

50. *Id.* at 1238-39.

51. *Id.* at 1246.

## 1. Models of Fair Housing Perspectives

Many commentators have pointed out that the Fair Housing Act is unclear as to what legislative objective Congress was seeking to obtain with the Act.<sup>52</sup> It is unclear in part because of the sparseness of the legislative history,<sup>53</sup> the hastiness of its enactment following the assassination of Dr. Martin Luther King, and the other contentious issues the Congress believed the Act presented.<sup>54</sup>

The Fair Housing Amendments Act of 1988 did not materially address the fundamental issues, but rather was concerned with trying to shore up certain procedural and enforcement weaknesses of the Act.<sup>55</sup> It did not clarify in any way the fundamental policy behind the Act.

As a society we have no answer to the question: “What is America’s fundamental fair housing policy?” There are, however, various perspectives as to what it could be. Most of the analyses are premised on what I shall call the “conflict” model of fair housing policy. This model sees a predominant or major purpose and posits different directly conflicting goals. For example, the most prevalent conflict cited appears to pit a non-discrimination purpose against an integration goal.<sup>56</sup> Another model might arrange goals lexically, with

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52. See, e.g., Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189 (1998).

53. See, e.g., Lisa J. Laplace, Note, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing*, 55 BROOK. L. REV. 197 (1989) (adopting the antidiscrimination paradigm).

54. See, e.g., Jerald J. Director, *What Constitutes “Pattern or Practice” of Racial Discrimination in Sale or Rental of Housing Within Meaning of Provision of Fair Housing Act of 1968 (42 U.S.C.A. § 3613) Authorizing Attorney General to Bring Civil Action for Preventive Relief Against Such Conduct*, 13 A.L.R. Fed. 285, 291 n.8 (1972).

55. See H.R. Rep. 100-711, 100th Cong. 2d Sess. 16 (1988). See, e.g., James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989); James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUSING POL’Y DEBATE 537 (1992).

56. See Christopher C. Ehrman, *Integration versus Antidiscrimination*, 24 MEMPHIS ST. U. L. REV. 33 (1993); Peter Engel, *The Reading Room: Antidiscrimination is to Integration as Black is to White*, 5 J. AFFORDABLE HOUSING AND COMMUNITY DEV. L. 203 (1996); Ankur Goel, *Restricting Minority Occupancy to Maintain Housing Integration—United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988), cert. denied, 109 S. Ct. 376 (1988); Laplace, *supra* note 53, at 247-48 (adopting the antidiscrimination paradigm). But see Marc A. Kushner, Note, *The Legality of Race-Conscious Access Quotas under the Fair Housing Act of 1968*, 9 CARDOZO L. REV. 1053 (1988) (supporting the desegregation paradigm).



higher goals taking precedence over the goals in priority.<sup>57</sup> One colleague has proposed multiple, and apparently complimentary, purposes for the Fair Housing Act.<sup>58</sup>

It appears that one could construct a series of five pairs of basic policy choices. The first model is the usually cited focus that contrasts a nondiscrimination policy with a desegregation (or an integration) focus.<sup>59</sup> The second model posits an individual rights perspective versus a group fairness perspective.<sup>60</sup> The third policy focus is a perspective that presents a process versus an outcome analysis.<sup>61</sup> The fourth perspective looks at a means analysis versus an ends analysis.<sup>62</sup> The fifth perspective sets out a micro analysis versus

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57. I have not found a specific fair housing proposal that actually would do that. The principle would require the ordering of values and the satisfaction of the highest value before moving to the next value in the order. This principle is frequently associated with John Rawls, *A THEORY OF JUSTICE* 42-43 (1971). See Thomas C. Grey, *Property and Need: The Welfare State and Theories of Justice*, 28 *STAN. L. REV.* 877 (1976).

58. James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 *U. MIAMI L. REV.* 931 (1998)

59. Nondiscrimination versus Integration: A nondiscrimination policy would favor the abolition of treatment of persons on a basis according to racial (or other characteristic) distinctions. Integration, on the other hand, seeks to incorporate all distinctive people into one group. See Webster's Collegiate Dictionary 332, 608 (10th ed. 1993). For a concise explanation on how the Fair Housing Act seeks to satisfy both of these goals, see Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 *U. MIAMI L. REV.* 1011 n.82 (1998). For a critique of the integration policy goal, see Marc A. Kushner, *The Legality of Race-Conscious Access Quotas Under the Fair Housing Act of 1968*, 9 *CARDOZO L. REV.* 1053, 1077-79 (1988).

60. Individual Rights versus Group Fairness: An individual rights policy would focus on specific rights on a case-by-case situation for a single person. A group fairness perspective looks at the greater good in terms of many individuals as a unit. For a discussion on individual rights versus group fairness in mandatory class actions, see Patricia Anne Solomon, *Are Mandatory Class Actions Unconstitutional?*, 72 *NOTRE DAME L. REV.* 1627, 1629, 1644-46 (1997). See also Jeffrey G. Hamilton, *Deeper Into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 *EMORY L.J.* 1519, 1560-64 (1994).

61. Process versus Outcomes: A policy detailing a process analysis is concerned with initiation and developing sequence of a situation that moves to an end result. The outcomes analysis looks at the end result itself. See generally Michelle Hyland, Book Review, *The Multiple Realities of International Mediation: By Marieke Kleiboer*, 31 *N.Y.U.J. INT'L L. & POL.* 942 (1999); Diane Meulemans, *Approaching the Slope: Processes and Outcomes of the Use of Slippery Slope in Legal Opinions*, 14 *WIS. WOMEN'S L.J.* 105 (1999).

62. Means Analysis versus Ends Analysis: Much like the process versus outcomes distinction, the means analysis and ends analysis focuses on the progression of a circumstance and how the circumstance is resolved. For a discussion on the means and ends in a due process context, see Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted By substantive Due Process*, 142 *U. PA. L. REV.* 837 n.90 (1993); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the*

a macro analysis.<sup>63</sup> No set of comparative models is necessarily discrete, but each tends to highlight a point of emphasis as to the basic policy choice.

In some respects elements of these pairs overlap in various ways; some of the items can be seen as policy “correlates.” For example, the non-discrimination focus and the individual rights perspective tend to see remedying the harm to the immediate individual as the primary objective of fair housing policy and law. This perspective devolves into a micro view of fair housing policy where the point of focus is on the atomistic or building block level—the smallest component upon which we might focus.

The process and means perspectives correlate to the extent that both look toward the input side of the fair housing policy equation, rather than the output side. Both the process and means perspectives focus on the “manner of” or “how” a thing was done rather than on the consequences that attended the process or means.<sup>64</sup>

Conversely, a broader focus on “desegregation” (or “integration”) overlaps group fairness because the concept of segregation is hard to contemplate at the individual level. This is not to say the such segregation cannot exist—witness the example in which one black family in a neighborhood or apartment complex might be isolated and “segregated” from interactions with white neighbors. The conduct, however, takes on broad social meaning and societal significance when substantial numbers of individuals are affected. In that sense segregation and desegregation or integration are inherently group-oriented concepts.

At the level of national fair housing policy, one would expect

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1971 *Term Through Romer v. Evans*, 32 IND. L. REV. 357, 365-70, 390, 414-15 (1999).

63. Micro Analysis versus Macro Analysis: A micro analysis focuses on variations on a small scale, whereas a macro analysis focuses on large-scale proportions. In essence, it is looking at the small picture, versus looking at the big picture, much like the perspective dealing with individual rights versus group fairness. See WEBSTER'S COLLEGIATE DICTIONARY 697, 734 (10th ed. 1993). For a detailed discussion of this perspective in both the economics discipline, as well as a legal discipline, see WAYNE C. CURTIS, MICROECONOMIC CONCEPTS FOR ATTORNEYS 4-5 (1984). See generally TERENCE HUTCHISON, THE LIMITATIONS OF GENERAL THEORIES IN MACROECONOMICS 3-8 (1980).

64. Here is a clear parallel to the due process analysis and an equal protection analysis: A due process analysis asks “Can they do that to me *like that*?” Equal protection asks “Can they do that to me *at all*?”

desegregation to produce some measure of integration. This is true whether the outcome is expected to be mixing, or the more practical reason that, absent some degree of mixing, one would have no way to know whether a desegregation policy was being achieved or was effective. This type of “outcomes” perspective, either as the goal itself or as a measuring device for goal achievement, must necessarily focus on ends. It must, as to national policy, focus on ends from a macro—large scale, broader, or even societal—perspective.

A “non-discrimination” policy applied at the micro level can be opposed to the integration model. *Starrett City* can be seen as an example of such a conflict. Perhaps achieving, but certainly maintaining, integration in the development was found to be in conflict with a non-discrimination analytical paradigm.<sup>65</sup> It is not clear whether the opposition was that direct. It may be that there was something wrong with the process that *Starrett City* used. For example, they may have lied to applicants about the availability of units, or there may have been something wrong with the means *Starrett City* was employing to maintain integration—for example, placing a ceiling quota on the number of minorities allowed into the development at the same time. Similarly, the *Starrett City* case placed primacy on the right of the individual to be free from “discrimination” at the micro level when seeking housing in the *Starrett City* development.

Earlier, citing Professor Simon, I pointed out that a broader perspective might well have asked whether some kind of discrimination was leading to the excess demand by minorities at *Starrett City*.<sup>66</sup> This suggests that one could analyze discrimination at the macro level, at some level broader than the *Starrett City* complex itself, or even at a societal level. One might then see that the fair housing policy that needed addressing was not *within* the *Starrett City* development but elsewhere. Moreover, one might also see that remedying the narrower problem at the *Starrett City* micro level, viewed from any perspective of national fair housing policy, was next

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65. The *Starrett City* decision distinguished *Otero v. New York City Housing Auth.*, 484 F.2d 1122 (2d Cir. 1973), as involving achievement of integration at initial occupancy from the *Starrett City* situation of long-term maintenance of specified levels of integration.

66. See *supra* note 43.

to no remedy at all. It did nothing to relieve the pressures on Starrett City by minorities suffering from a lack of opportunity in housing elsewhere, economics, or both. Additionally, it frustrated the chance for integration in that housing development.

Attempting to remedy either the housing needs problem or the fair housing problem at the micro level at the insistence of the private litigants in the *Arlington Heights* case, perhaps, would have made the proposed units available. This remedy would have had no significant impact on the lack of opportunity that produced the disproportionate need minorities had for the proposed subsidized housing. Even if the case had gone the other way, it is doubtful that it would have done much to open up other suburbs. The ability to find adequate sites, sufficient federal or other funding, willing sellers, prepared developers, lawyers to advocate, and litigants to pursue cases would all probably mean that the volume of potential litigation would be small and, therefore, the *in terrorem* effect of possible lawsuits as a restraint on exclusionary zoning would likely be *de minimis*. Pursuit of a fair housing policy devoted to a non-discrimination goal in the context of fair housing and exclusionary zoning would likely not further much in the way of integration in housing patterns. Vindicating the rights of those individual litigants who filed lawsuits would probably not be much of a deterrent to exclusionary zoning elsewhere, and would not create much, if any, incentive in other municipalities to stop engaging in exclusionary zoning.

What is clear is that we would need a macro focus on the larger societal goal of desegregation to really think right about the *Arlington Heights* litigation from a national fair housing policy perspective. We would have to think about desegregating all of the Arlingtons in America. That would lead to a group focus on distinct policy and substantive housing outcomes as goals or ends. We would enumerate those ends as aspects of fairness to members of groups in need of housing or consigned to segregated housing in housing market areas. This appears to be the clear import of Professor Mandelker's critique of *Arlington Heights*. "Moral outrage at the indecency of racially exclusionary zoning practices, especially when viewed against the continuing pattern of racial segregation existing in metropolitan

areas, argues strongly for a more activist judicial role.”<sup>67</sup> However, he doubted that the courts could undertake this new role, at least not without substantial legislative guidance. He pointed out that:

To do more would require a different judicial perspective, one that would necessarily require an evaluation of municipal zoning from a regional perspective. This task is one that the federal courts, operating solely with the purpose of correcting racially correlated impacts in the local zoning process, are ill-equipped to undertake absent more explicit congressional guidance.<sup>68</sup>

The *Coffey* case raises the same type of issues, only in reverse, or possibly scaled down to within a municipality. The plaintiffs needed to challenge the building of Trinity Gardens because the zoning permitted it to go forward on the site in question. The plaintiffs fought the construction as a matter of their individual rights to be free of racial transition caused or increased by action of the federal government. This individual focus was broader than that in *Starrett City* where the proposition declared that minorities had a right to a unit in Starrett City unencumbered by racial quotas, even if it caused segregation. Conversely, the *Coffey* plaintiffs’ individual focus was narrower than that in *Arlington Heights* in which it was asserted that minorities had a right to live in Arlington unencumbered by exclusionary zoning that made suburban housing unavailable to a disproportionate number of minority families who were eligible for federal housing subsidies. However, it should be noted that *Coffey* still had an individual, nondiscrimination focus.

Although the plaintiffs, to some extent, had an outcome perspective, the process issues in *Coffey* focused on whether HUD had used the correct method for approving Trinity Gardens. The plaintiff’s argued that if HUD had used the correct process and criteria it would have refused to fund Trinity Gardens. However, the court took a micro perspective on the issue and drew a small circle around Trinity Gardens in order to find that the area was predominately white. A macro perspective would have asked: “Why

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67. Mandelker, *supra* note 47, at 1253.

68. *Id.*

is this housing proposed for this location?” Although the issue of “suitable alternative sites” was raised, it never focused on the fair housing policy implications for the city as a whole. Assuredly, the restrictive zoning in other parts of the city was making multifamily federally-assisted housing unavailable in the white part of town, thereby excluding those minorities over-represented in the group eligible for the federally-assisted housing. Indeed, the defendants specifically cited this unavailability of suitable alternative sites as a justification for building on the challenged site! Other macro issues were also raised, but not decided, in the context of the tipping issues. One such issue concerned whether those middle-income, white homeowners who wanted to sell their property in proximity to Trinity Gardens and flee the area had any other area to which they could go. As a result, even in this situation a macro perspective was used to buttress a micro result.

To the extent that *Coffey* raised either the desegregation issue or the “outcomes” or the “ends” perspective it did so in the limited context of a micro focus. Using a micro perspective the court asked whether the area around Trinity Gardens would become segregated rather than whether the city perpetuated segregation by excluding federally-assisted housing, and the minorities who in disproportionate numbers would likely occupy it, from other sections of the city.

The analysis so far suggests that some policies—nondiscrimination, individual rights, process, means, and micro perspective—tend to be related and correlated, though not exclusively or completely. Similarly, policies such as desegregation, group fairness, outcomes, ends, and macro perspective tend to correlate one with the other. While each policy can have a distinct emphasis in a particular context, on the whole, they have a tendency to overlap. Each correlated policy group also tends to point in the opposite direction from the other group. In this sense they seem to have oppositional tendencies. I am not trying to suggest, however, that in every instance each policy in the oppositional group that it is associated with always stands in opposition to every policy in the other group. But it does appear that in most cases the oppositionals in one group tend to point to opposite analyses from the other group.

The following matrix depicts the fair housing policy perspectives that tend to be correlated and those that tend to be in opposition:

Matrix of FAIR HOUSING POLICY CORRELATES AND OPPOSITIONALS		
<u>CORRELATES</u> (vertical)	with <u>TENDENCY</u> to be	<u>OPPOSITIONALS</u> (horizontal)
MAJOR POLICY EMPHASIS IS ON:		
NONDISCRIMINATION		DESEGREGATION
INDIVIDUAL RIGHTS		GROUP FAIRNESS
PROCESS		OUTCOMES
MEANS		ENDS
MICRO		MACRO

The matrix does not mean to depict a claim that the policy perspectives that tend to be oppositional must always be in opposition. For example, if individuals who assert a right not to be discriminated against broadly prevailed against discrimination at least over a substantial time, one would observe desegregation and fairness for the group previously victimized by the discrimination. Over time a nondiscriminatory process would inevitably affect the outcome with the consequence that society would be less segregated when viewed from a macro perspective. This analysis seems to beg for an answer to the question of why the apparent conflict exists in fair housing policy. Why do the policy correlation groups tend to be in opposition?

## 2. Ambivalent Answer and Wrong Paradigm

One reason the policy correlation groups tend to be in opposition is that America has not seriously come to grips with either set of policy correlates. On the nondiscrimination side of the chart, Americans still focus on relief for the individual and personal vindication, even in face of conduct with widespread effects. This portion of the chart explains why the government under Ronald Reagan's Justice Department went after the Starrett City complex for discrimination, yet otherwise did very little to enforce the Fair

Housing Act.<sup>69</sup> The position taken mirrored the position the Reagan Administration espoused regarding Title VII employment discrimination violations—only individualistic relief was available and it opposed group-based remedies, such as affirmative action.<sup>70</sup> This perhaps explains much, but it does not explain why the NAACP also opposed the Starrett City methodology.<sup>71</sup>

In some respects the federal fair housing policy has been to pursue spatial deconcentration, but the pursuit has not been particularly vigorous. One reason may be that to do so would have virtually halted the building of federally-subsidized units. Even the switch to tenant-based vouchers has not effectively promoted deconcentration. It would be fair, I think, to suggest that white America is ambivalent about the solution of housing segregation and that many in the black and other minority communities do not necessarily favor deconcentration.<sup>72</sup> Blacks ask, "What is wrong with a black area?" One cannot know the extent to which blacks and other minorities, if given a real choice, would indeed choose to move from an area comprised mostly or completely of persons of the same racial or ethnic group in order to live in an integrated environment.<sup>73</sup> Moreover, even if one knew for sure that minorities would prefer to live in integrated communities, one still could not know all the reasons behind their preference. For instance, minorities could base their preference on the integration itself or on attributes that the all-black or all-minority community did not have but the white or integrated community might have, such as better schools, better jobs, better community facilities, greater amenities with better access, and

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69. See *supra* note 29. See also Selmi, *supra* note 16, at 1440-47 (discussing limited governmental enforcement and pointing out that private litigation might achieve better results for clients, at least with larger damage awards in some types of cases).

70. See William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980-89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645 (1994). See also Brad Lindeman, *Diversifying the Work Place: Affirmative Action in the Private Sector After 1991*, 42 S.D. L. REV. 434 (1997).

71. Simon, *supra* note 43, at 824. See also *Arthur v. Starrett City Assocs.*, 98 F.R.D. 500 (E.D.N.Y. 1983) (certifying a class with NAACP attorneys representing plaintiffs).

72. See, e.g., Charles Smith, *Racism and Community Planning: Building Equity or Waiting for Explosions*, 8 STAN. L. & POL'Y REV. 61 (1997).

73. See, e.g., Reynolds Farley, *Neighborhood Preferences and Aspirations Among Blacks and Whites*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 161 (G. Thomas Kingsley & Margery Austin Turner eds., 1993).



more effective municipal services.<sup>74</sup> Assuredly, no evidence exists to suggest that blacks believe, as the Third Circuit court once opined, that the “increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with national housing policy.”<sup>75</sup>

On the tipping problem, both the *Starrett City* and *Coffey* courts rejected the proffers of potential tipping, respectively, as a reason for permitting the quota on minorities or as a reason for stopping Trinity Gardens. I am confident that the response among many in the black community about the prospect that whites might move out or that whites would not move in to replace those who left would be, “Let the whites run!”

Therefore, as an abstract ideal, integration is seen as a desirable goal and a good policy. However, when the chips are down in the real world, and in a practical context, the integration policy takes a back seat with both whites and blacks.<sup>76</sup> Many whites are probably ambivalent about the goal in the first place,<sup>77</sup> and many blacks would quickly sacrifice integration to satisfying a housing need in preference to an abstract notion of fair housing.<sup>78</sup> Consequently, the ultimate conclusion is that America is ambivalent about integration of housing.<sup>79</sup>

Given America’s ambivalence, it is understandable that Congress reflects that same ambivalence. The 1968 Congress that enacted Title VIII did not contemplate today’s manifestation of the fair housing

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74. See, e.g., Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 973-74 (1997); John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749 (1996); James E. Rosenbaum et al., *Can the Kerner Commission’s Housing Strategy Improve Employment, Education, and Social Integration For Low-Income Blacks?*, 71 N.C. L. REV. 1519 (1993).

75. Shannon v. Shannon, Department of Hous. and Urban Dev., 436 F.2d 809, 821 (3d Cir. 1970).

76. See, e.g., Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977 (1998).

77. This is one aspect of the NIMBY (Not in My Backyard) phenomenon. See generally Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539 (1995); Thompson, *supra* note 17.

78. See, e.g., John O. Calmore, *Spatial Equality and The Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1486, 1496-1500 (1993).

79. For example, America is ambivalent about integration of housing just like it is ambivalent about affirmative action. See Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1177 (1997). See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993).

policy choices that have been constructed in this essay. To the extent that Congress contemplated a policy, it most likely would have been the nondiscrimination set of correlates. Given the history of racial animus that characterized the problems of the 1960s, it would have been natural to focus on the anti-discrimination policy. If there is no social consensus, even among blacks and progressive whites to work on the desegregation paradigm, it stands to reason that the Congress has not and will not clarify the statutes in ways to further the pursuit of that goal. Similarly, as long as courts do not have the doctrinal tools needed to focus on the right paradigm to which they are asked to provide answers, one cannot expect much of them when it comes to desegregating America.

I have a concern that as long as there are wide economic disparities between minority groups and whites any goal of fair housing will continue to be out of reach. Notice that in each of the cases examined necessity drove in some respect a disproportionate share of minorities to seek the housing involved. This phenomenon had to be related to economic deprivations experienced by minorities. Clearly a class dimension to the phenomenon exists, but that is not enough.

Economics alone does not account for white opposition to desegregation of housing when it involves housing near them.<sup>80</sup> It is hard to believe that serious analysts deny that outright bigotry and disguised bigotry under the guise of property values, crime, cultural difference, and a host of antagonisms are still potent forces forestalling desegregation in housing.<sup>81</sup> Therefore, any real effort to promote a housing desegregation policy must have both a social thrust and an economic thrust.<sup>82</sup>

The economic thrust would need to include adequate housing subsidies so that an eligible person's housing subsidy becomes as much of an entitlement for the poor as it already is for middle- and upper-class homeowners. The inadequacy of subsidies for the poor

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80. See Marc Seitles, Comment, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89 (1998).

81. See, e.g., Boger, *supra* note 15, at 1574-81.

82. See, e.g., Farley, *supra* note 73, at 183-85.

contained in the HUD housing budget for subsidized housing contrasts starkly with entitlement subsidies, called “tax expenditures,” that go to the middle and upper class.<sup>83</sup> In Fact, as a distributive end, that outcome reverses the classical ideas of an income-redistribution policy.<sup>84</sup> It gives to the higher-income groups rather than redistributing from higher-income groups to lower-income groups. There are equity questions even within the upper-income persons who get the entitlement benefit because, in general, the benefit provided goes disproportionately to those with the highest incomes,<sup>85</sup> and thus, by definition, the least need.

The social thrust must be directed to ending residential segregation. This thrust would require a mammoth and controversial undertaking. In the current political climate, I regret that I do not think it will be undertaken. However, many years ago I formulated the outline of a plan that I thought then and still think now would enable us to address the desegregation side of the policy matrix by working to curtail exclusionary zoning. Of course, the pervasiveness of the residential segregation patterns probably would require a multifaceted approach.<sup>86</sup>

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83. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971).

84. *Id.*

85. See Peter Dreier, *The New Politics of Housing*, 63 J. AM. PLAN ASS'N 5, 6-9, 18 (1997), cited in CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT, 7-12 (3d ed. 1999). Even Congress has long been aware of these issues. See JOINT COMM. ON TAXATION, 104TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURE FOR FISCAL YEARS 1996-2000 (Comm. Print 1995). This report, prepared for the House Committee on Ways and Means and the Senate Committee on Finance by the Staff of the Joint Committee, contains data showing the distribution of the mortgage interest deduction (“tax expenditure”) by income class for 1996. *Id.* at 25.

86. For examples of the many proposals that have been advanced see Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996); Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909 (1991); Boger, *supra* note 15, at 1580-90; Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623 (1987); Peter W. Salsich, Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 Stetson L. Rev. 577 (1999); Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 36 (1998); Peter J. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235 (1997); Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2062-63 (1994); J. Mark Powell, Note, *Fair Housing in the United States: A Legal Response to Municipal Intransigence*,

### III. TOWARDS "ONE AMERICA": REPRISÉ OF A LEGISLATIVE PROPOSAL

The discussion in this Section is directed to identifying the statutory provisions needed to correct the legislative inadequacies with respect to suburban exclusion/inclusion that are found in both doctrine and remedies. I first made this proposal for a "One America Act" over twenty years ago.<sup>87</sup> In the Appendix, I set forth the essential text of the proposed statute as the legislative vehicle for correcting the inadequacies. I have not empirically tested or modeled the application of the proposed provisions to the facts of any metropolitan areas or housing market areas; but the general thrust of the proposal is clear. I attempt to identify the framework in which a statute such as the one proposed should be considered, the premises and constraints affecting housing and development policies, and outline specific problems to which provisions of the proposed statute address, the elements of an adequate statute and the rationale underlying particular elements.

Even if Congress enacted a statute such as the one proposed, of course, it would not cure all the ills of race and class, or even of housing need, exclusion, and minority status affecting America. Recognizing the nature of the political process and understanding the nature of the legislative process, I understand fully that the statute, as proposed, most likely could not be enacted. Nevertheless, it does, in the context of the discussion that preceded it, illustrate the dimensions of the solution needed in light of the magnitude of the

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1997 U. ILL. L. REV. 279.

87. See Charles E. Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy of Suburban Inclusion*, 9 N.C. CENT. L. REV. 37 (1977). This part of the discussion is a slightly revised representation of the arguments and the proposal that I made in that 1977 article. While times have changed the thrust of the proposal still seems relevant. The thing that may have changed most may be the political horizon and the outlook of the author. My optimism about the possible future of a desegregation thrust may have diminished, although in 1977 I was fairly sure the proposed act could not pass political muster. Now I am virtually certain the proposal could not be enacted because my perception is that the country has actually grown more conservative. The cycle is overdue for a more liberal perspective. See generally ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* (1986). Perhaps my perspective has evolved and matured, or perhaps I have just become cynical about the political climate for corrective social legislation and the judicial climate for using courts as instruments to effect social justice.

problems the nation faces.

### A. *Premises and Constraints*

A statute prohibiting suburban exclusion and mandating inclusion cannot be subordinate to either the tradition of local land use autonomy<sup>88</sup> or the desire for unrestricted freedom of individuals to associate, at least not when municipal action becomes the vehicle for effectuating that desire.<sup>89</sup> Nevertheless, in recognition of the importance of these interests the proposed statute subordinates them only to the limited extent clearly necessary. The proposal does not directly address segregation within a municipality by the use of exclusionary devices.<sup>90</sup> In that sense one might say that the proposal would not address the situation involved in the *Coffey* case. However, I think that, in part, there were broader reasons underlying the problem raised in *Coffey*. Two of these reasons were that minorities were over-represented in the economic class eligible to live in Trinity Gardens, and that exclusionary zoning in other parts of the city contributed to the excessive demand for the proposed site in question. To the extent that the proposed statute is premised on opening opportunities for minorities and lower-income classes throughout the housing market area of the proposed housing, two events would happen. First, minorities would not be limited to areas within the city zoned for multifamily housing. Second, families needing subsidized housing would not be limited to areas within the city. In that sense the excess demand by minorities for housing such as Trinity Gardens within the particular area would be lessened. However, the statute does not address situations in which minorities still prefer to live in a minority area or in an area with a concentration of assisted housing,

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88. See *Hills v. Gautreaux*, 425 U.S. 284, 300-01 (1976).

89. See, e.g., *Smith v. Clarkton*, 682 F.2d 1055, 1063-66 (4th Cir. 1982) (finding a town liable under the Equal Protection Clause, inter alia, for withdrawing from a joint plan to construct low-income housing, where its withdrawal was a response to *town residents'* opposition that was "motivated in significant part by racial considerations"); *Dailey v. Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) (stating that in a racial discrimination action it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals).

90. See, e.g., *NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

even after the opportunity to live elsewhere actually becomes available. The “pressure-relieving” strategy of making a broader range of locations available to increase opportunities for eligible families should work to better address the excess demand for housing by minorities in either the *Starrett City* or the *Coffey* context.

If ending suburban exclusion and mandating suburban inclusion are to be made an enforceable and meaningful national fair housing policy, the most adequate remedy would be to require the entire federal apparatus to further that policy, not merely those federal agencies dealing with housing. This requirement would mean that, at least to the extent that funds are involved, every agency should provide funds only when the funds would be used consistently with, and in furtherance of, the nation’s fair housing policies. An analogous provision already included in Title VIII provides that:

All executive departments and agencies shall administer their programs and activities *relating to housing and urban development* (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.<sup>91</sup>

The proposed statute, in substance, would simply delete the italicized, limiting phrase leaving the duty applicable to *all* of federal agencies and *all of their* “programs and activities.” The prohibition on exclusionary land use practices should be strong and extensive.<sup>92</sup> To avoid any problem of interpreting the extent of the act’s reach with respect to these practices, the proposed act makes clear that all the power Congress possesses under the Constitution is exercised. The sole issue of determining the extent of the prohibition would be whether under any provision of the Constitution, Congress has the power to act. If Congress possesses the power to prohibit the exclusionary practice in question in any case, the proposed act would make clear that it is prohibited.

Whether such a limitation would pass constitutional muster before the present Supreme Court cannot be predicted with confidence.

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91. 42 U.S.C. § 3608(d) (1988) (emphasis added).

92. See Appendix, One America Act, § 4 (proposed) [hereinafter One America Act].

There are some questions about the extent of permissible conditions under the Spending Clause of the Constitution.<sup>93</sup> Also, there may be questions of power or conditioning of funds under the Thirteenth and Fourteenth Amendments.<sup>94</sup> It must be pointed out, however, that the federal government is deeply implicated in the creation of the housing segregation that continues to exist today.<sup>95</sup>

In addition, to the extent that decent housing in a suitable living environment is fundamental to the achievement of virtually every national social policy, in education, employment, economic uplift, and other affairs, it is not completely unreasonable to argue that similarly extensive activities of the federal government should be

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93. See *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (setting down in certain contexts three requirements on imposing conditions under the spending power: that the matter must be within the concept of the “general welfare,” be unambiguous, and be reasonably related to the federal interest in a national program); see also Thomas Lundmark, *Guns and Commerce in Dialectical Perspective*, 11 *BYU J. PUB. L.* 183, 203 (1997) (discussing the reach of the commerce clause through use of the Fourteenth Amendment or the spending power to prohibit state discrimination). Analyses have also been made in other contexts. See Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 *VAND. L. REV.* 1303, 1311 (1994) (arguing that that to pre-empt state authority Congress can use the spending power or the Fourteenth Amendment); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 *CARDOZO L. REV.* 565, 587 n.89 (1999) (discussing Religious Liberty Protection Act’s basis on the Fourteenth Amendment’s enforcement clause, the spending power, and the Commerce Clause); Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress’s Constitutional Powers to Pass Title IX*, 74 *N.Y.U. L. REV.* 235, 268 n.218 (1999) (discussing how Congress could have used either the Fourteenth Amendment or the spending power to enact Title IX).

There may also be questions about the extent of congressional regulation outside of the spending context, such as the Commerce Clause. See *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Commerce Clause did not provide Congress Power to enact the civil remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981 (West 2000), because the activity affected did not have a substantial effect on interstate commerce).

94. See *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409 (1968) (upholding § 1982 under the Thirteenth Amendment); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding public accommodations provisions of Civil Rights Act of 1964 under the Commerce Clause). See generally Adams, *supra* note 86.

95. See, e.g., Michelle Adams, *The Last Wave of Affirmative Action*, 1998 *WIS. L. REV.* 1395, 1419 (“The extent and severity of such segregation would have been impossible, however, without the active participation of various levels of government.”). For a fuller rendition of this theme see James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 *HOW. L.J.* 547 (1979); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 *J. MARSHALL L. REV.* 617 (1999).

devoted to remedying the housing problem.<sup>96</sup> The essential argument is that the federal government should not provide funding to a governmental body that acts to undermine an objective, non-exclusionary housing, which is perhaps the lynchpin of school desegregation, improved job opportunities, and an improved living environment for minority and lower-income families. All federal funds, at a minimum, should be conditioned on the governmental recipient's forbearance of conduct that undercuts a fundamental national fair housing policy. Accordingly, all federal funds should be conditioned on the effectuation of that basic policy.<sup>97</sup> Indeed, apart from national defense concerns, it is difficult to see that there is any policy the federal government can undertake that is not related to the achievement of the goal of "a decent home in a suitable living environment."<sup>98</sup> To the extent that the goal is unrealized, virtually all other domestic policies cannot be realized fully or at all.

To mandate a policy without providing tools to the agencies and courts to effectuate that policy would be a hollow, perhaps cruel, gesture. Accordingly, to be regarded as adequate, a statute would have to precisely specify its objectives, provide clear commands to agencies and courts, specify the standards by which to determine its reach, and provide enforcement tools to most effectively realize its objectives. The overriding problem the statute would address is governmental action in the land use area that excludes a disproportionate number of racial minorities or persons of the lower economic classes from living within its boundaries. The proposed statute addresses that specific problem of exclusion.<sup>99</sup>

The problem involves exclusion as a nationwide concept, but it appears that a nationwide prohibition would be unworkable. Therefore, the criteria for determining whether exclusion has occurred must be referenced to some realistically workable geographic standard. In an attempt to maximize housing locational

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96. See U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 11 (1975); Rosenbaum et al., *supra* note 74, at 1552.

97. See One America Act § 5(a).

98. The Housing Act of 1949, 42 U.S.C. § 1441 (1994). See also The National Housing Act, 12 U.S.C. § 1701t (1999) (reaffirming § 1441); 42 U.S.C. § 1441a (1994) (same); 42 U.S.C. § 5301 (Supp. II 1990) (same).

99. This term is operationally defined *infra*.



choices, but not dictate them, the standard should be tied to general locational choices the population has already expressed. Thus, the geographic area in which exclusion is measured should, on the one hand, be small enough to be workable and, on the other hand, large enough to effectuate the goal of placing the prohibition on exclusion in its meaningful context as discussed, for example, by Professor Mandelker in his *Arlington Heights* analysis.<sup>100</sup> The statute, therefore, would appropriately define the geographic area as the metropolitan area or housing market area. However, the definition of these terms must be workable. Workability would be enhanced if the statute focused on geographic areas for which data is already generally available, areas that represent functional geographic units, and areas that are tied to concepts employed by housing and planning professionals.<sup>101</sup>

Finally, to make a prohibition on exclusion something more than an empty promise, the means must be made available both locally and nationally for providing housing that would bring about an end to exclusion. If, or when, local governmental action fails to achieve its goal, the national government must be authorized to act to achieve the national policy. In recognition of deep rooted traditions of local autonomy in the land use area, the opportunity for local governments to act should be substantial.<sup>102</sup> Therefore, only when local governments clearly fail should the more intrusive options be pursued. When events make it clear, however, that without direct federal action the national policies will fail of achievement, the federal government's capacity should equal the need.

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100. Mandelker, *supra* note 47, at 1246.

101. The statute should focus on areas such as "housing market areas." See *Hills v. Gautreaux*, 425 U.S. 284, 299-300 (1976), for a discussion of housing market areas in the context of a metro-wide housing order directed to the Department of Housing and Urban Development but noting that since compliance with local zoning would be required no coercion of suburban jurisdictions would be involved.

102. See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

### *B. Elements of an Adequate Statute*

#### 1. The Policy of Prohibiting Exclusion

The first matter that demands attention is defining the problem to be addressed: exclusionary land use practices. But what is a land use practice, and when is it exclusionary? A narrow definition of land use practice would invite artful or devious devices to avoid the statute. The proposed statute would prevent evasive strategies by laying down an encompassing definition of "land use practice."<sup>103</sup> Its definition includes any "restrictions, regulations or controls" on the usage of real property and goes on to specify several examples. Then it contains the inclusive phrase, "any and all qualitatively similar" kinds of local conduct. Further "land use practice" should be defined to include any conduct "directly related" to any restriction, regulation, or control on the usage of real property. The definition then lists several specific examples such as limitations on residential construction, limitations on sewer hookups, and concludes with a catchall phrase covering "qualitatively similar" conduct.<sup>104</sup> The definition should be broad enough to make clear that evasive conduct will prove unsuccessful. Where evasive conduct exists, courts will not have to hesitate while guessing at the application of the statute. Accordingly, the impulses to adopt evasive devices, as well as the delays incident to extensive litigation, would be minimized under the proposed statute.

The next step is to define land use practices that constitute the evils to which the statute is directed. One evil is an "exclusionary" land use practice.<sup>105</sup> A second evil is the failure of local governments that have practiced exclusion to remedy the consequences of that conduct. The proposed statute addresses both aspects of the problem.

Exclusionary land use practice should be defined as any practice which results in or causes the exclusion of a "disproportionate number of persons of any racial group, ethnic group, or any national

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103. See One America Act § 3(a).

104. See *id.* § 3(a)(2).

105. See, e.g., Janai S. Nelson, Comment, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689 (1996).

origin, or income group from residing within the geographic or political jurisdiction of the local governmental body” engaging in the land use practice.<sup>106</sup> The proposed definition has four features. First, it is limited to the specific problem of land use exclusionary practices along racial or economic lines.<sup>107</sup> Second, the definition covers instances in which a governmental body’s capacity to engage in a land use practice extends beyond its geographic jurisdiction, such as in an extra-territorial planning district. Thus, the act would include not merely a local government’s geographic jurisdiction, but also its “political” jurisdiction.<sup>108</sup>

Third, the definition contains a provision that incorporates a “fair share” analysis for determining whether a land use practice is exclusionary. The provision accomplishes this by defining an “exclusionary land practice” as one which excludes a “disproportionate number” of persons of a racial or income group. In turn, it defines “disproportionate” and “number of persons” by comparing the ratios of the proportions of persons residing within the governmental body’s jurisdiction and the persons residing in the larger geographic or housing market area that includes the governmental body.<sup>109</sup> By way of analogy, the Housing and Community Development Act of 1974<sup>110</sup> contained a provision conditioning federal community development block grants on a local government’s making an assessment of the housing needs of lower-income persons residing in or expected to reside in the area of the local government.<sup>111</sup> One court eviscerated the requirement by

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106. See One America Act § 3(b). Compare H.R. 3504, 95th Cong. (1977). Section 206(g) of H.R. 3504 would have amended the 1968 Civil Right Act by adding to § 804, 42 U.S.C. § 3604 (1977), and would have made unlawful the exercise of any governmental powers with respect to “planning, zoning, subdivision controls, building codes or permits or other matters affecting land use or development, to exclude low or moderate income housing because of the eligibility of such housing for governmental assistance, or because of the race, color, national origin, or economic status of the prospective occupants of such housing.”

107. An argument can be made for addressing other characteristics (such as age, sex, religion, household status as unmarried female-head). I would not be opposed to that, but exclusionary zoning on the basis of these characteristics probably is less frequent or in some respects overlaps the concerns of racial and economic exclusion.

108. See One America Act § 3(b)(1).

109. See *id.* §§ 3(b)(2), (3).

110. See *id.* §§ 3(b)(2), (3).

111. 42 U.S.C. § 5304(a)(4)(A) (1977), replaced by Housing and Community Development

holding that persons and municipalities outside the area of the local government who were challenging the government’s “expected to reside” figures had no standing to sue HUD or the allegedly offending local government with respect to the figures.<sup>112</sup> The specific “expected to reside” requirement was later deleted from the legislation.<sup>113</sup>

Fourth, the proposal establishes a presumption of an exclusionary practice if the ratio of the number of minorities or low-income persons residing in the governmental area is below a benchmark ratio of minorities or low-income persons in the larger geographic or housing market area of which the governmental area is a part.<sup>114</sup> The proposal defines presumptive exclusion as an instance in which there resides in a municipality a proportion of minorities or poor persons that is below, by fifty percent or greater, the proportion of minorities or poor persons who reside in the geographic or housing market area containing that municipality.<sup>115</sup> If the fifty percent benchmark were deemed too low or too high it could be raised or lowered.<sup>116</sup> Raising the benchmark reduces the stringency of the non-exclusion requirement, while lowering the benchmark places a more stringent obligation on the municipality.<sup>117</sup>

The proposed statute would prohibit an act that has the “effect” of excluding persons by defining an act as exclusionary if it “results in”

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Amendments of 1981, Pub. L. No. 97-35, § 302(b), 95 Stat. 384.

112. *Hartford v. Glastonbury*, 561 F.2d 1032 (2d. Cir. 1976).

113. *See* Pub. L. No. 97-35, § 302(b), 95 Stat. 384.

114. *See* Appendix § 3(b)(3). *See also id.* § 3(b)(4).

115. For example, the ratio of minorities in the housing market area is twenty percent. The percentage of minorities residing in the municipality under this formulation must equal at least ten percent to avoid the determination that a “disproportionate number” of minorities have been excluded. But note that this is not a “strict liability” provision. The determination that a disproportionate number has been excluded sets a presumption that triggers other steps.

116. For example, if the benchmark required less than seventy-five percent minority proportion within a municipality, and the housing market area had twenty percent minorities, the presumption of exclusion would arise only if the municipality had less than five percent minorities. The municipality’s five percent would be seventy-five percent below the housing market area’s ratio of twenty percent.

117. If the benchmark required less than twenty-five percent, for example, if the housing market area had twenty percent minorities the presumption of exclusion would arise when the municipality had less than fifteen percent minorities. In this instance, the municipality’s fifteen percent would be twenty-five percent below the housing market area’s ratio of twenty percent.

or “causes” exclusion.<sup>118</sup> Any requirement that a showing be made of a “purpose or intent” to discriminate or exclude a person or class of persons would be unworkable and unrealistic, as Professor Mandelker pointed out in his discussion of the *Arlington Heights* case.<sup>119</sup> It would be unworkable because proving purpose or intent is so difficult that a large portion of instances in which exclusion takes place could not be proved and, thus, would admit of no remedy. It would be unrealistic because the purpose or intent with which exclusionary conduct takes place is irrelevant to the question of whether exclusion exists. For purposes of the statute, conduct that may not be motivated by an exclusionary intent would constitute the evil if it is effective at excluding. Conversely, the statute need not proscribe conduct wholly ineffective at achieving exclusion for the simple reason that bad motivation to engage in conduct could injure no one if the motivation produced no exclusion. As an overall matter a standard that would necessitate looking for purpose or intent would simply encourage, indeed invite, artful devices to conceal it. A search for intent in this area would mire courts in the morass of separating out good motive from bad motive when motive is irrelevant for purposes of a statute mandating an inclusionary society.

Consistent with the act’s objective of making the least intrusion upon private individual rights of association, it would be addressed to governmental, not private, conduct.<sup>120</sup> It would reach, however, devices in which private persons or entities undertake functions that are traditionally carried out by governmental bodies. In conjunction with the proposed statute’s concern with land use practices, however, it would not reach private entities that carry out traditional governmental functions that are not included in the definition of “land use practice.” For example, the operation of schools, fire departments, and garbage collection services might be regarded as functions traditionally carried out by governmental bodies. However, if private entities undertook such activities, these entities would fall within the definition of “governmental body.” Falling within the

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118. See One America Act § 3(b)(1).

119. Mandelker, *supra* note 47, at 1245-47.

120. To arrive at this conclusion, compare One America Act. § 3(b)(1) with One America Act § 4.

definition of “governmental body,” though, would not be within the statute’s coverage unless the governmental body also engaged in a “land use practice.” This is so because the definition of land use practice does not include operation of schools, fire departments, or garbage collection services.<sup>121</sup>

Conversely, the statute should cover a private entity that determined dwelling square footage requirements or issued building permits because it would be performing a function traditionally regarded as governmental, and one that is included in the definition of land use practice. Thus, divestiture of a land use function by a governmental body and transference of the power, for example, to an association of homeowners or a private club should not take the activity out of the act’s coverage. Similarly, the creation by the state of special sewerage treatment districts should not take those districts out of the act’s coverage since the provision of sewerage services is traditionally a governmental function and would be defined as a land use practice under the act. In this connection, attention should be called to those provisions of the proposed act referring to a “land use practice”<sup>122</sup> because the basic prohibition speaks of a “land use practice” and other provisions apply only to governmental bodies that “engage in” a land use practice.<sup>123</sup>

While the prohibition on exclusionary land use practices might be absolute, the ultimate sanction probably should not be absolute. The difficulty inheres in the impracticability of both devising a sanction that is absolute and devising a reasonable means for enforcing any such sanction, short of calling federal troops, which would probably create a situation worse than the problem of exclusionary zoning. Moreover, the specter of “forced housing,” as the shibboleth goes, is probably not worth fueling any more than is minimally required to effect the purposes of the statute. The premise of the administrative enforcement provision on non-exclusionary land use practices in the proposed act<sup>124</sup> is that in the vast majority of instances federal funding would constitute enough of a carrot that using a stick would

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121. *See id.* § 3(a)(1), (2).

122. *See id.* § 4.

123. *See id.* §§ 3(b)(1), 5, 6(b), 7(b).

124. *See id.* § 5.

not be necessary. At a minimum, since federal funds are pervasive in the lives of governmental bodies, the potential loss of such funds would spur a wide measure of desirable conduct.

## 2. The Policy of Mandating Inclusion

A prohibition of exclusionary land use practices would not necessarily result in making housing available, or in correcting the continuing effects of prior exclusionary practices. But, since local governmental bodies are rarely involved in the direct provision of housing, the most that can be required of them is that their land use plans provide for inclusionary housing.<sup>125</sup>

The absence of inclusionary housing appears to result from two separate phenomena. The first phenomenon is that local governments engage in land use actions that exclude persons who have the financial resources to demand housing in the private housing market. The second phenomenon is that poor persons, regardless of race, are excluded if they lack resources to make an effective housing demand even without exclusion.

With respect to the first phenomenon, a prohibition on exclusion by land use practices, if effective, would benefit excluded upper income persons. If the governmental body did not cease its exclusion, provide remedies for continuing effects of the prior exclusion, and adopt a plan for including the fair share of excluded persons within its jurisdiction, it would be ineligible to receive any federal funds.<sup>126</sup> With respect to the second phenomenon<sup>127</sup> affecting those persons who could not demand housing on the private market without financial assistance, a prohibition alone would be of no benefit.<sup>128</sup> If that were the end of the act, it likely would fall far short of its purpose. To prevent such a frustration of purpose and to effectively implement and achieve inclusionary objectives in instances when inclusion is not likely to occur without housing subsidies, the act

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125. See One America Act. § 5(c)(2).

126. See *id.* § 5(c).

127. See *id.*

128. See, e.g., McDougall, *supra* note 86, at 641 n.112 (pointing out that without assistance the beneficiaries of inclusionary zoning might not be lower-income people).

would make the federal government the "houser of last resort."<sup>129</sup> The federal government would even make funds available to meet the housing assistance needs of persons with lower-incomes.<sup>130</sup> The Uniform Relocation Act's provisions governing residential displacement by federal agencies or state or local entities using federal financial assistance, contains a limited aspect of this concept by providing that funds *from the displacing project* may be used to provide replacement housing.<sup>131</sup> A provision contained in the House bill that reported out the Housing and Community Development Act of 1974 would have enabled direct HUD action in local areas that failed to implement housing activities, but it was not enacted.<sup>132</sup> However, under the federal government's Section 8 program the Secretary of HUD is authorized to act at the local level if local agencies do not exist or cannot act.<sup>133</sup>

The funds would be made available for housing assistance within the area of jurisdiction of the governmental body.<sup>134</sup> At that juncture, in order to maximize the land use prerogatives of local government in conformity with the purpose of the act, the local governmental body should be given ample opportunity to employ the funds in any way it saw fit to meet the needs of the lower-income persons.<sup>135</sup> However, if the local government failed to do so after a reasonable interval, the federal government should be empowered to make the housing available consistent with sound planning concepts, but without regard to the local land use practices of the governmental body.<sup>136</sup>

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129. See One America Act § 8.

130. See *id.* § 8(a).

131. See Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4626 (1994) (entitled "Housing Replacement by Federal Agency as Last Resort").

132. See H.R. CONF. REP. NO. 93-1279 (1974), reprinted in 1974 U.S.C.C.A.N. 4449.

133. See 42 U.S.C. § 1437f(b)(1) (1988) ("In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, *the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.*") (emphasis added).

134. See One America Act § 8(c).

135. See *id.* § 8(c)(3), (4).

136. See *id.* §§ 8(c)(5), (6), (7).



### 3. The Tools of Policy Enforcement

Present doctrines and legislation are seriously deficient with respect to enforcement mechanisms. The proposed act would go a long way toward remedying those deficiencies. In the administration of its provisions relating to federal financial assistance, the proposed act would vest power in the Secretary of HUD to determine the eligibility of a governmental body for federal funds.<sup>137</sup> I am not wed to this agency. If giving these responsibilities to HUD, which has been criticized on various grounds, is deemed a problem, then some other agency could be designated, such as the Office of Management and Budget, or a new agency could be created.

The proposed act would spell out the precise criteria by which the determination of eligibility for federal funds would be made. Generally speaking, all local governments are engaged in some kind of land use practice, as that term would be defined in the proposed act. The key provision would require a presumption that a land use practice has resulted in exclusion if the proportion of minorities and lower-income persons residing in the jurisdiction of a governmental body is at least fifty percent lower than the ratio of the proportion of that group in the geographic or housing market area within which the local government is located.<sup>138</sup> In cases where the proportion is no more than ten percent, or less, below the larger area's proportion, a determination of ineligibility would not be made.<sup>139</sup> In instances in which the proportion falls below the larger area's proportion and between forty-nine and eleven percent the Secretary would be required to consider all known and relevant factors bearing on the exclusion issue, as well as the ratio of proportions and the effects and tendencies of any land use practices.<sup>140</sup> Following a determination of ineligibility for federal funds, the governmental body could become eligible by showing that it made provision for a reasonable proportion of housing for minorities and low-income persons. This showing could be made if either the state prohibited exclusionary land use

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137. *See id.* § 6(a).

138. *See id.* § 6(b).

139. *See* One America Act § 6(b)(2).

140. *See id.*

practices,<sup>141</sup> or the local government both ceased its exclusionary housing practices and took effective ameliorative steps.<sup>142</sup>

The proposed provisions would also encourage states to exercise greater control over their political jurisdictions since enactment of an adequate state statute would make every governmental body in the state eligible for federal financial assistance. This provision would be similar to the deferral under Title VIII of most fair housing actions to state or local entities that enact “substantially equivalent” fair housing laws or ordinances.<sup>143</sup> Similarly, a finding of eligibility would not preclude future federal financial assistance if the local government took adequate corrective measures. This provision would, therefore, encourage local governments to correct their practices.

Finally, by setting out clear criteria for determining eligibility, the proposed statute would put local governments on notice of what is required and avoid as far as practicable the risks of differential treatment and arbitrary determinations by the Secretary. Simultaneously, the act would make a clear statement of its inclusionary thrust, thus avoiding the need for a large bureaucracy to make the eligibility decision.<sup>144</sup>

A comprehensive act should also be enforceable at the instance of private persons or governmental entities that are affected by any violation of the act. In order to avoid severe inadequacies in present doctrines and legislation, the provisions on private enforcement, should specify who can sue, as well as the standard for determining whether exclusion had taken place. Key provisions of the proposed act address these problems.

The proposed act would permit any person, as well as any governmental body in which a disproportionate number of persons of any identifiable group or class covered under the proposed act reside, to sue in federal district court without meeting any jurisdictional requirement based on the amount in controversy.<sup>145</sup> However,

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141. *See id.* § 6(c)(1) (referring to One America Act § 5(c)).

142. *See id.* § 6(c).

143. *See* 42 U.S.C. § 3610(f) (1999).

144. *See* One America Act § 6(b).

145. *See id.* § 7(a).

plaintiffs could only bring suit against another local governmental body if the plaintiffs lived in the same metropolitan or housing market area as the governmental body. Since the standard for determining whether exclusion has occurred is referenced to functional geographic units, suits against local governments should be similarly limited.

As to determining whether exclusion has taken place, the proposed act would provide that a prima facie case may be made by a statistical showing that minorities or low-income persons are under-represented in the jurisdiction of a governmental body engaging in a land use practice,<sup>146</sup> or by showing that the land use practice had exclusionary tendencies or effects.<sup>147</sup> After a prima facie showing, the burden of proof shifts to the governmental body to rebut the prima facie case.<sup>148</sup> Rebuttal could be shown on the same grounds as an administrative rebuttal,<sup>149</sup> as well as on one additional ground. The additional ground would permit rebuttal upon a showing that the land use practice had no effect and no tendency to exclude any specified group or class.<sup>150</sup>

Based on two considerations the additional rebuttal ground would be included in the private action section and not the administrative conditioning section. First, in using federal funds, the government may set requirements and conditions which tend to effectuate national policies. Short of constitutional invalidity, the standards by which the federal government judges whether national policies are being effected may be as strict as desired, since the government is not required to make funds available to local governments unless those governments clearly pursue national objectives. Second apart from the conditioning of funds to induce inclusion, the act would be directed to prohibiting exclusion, but not to mandating inclusion. Accordingly, in private actions the issue will be whether local land use practices are exclusionary. By hypothesis, such practices could not be regarded as exclusionary if they could be shown to have no

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146. *See id.* § 7(b)(1).

147. *See id.* § 7(b)(2).

148. *See id.* § 7(c).

149. *See One America Act* § 7(c)(1).

150. *See id.*

effect on exclusion and no tendency to exclude. Ultimately, these provisions would be based on a finding that as a matter of national policy a local government should not be required to do more than avoid exclusionary practices if it is willing to forego all federal financial assistance. But note that local governments might not be able to avoid all federally-assisted housing, if they are part of a metropolitan area or housing market area in which a need for housing assistance exists.<sup>151</sup> However, if a local government could prove that it did not exclude, it would not be liable under the private remedies provisions of the proposed act. Also, if the local government did not receive any federal funds and was not in a metropolitan area or housing market area in which persons needed housing assistance, it would have no inclusionary duties under the act. Upon failure of a local government to rebut a *prima facie* case of exclusion in a private action, the court could grant any effective remedy within its statutory or equitable power<sup>152</sup> to end the exclusion and ameliorate its effects.<sup>153</sup>

Finally, standing under the act would be expanded to the minimum required by the constitutional Article III limitation of jurisdiction to "cases" and "controversies."<sup>154</sup> The "injury in fact" and "benefits" test gloss on the standing question<sup>155</sup> would be specified as any "injury" which is not "completely conjectural" and any "benefit" which is not "completely speculative."<sup>156</sup> The intent of those provisions would be to avoid the closing of the courthouse doors except when the person suing had no interest to be protected under the act and would derive no benefit from a successful suit. Since the issues would be narrowed and the determination of those issues would be made under criteria specified under the act, it would seem proper to permit a wide range of potential plaintiffs to seek to enforce the national policies of the act. The reason courts restrict standing seems at least in part to be to avoid getting into open-ended law suits

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151. See One America Act § 8.

152. See *id.* § 4.

153. See *id.* § 7(f).

154. U.S. CONST. art. III

155. These are the kinds of problems that plagued the plaintiffs and the court in *Hartford v. Glastonbury*, 561 F.2d 1032 (2d Cir. 1976).

156. See One America Act § 7(e). See also *id.* § 7(a).

with unclear or indeterminable decisional benchmarks. The act would avoid any need to be concerned about such possibilities.

#### IV. CONCLUSION

Legislative action such as the statute proposed, if combined with thrusts to revitalize America's central cities, would provide the vehicle for America to seize the opportunity to become, literally, one nation. The only thing that would make so bold an effort worth undertaking is the extremely high stake each of us has in the unfinished evolution of America from a society that has held out the promise of being just and decent to a society that keeps that promise.

#### APPENDIX

##### The One America Act

Section 1. Congressional Findings. The Congress finds and declares that:

(a) The Nation faces critical social and economic problems arising in significant measure from the exclusion of racial and ethnic minorities and persons of lower income from the opportunity to exercise choice in selecting where to live and work;

(b) It is in the fundamental interest of the Nation to employ federal resources to eliminate the exclusion of and to mandate the inclusion of racial and ethnic minorities and persons of lower income in order to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty for all persons;

(c) The absence of opportunity to exercise choice in selecting where to live and work has lead to the concentration of racial and ethnic minorities and persons of lower-income in geographic areas within cities and other areas and that concentration has created pressures that have diminished the Nation's ability to achieve truly integrated and open living patterns;

(d) Exclusion of racial and ethnic minorities and persons of lower income denies decent housing, a suitable living environment, and economic opportunities to such an extent that racial and ethnic minorities and persons of lower income cannot make their maximum potential contribution to the Nation's general welfare and to the

common good; and

(e) Systematic and sustained action by federal, state, and local governments is required to eliminate the exclusion of and to mandate the inclusion of racial and ethnic minorities and persons of lower income in all communities that engage in land use practices.

Section 2. Purposes. The purposes of this chapter are:

(a) To develop viable communities in which decent housing, a suitable living environment, and economic opportunities are available to all persons by prohibiting land use practices that exclude racial and ethnic minorities and persons of lower income;

(b) To develop truly integrated and open residential living patterns by mandating inclusionary land use practices as a condition of any state’s or local government’s receipt and use of federal financial assistance; and

(c) To more effectively enforce both the non-discrimination and the desegregation objectives of the Fair Housing Act in mutually consistent and supportive ways, thereby eliminating instances in which pursuit of non-discrimination objectives conflict with desegregation objectives because racial and ethnic minorities and persons of lower income lack the opportunity to exercise choice in selecting where to live and work.

Section 3. Definitions –

(a) *Land use practice*. “Land use practice” includes–

(1) any and all restrictions, regulations, or controls on the usage of real property, for residential purposes, including zoning, lot size requirements, dwelling square footage requirements, set-back requirements, density requirements, platting, land use plans, water shed regulations, subdivision regulations, flood plain regulations, comprehensive plans, official maps, and any qualitatively similar acts, rules, regulations, laws, ordinances, programs, plans, or practices, and

(2) any and all acts, rules, regulations, laws, ordinances, programs, plans, practices, or activities directly related to any land use restriction, regulation, or control on the usage of real property, for residential purposes, including any referendum requirement, limitation on residential construction, limitation on the issuance of building permits, limitation on sewer or water hookups, limitation on the provision of any service furnished by a governmental body or with

the permission of a governmental body, or furnished within the jurisdiction of a governmental body by or with the permission of another governmental body or a state, the conditioning of any permission to build any dwelling unit upon the availability of any service furnished by or with the permission of a governmental body, by or with the permission of another governmental body or a state, or by the builder of any dwelling unit, and any qualitatively similar act, rule, regulation, law, ordinance, program, plan, practice, or activity.

(b) *Exclusionary land use practices*—

(1) An “exclusionary land use practice” is any land use practice of a governmental body which results in, or causes, the exclusion of a disproportionate number of persons of any racial group, ethnic group, group of any national origin, or income group from residing within the geographic or political jurisdiction of that governmental body.

(2) The “number of persons” of any race, ethnic group, national origin, or income group shall be determined by comparing the ratios of

(A) the number of persons of that race, ethnic group, national origin, or income group and the total number of persons residing in the metropolitan area or housing market area, as applicable, with

(B) the number of persons of that race, ethnic group, national origin, or income group and the total number of persons residing within the geographic or political jurisdiction of a governmental body.

(3) A “disproportionate number of persons” shall be deemed to have been excluded by any land use practice when the ratio of the number of persons of any race, ethnic group, national origin, or income group residing within the geographic or political jurisdiction of a governmental body is below, by fifty percent (50%), or more, the ratio of such persons residing in the metropolitan area or housing market area, as applicable, in which that governmental body is included.

(4) A “proportionate number of persons” shall be deemed to exist when the ratio of the number of persons of any race, ethnic group, national origin, or income group residing within the geographic or political jurisdiction of a governmental body or the number of dwelling units available for occupancy by such persons equals or is within ten percent (10%) of equaling the ratio of such persons

residing in the metropolitan area or housing market area, as applicable, in which that governmental body is included.

(5) “Income group” means persons whose individual income, or who are members of a household whose income, places a person or household within either that group of persons whose income equals or is below the poverty line established by the United States government, or that group of persons whose income equals or is less than eighty percent (80%) of the median income for the metropolitan area, or housing market area, as applicable, in which that person, or the household of which that person is a member, resides.

(c) *Inclusionary land use plan*. An “inclusionary land use plan” is a plan submitted by a governmental body to, and approved by, the Secretary.

(d) *Federal financial assistance*. “Federal financial assistance” means any monetary assistance provided by the United States government or any agency thereof to a governmental body for any governmental activity, plan, or program including all grants, loans, contracts of insurance or guaranty, matching grants, or funding of any kind for any governmental purpose or for any proprietary purpose carried out by a governmental body.

(e) *Governmental body*. “Governmental body” means the District of Columbia, any political subdivision of any state, and any entity which is a public body corporate and politic authorized by a state to exist or created by a state, and any entity which carries out functions traditionally carried out by public bodies.

(f) *Metropolitan area*. A “metropolitan area” is any area defined as a standard metropolitan statistical area by the Office of Management and Budget, and any other urbanized area not included within a standard metropolitan statistical area, which is determined by the Secretary to be a metropolitan area.

(g) *Housing market area*. A “housing market area” is any geographic area (within or outside of a metropolitan area) in which comparable housing units are in competition based on working, commuting, and residential patterns, and any area within which residences and jobs are customarily regarded as within commuting distances from home to work, as shall be determined by the Secretary.



(h) *Secretary*. The “Secretary” means the Secretary of the Department of Housing and Urban Development.

(i) *Assisted housing*. “Assisted housing” means any dwelling unit for which federal assistance is provided in whole or in part, or any person determined to be eligible for assistance for housing purposes, under any program of the federal government.

Section 4. Exclusionary land use practices prohibited. All exclusionary land use practices are prohibited to the maximum extent Congress has the power to do so under any provision, clause, or amendment of the Constitution.

Section 5. Federal financial assistance prohibited—

(a) No governmental body that is engaged in any land use practice which receives federal financial assistance shall engage in any exclusionary land use practice.

(b) Every agency of the United States government is prohibited from granting any federal financial assistance directly or through any state to a governmental body which engages in any exclusionary land use practice, or to any governmental body which is in whole or in part subject to the jurisdiction of any other governmental body or a state which engages in any exclusionary land use practice within the geographic jurisdiction of the governmental body which would be granted federal financial assistance, except as authorized in subsection (c) of this section.

(c) No agency of the United States government may provide federal financial assistance to any governmental body which on August 22, 1974 was engaged in any exclusionary land use practice, or which at any time after the effective date of this act has engaged in any exclusionary land use practice, unless

(1) the governmental body which would be granted federal financial assistance is located within a state which by statute prohibits exclusionary land use practices within that state in terms substantively identical to the terms of this act and which statute provides remedies to exclusionary land use practices substantively and procedurally identical to those specified in section 7 of this act, or

(2) the governmental body which is to receive federal financial assistance

(A) has ceased to engage in any exclusionary land use practice, or in the case of another governmental body or a state, such other governmental body or state, has ceased to engage in any exclusionary land use practice within the geographic jurisdiction of the governmental body which would be granted federal financial assistance,

(B) has undertaken to remove any continuing effects on any person of the exclusionary land use practice, and

(c) has submitted an inclusionary land use plan which plan has been approved by the Secretary.

Section 6. Administrative provisions—

(a) *Certifying eligibility for federal financial assistance.* The Secretary shall be responsible for certifying, for purposes of Section 5 of this act, whether a governmental body is eligible to receive federal financial assistance, and upon request of any agency of the United States government, shall certify whether the governmental body is eligible to receive federal financial assistance, and such certification shall be binding on the requesting agency.

(b) *Presumptions and method for certifying eligibility.* For the purpose of making the certification of eligibility under this act—

(1) in the case of a governmental body which is engaged, or on or after August 22, 1974 has engaged, in any land use practice, or of a governmental body which is in whole or in part subject to the jurisdiction of any other governmental body or a state which, within the geographic jurisdiction of the governmental body, has engaged in a land use practice, the Secretary shall presume that the governmental body has engaged in an exclusionary land use practice when a disproportionate number of persons would be deemed to have been excluded under section 3(b)(3) based on the most recent data available to the Secretary at the time the certification is made; or

(2) in the case of a governmental body which has not engaged in a land use practice at any time specified under subsection (b)(1) of this section, or in the case of a governmental body from which a disproportionate number of persons would not be deemed to have been excluded under section 3(b)(3), but within which a proportionate number of persons under section 3(b)(4) does not reside, the Secretary shall make the certification based on the most recent data available to the Secretary at the time the certification is

made, provided, that the Secretary shall consider the ratio of the proportions determined under section 3(b)(3) and shall evaluate any exclusionary effects of any land use practice engaged in at any time, the continuing effects of such land use practice, any exclusionary tendencies of such land use practice, as well as any other relevant factors of which the Secretary has knowledge.

(c) *Rebutting a determination of ineligibility.* Any governmental body determined to be ineligible may rebut such finding by

(1) meeting the provisions of section 5(c) of this act, or

(2) presenting evidence satisfactory to the Secretary that neither it has engaged in any exclusionary land use practice, nor has any governmental body or state engaged in any exclusionary land use practice within its geographic jurisdiction in that in engaging in any land use practice, provision was made for the number of housing units which would be occupied by a proportionate number of persons within its geographic jurisdiction.

(d) *Elements of an inclusionary land use plan.* The Secretary shall not approve any land use plan as an inclusionary land use plan unless the plan makes provisions for the numbers of housing units which would be occupied by a proportionate number of persons.

Section 7. Remedial provisions—

(a) *Private actions authorized.* Any person who is a member of a group or class specified in Section 3(b)(1) of this act, and any governmental body within the political or geographic jurisdiction of which reside a number of persons which exceeds a proportionate number of persons by ten percent (10%) or more, may sue any other person, any governmental body or any agency of the United States government to enforce any provision of this act in a U.S. district court, without regard to the amount in controversy, provided

(1) that in the case of suit brought against a governmental body, suit may be brought only if the person bringing the suit resides in, or governmental body bringing the suit is located within, the same metropolitan area or housing market area, as applicable, as the governmental body being sued; and

(2) that in the case of suit brought against a person as an official of a governmental body, suit may be brought only if the person bringing the suit resides in, or governmental body bringing the suit is located within, the same metropolitan area or housing market area, as

applicable, as the governmental body of which the person being sued is an official.

(b) *Prima facie evidence of exclusionary land use practice.* A prima facie case of an exclusionary land use practice may be made against a governmental body upon proof

(1) that a disproportionate number of persons would be deemed to have been excluded under section 3(b)(3) of this act; or

(2) that any land use practice engaged in by, or within the geographic jurisdiction of, a governmental body had either an exclusionary effect, or a natural tendency to exclude any person who is a member of a group specified in section 3(b)(1).

(c) *Rebutting a prima facie case.* A prima facie case of an exclusionary land use practice may be rebutted only by a showing by a preponderance of the evidence, with the burden of proof being on the governmental body against which a prima facie case is made, that

(1) the governmental body clearly satisfies the provisions of section 5(c)(1) or (2), or section 6(c)(2) of this act; or

(2) the land use practice of the governmental body clearly had no effect of excluding, and clearly has no tendency, direct or indirect, to exclude, any person specified in section 3(b)(1) of this act.

(d) *Secretary may be made a party.* The Secretary may be made a party

(1) to any action in which there is drawn into question the Secretary’s compliance with any provision of this act, or

(2) to any action not specified in subsection (1) of this section in which there is drawn into question any provision of this act, and if made a party, the Secretary shall provide to the court and to the other parties to the action any relevant information the Secretary may have regarding any issue raised under this act.

(e) *Standing to sue.* In any action in which there exists a case or controversy under Article III of the Constitution, any person who suffers injury directly or indirectly so long as the injury is not completely conjectural, or who would benefit directly or indirectly so long as the benefit is not completely speculative, shall have standing to sue to determine whether any governmental body is eligible to receive federal financial assistance, whether the Secretary is complying with any provision of this act, or to determine whether any provision of this act is being violated.

(f) *Judicial remedies.* Upon a determination that any provision of this act has been violated the court shall grant that remedy, so long as the remedy is within its statutory power under this act or its general equitable power, which will most effectively result in enforcing the provisions of this act.

Section 8. Federal government as houser of last resort—

(a) *Houser of last resort.* To the extent of appropriations, the federal government, acting through the Secretary, shall be the houser of last resort, and shall make available housing for any person who does not live in a decent home in a suitable living environment, as determined by the Secretary.

(b) *Studies and reports.* The Secretary shall make appropriate studies to determine, under criteria to be developed by the Secretary, the extent to which any person does not live in a decent home in a suitable living environment, and shall, at least annually, issue a report, on a state-by-state basis, to the President and the Congress, which contains the results and findings of such studies, which report shall contain an evaluation of the extent to which any person is not living in a decent home in a suitable environment by reason of

- (1) any exclusionary land use practice,
- (2) the unavailability of sufficient authorizations or appropriations by the Congress,
- (3) any rescision, impoundment, or refusal to authorize the spending of funds appropriated by the Congress, and
- (4) any inadequacy in any legislation passed by Congress which would further the ends of this act.

(c) *Studies of and funding to meet housing assistance needs—*

(1) The Secretary shall make appropriate studies to determine, under criteria to be developed by the Secretary, the housing assistance needs of any person specified in section 3(b) in each metropolitan area or housing market area, as applicable.

(2) Based upon the studies required under subsection (1) of this section, but not later than eighteen (18) months after the effective date of this act, the Secretary shall notify every governmental body that engages in a land use practice within the metropolitan area or housing market area, as applicable, to which the study relates of

(A) the housing assistance needs of any person specified in section 3(b) of this act who resides within that metropolitan area or

housing market area, as applicable, and the number of assisted housing units needed, and

(B) the number of assisted housing units available to any person specified in section 3(b) which are needed in the political or geographic jurisdiction of the governmental body to which the notice is sent to bring the number of units occupied by such persons up to an amount which equals the proportion of such persons who reside in the metropolitan area or housing market area, as applicable, to which the study relates.

(3) Any governmental body notified under subsection (c)(2) of this section, if the number of units stated under subsection (c)(2)(B) of this section is more than two percent (2%) of the existing housing units within the political or geographic jurisdiction of that governmental body, shall be notified that it has ninety (90) days to prepare an inclusionary land use plan, except that in the Secretary’s discretion the period may be extended for an additional period not to exceed ninety (90) days.

(4) Upon receipt and approval of an inclusionary land use plan under subsection (c)(3) of this section, the Secretary shall, to the extent of funds authorized and appropriated for housing assistance under any federal housing program, make available, for the area within the political or geographic jurisdiction of the governmental body submitting the plan, funds for housing assistance sufficient to assist the number of housing units determined under subsection (c)(2)(B) of this section.

(5) After an interval of at least twelve (12), but not more than eighteen (18) months, the Secretary shall ascertain whether the housing units for which funds were made available under subsection (c)(4) of this section are occupied or available for occupancy, or subject to construction contracts, and

(A) if such housing units are not occupied or available for occupancy, but are subject to construction contracts, the Secretary may extend the period for making units available for occupancy for a period not to exceed six (6) months beyond eighteen (18) months from the date housing assistance funds were made available; or

(B) if such housing units are not occupied, available for occupancy or subject to construction contracts, within twenty-four (24) months from the date housing assistance funds were made

available the Secretary shall notify the governmental body for which funds for housing assistance were made available that the Secretary may take such action as is authorized under subsection (c)(6) of this section.

(6) In the case of a governmental body which fails to submit an inclusionary land use plan under subsection (c)(3) of this section, after notice under subsection (c)(2), or in the case of any governmental body notified under subsection (c)(5)(B) of this section, the Secretary may take such action as is necessary and appropriate to make the housing units available which were determined under subsection (c)(2) of this section.

(7) In making units available under subsection (c)(6) of this section, the Secretary may consider any reasons justifying a failure to submit an inclusionary land use plan or the delay on the part of the governmental body in making housing units available and if the circumstances, as determined by the Secretary, warrant, may provide a further period to the governmental body to make the housing units available, but such additional period shall not extend beyond thirty (30) months from the date funds were first made available under subsection (c)(4); and in any event at the expiration of a period of thirty six (36) months, the Secretary shall take such action as is necessary and appropriate to make housing available under subsection (c)(6) of this section; and in so doing may disregard any land use practice of any governmental body, provided that the Secretary's actions shall not be inconsistent with sound housing planning; and provided further that any governmental service shall be extended to housing made available by the Secretary on the exact terms and conditions that such service is made available by the governmental body to other residential users.

Section 9. The Secretary is authorized to issue rules and regulations. The Secretary is authorized to issue rules and regulations, not inconsistent with this act, which are reasonable and necessary to accomplish the purposes of this act.