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Inclusion Imagined: Fair Housing as Metropolitan Equity

DAVID D. TROUTT†

We're not talking about the Normandy School District losing their accreditation because of their buildings, or their structures, or their teachers. We are talking about violent behavior that is coming in with my first grader, my third grader, and my middle schooler that I'm very worried about. . . . I want the same security that Normandy gets when they walk through their school doors. And I want it here. And I want that security before my children walk into Francis Howell, because I shopped for a school district. I deserve to not have to worry about my children getting stabbed, or taking a drug, or getting robbed because that's the issue.¹

Another liberal social engineering program doomed to fail, just like public housing in the 1960s and busing in the 1970s. While you can force people to work together, you simply cannot force people to live together who don't want to as they will simply pick up and move as people whom they don't want to live next to move in. Even the wealthy white liberals in Bill and Hillary's town are aghast at poor residents moving in. This simply won't work.²

† Professor of Law, Rutgers Law School; Director, Rutgers Center on Law, Inequality and Metropolitan Equity. I want to thank the many Fordham Law School faculty for their helpful comments on an early draft presented at the Fordham Legal Theory Workshop, especially Tanya Hernandez and Nestor Davidson. I am also indebted to the colleagues who commented on a draft presented at the Fourth Annual Local Government Law Scholarship Conference. Elise Boddie and Ventura Simmons provided invaluable insights. I am grateful for the timely and rigorous research assistance from Handel Destinvil, Emily Stein, and Valerie Shore. As always, no work is ever done without the love and support of my family. All mistakes are mine.

1. *The Problem We All Live With*, THIS AMERICAN LIFE (July 31, 2015), <http://www.thisamericanlife.org/radio-archives/episode/562/transcript> (quoting Beth Cرامي, a parent of a child attending Francis Howell School District, Missouri).

2. Comment by Paul from Kansas to *The End of Federally Financed Ghettos*,

INTRODUCTION

In 1968, Congress declared that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”³ It is the purpose of this Article to demonstrate the scope of what that policy covers today. Since World War II, housing policy has been fundamentally concerned with economic opportunity. In the twenty-first century, I argue, fair housing law is fundamentally about reducing economic inequality. I reach this outcome through an analysis of the dual and sometimes overlapping objectives of the Federal Fair Housing Act⁴ itself—anti-discrimination and anti-segregation—and the empirically demonstrable nature of place-based inequality that has given rise to multidisciplinary efforts to achieve “metropolitan equity.”

Sometimes a single conflict captures the complexity of problems that a legal framework was designed to redress. In this example, two school districts in a southern state are separated by thirty miles, racially homogenous student populations, and most measures of academic achievement. State law has temporarily allowed black students from the low-performing district to attend school in the mostly white, high-achieving district, and white parents show up at a school board meeting to vent their collective frustration. Though race is never mentioned, the parents’ rage runs through concerns couched in school safety, resource diversion, and the foreign norms of outsider children. One by one, they deliver into microphones the threats of racial exodus promised by Charles Tiebout.⁵ The issue is as much segregation as education. The year is not 1970, but 2015. The

N.Y. TIMES (July 11, 2015), <http://www.nytimes.com/2015/07/12/opinion/the-end-of-federally-financed-ghettos.html>.

3. 42 U.S.C. § 3601 (2012).

4. 42 U.S.C. §§ 3601–3619, 3631 (2012).

5. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–22 (1956).

gymnasium just happens to be in the South (Missouri) in the same county (St. Louis) that became notorious for the shooting death of a black teenager by a white police officer within the same year. That tragic event in Ferguson, and many more around the country that year, demonstrate that these local, yet national, problems have institutional repercussions that flow from policing to housing to schools to municipal finance and back again.

As the analysis in this Article will show, all of this was contemplated by Title VIII, the last of the major civil rights acts. “Fair housing” is a far more comprehensive term than commonly understood. It has always referenced the goal of racially integrated suburbs as a cure for urban ghettoization, and it has always recognized a regional perspective. At the core of fair housing are two broad ideas: anti-discrimination and anti-segregation.⁶ The line between them is not bright, and the two were expected to overlap depending on the context, though they sometimes conflict.⁷ Both prongs are evident in the legislative history, statutory text, and early judicial opinions. Toward the last part of the twentieth

6. I favor the term “anti-segregation” for most references in this Article rather than “desegregation” or “integration.” Desegregation implies a process for undoing a state of segregation, which applies to some, but not all, of the references discussed here. Integration suggests a step beyond desegregation, according to Dr. Martin Luther King, Jr., the attainment of something socially more interconnected than the numerical decline of segregated conditions. Anti-segregation, on the other hand, is used here to indicate a statutory purpose in opposition to the legacy and policies maintaining segregated conditions in particular places.

7. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 7.3 (2013). Congress did not consider the conflict because it “believed that integration and nondiscrimination were complementary goals.” *Id.* (citations omitted); Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 718 (2008) (“The goal of the FHA was not merely to end housing discrimination based on race and national origin, but to replace the ghettos by truly integrated and balanced living patterns.”) (citations omitted); Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 360 (2013).

century, the anti-discrimination prong became dominant.⁸ Since the turn of the century, the anti-segregation prong has seen a mild renaissance,⁹ including the recent issuance by the Department of Housing and Urban Development of a final rule on the meaning of the Act's requirement to "affirmatively further fair housing" (AFFH).¹⁰ Taken as a unified whole, the Act's two prongs advance an interest in fair housing that encompasses virtually any institutional means that connects people's residential status to social and economic mobility.

This is why it should not surprise us to see that, lurking behind the educational integration issue confronting two school districts in the example above, is a more fundamental problem of residential segregation. Education is viewed by all the parents in the Missouri situation as an institutional mechanism for mobility, a means to better life prospects. For the parents in the high-opportunity district, classroom integration poses the first threat to the stability of that mechanism. By 2015, many comfortably use the language of consumption to remind school board members that they have purchased that stability through home ownership, and they will sell off their stake unless it is properly—in their view—stewarded. Unspoken are the numerous benefits that residents of the Francis Howell district enjoy in securing the foundations of their children's economic opportunities by excluding the much poorer black children from the Normandy district—safe streets to play and compete in, high

8. This may have been a flaw in the law's original design. See John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUSING COMMUNITY DEV. L. 145, 152 (2008) ("The focus on antidiscrimination normative measures has served to increase the freedom of choice for homebuyers, but it has not necessarily helped produce integrated neighborhoods or addressed segregated living patterns.").

9. See, e.g., *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 408 (D. Md. 2005) (finding defendants failed to adequately consider regional approaches to segregated public housing in the city).

10. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

median incomes to attract economic development and job growth, healthy food options, strong libraries, and the rest. What begins in this example with a demand for economically and racially homogenous schools easily corresponds to other aspects of residential membership. It supports the belief among many that “housing policy is school policy”—at least from a structural vantage point.

This understanding of the federal fair housing concept is especially important now that courts as well as local policymakers must interpret a variety of initiatives associated with either mobility-based fair housing litigation, such as the Supreme Court’s recent decision affirming disparate impact analysis in housing choice voucher (HCV) programs,¹¹ the application of HUD’s new AFFH regulations, or the continued experimentation with subsidized housing remedies that are either mixed income or based on dispersal. I argue here that the scope and reach of these initiatives can be significantly greater than we have previously allowed. While the precise scope of Title VIII is impossible to specify, it should be measured by the principle of fairness, or *equity*, and by the interest in *integration* for the clear civil rights purpose of equality of *opportunity*. The equity-integration-opportunity trio of substantive norms underlies the entire design of the legislative and constitutional idea. Fairness is a little-explored feature of fair housing, so I spend time developing that principle later. Integration is also underimagined. While it clearly means racially diverse residential communities, it speaks to something more basic—resources. The imperative of racial integration has always been understood to acknowledge not only the moral goal of inclusive relationships but also the practical consequences of shared resources. There are many ways to share resources more equitably. Thus, integration under the FHA could include a demand for regionally integrated resources. What

11. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2510 (2015).

directs the design of policies that promote resource sharing is the objective of greater economic and social opportunity through compromises deemed equitable. In this way, the three elements of equity, integration, and opportunity reinforce each other. The fullness of this regenerative fair housing architecture has not yet been realized.¹²

For this we have paid the price alluded to in the second quote above. The writer's exasperated reaction to a New York Times editorial supporting HUD's AFFH rule expresses a negative, but mostly neutral, view on residential segregation. Fifty years after passage of the Act, Paul is tired of what he seems to consider unworkable big government schemes to "engineer" what he believes are socially based living arrangements among unwilling partners. Paul is representative of hundreds of public commenters whenever issues of residential segregation or affordable housing make the news (though his language is milder than most). The more pressing issue is not one's closeness to social relationships across race, but rather one's proximity to material opportunity and its institutional ingredients. That is what is being contested in the Missouri gym by white parents who probably sympathize with Paul. Their perennial resistance to the Fair Housing Act, its weak terms and weaker enforcement is, ironically, why segregation remains such a pervasive feature of American residential organization—not our exhaustion over trying to make it work. Yet this is precisely the condition fair housing was supposed to transform.

The persistence of inequality fueled by segregation has

12. In anticipation of the passage of HUD's latest assessment tool for disbursements of HUD funding, ProPublica revisited its 2012 story, which documented HUD's history of non-enforcement. The story found that HUD had only withheld funding for violations of the Fair Housing Act on two occasions since the early 1970s. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (Oct. 29 2012, updated July 8, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

led to the emergence of regional or “metropolitan equity” as a remedial framework for advocates of greater opportunity.¹³ Metropolitan equity is the idea that all parts of a region are relevant to the distribution of opportunity in any part, and that remedies for expanding mobility can and should be assessed on an equitable basis. The concept derives not only from housing and civil rights law, but other disciplines such as economics, urban planning, sociology and political science.¹⁴ Increasingly appealing to lawyers, metropolitan equity examines the structures that reproduce racial and economic inequality and finds them rooted in place. It seeks a more equitable distribution of tax base revenues, housing vouchers, and infrastructure dollars across metropolitan areas, altering a stratified landscape of winner and loser municipalities.¹⁵

Fair housing and metropolitan equity share much in common, but they are not the same thing. They rest on different premises—the one on the presence of discrimination, the other with at least its legacy effects. This Article bridges them in an effort to show the greater scope to which Title VIII is susceptible. To do so, I posit that they are each related species of a common theory of structural

13. See Brief for Housing Scholars as *Amici Curiae* Supporting Respondent at 40, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015) (“HUD has only recently proposed a rule that would condition grants on policies to affirmatively further fair housing, but that such a rule is now being considered nearly 47 years after the Fair Housing Act required it, is itself suggestive of how racial segregation has been permitted to rigidify.”); see also Deborah Nelson & Himanshu Ojha, *Redistributing Up*, THE ATLANTIC (Dec. 18, 2012), www.theatlantic.com/business/archive/2012/12/redistributing-up/266400/ (“Inequality has increased in 49 of 50 states since 1989.”); Rakesh Kochar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics*, PEW RESEARCH CTR. (July 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

14. See generally NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA (Harriet B. Newburger, Eugene L. Birch & Susan Wachter, eds., 2011); WILLIAM H. HUDNUT, *HALFWAY TO EVERYWHERE: A PORTRAIT OF AMERICA’S FIRST TIER SUBURBS* (2004).

15. See MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 28–48 (2002).

inequality. Because this theoretical foundation has not been articulated before, I offer a theory of structural inequality under law. Structural inequality theory entails comparative analyses of the institutional rules governing those place-based public and private institutions most responsible for promoting or retarding equal opportunity. The theory contains the following additional observations: The geography of regional opportunity is predictable and follows patterns of racial and economic segregation that are easily demonstrated. The primary feature of empirical analyses of inequality is concentration—of wealth and well-resourced institutions on the one hand, and poverty and under-resourced institutions on the other. These spatial concentrations (often by jurisdiction) show how place has become the repository of inequitable institutional arrangements—racist and otherwise—that contribute to gross disparities in material outcomes for particular groups. Hence, structural inequality requires the study of formal and informal institutional rules. Which institutions? An incomplete list includes education, health care, housing policies, banking and real estate practices, infrastructure priorities, transportation, law enforcement and criminal justice. One's opportunities for greater mobility are generally no better than the resources available to the institutions with which one interacts.

The Missouri example above reveals that what gained national notoriety as a police shooting in the inner-ring suburb of Ferguson, reflected decades of segregation and institutional inequity across much of St. Louis County's ninety-one municipalities.¹⁶ Studies whose focus, tools, and

16. A brief demographic comparison of the two districts is instructive. The Francis Howell School District (FHSD) serves St. Charles County, a western neighbor of St. Louis County where the Normandy District is located. According to the 2010 Census, the FHSD district is overwhelmingly white (90.9%), with mostly homeowners (85.5%) and very few renters (14.5%). *Census 2010 Profile Report, Francis Howell School District, MO.* CENSUS DATA CTR. (2016), <http://census.missouri.edu/census2010/report.php?g=97000US2928950>. By

normative commitments fall within the rubric of metropolitan equity have shown the historical interaction of several institutions to perpetuate racial and economic inequality across that region since at least the start of the Jim Crow era.¹⁷ More recently, the Department of Justice looked only at the city of Ferguson, yet corroborated many of those findings with respect to coordinated discrimination by the municipal court system, the city council, code enforcement officials, public finance and law enforcement.¹⁸

The problem I consider for the first time in this Article is whether the convergence of fair housing with metropolitan equity should justify an expansion of Title VIII's scope beyond simply housing and urban development. Metropolitan equity is both a descriptive and a remedial framework, but it is not a legal framework, *per se*. Fair housing is a more comprehensive legal framework than perhaps thought, encompassing the twin goals of reducing

contrast, the Normandy district—renamed the Normandy Schools Collaborative since its de-accreditation and re-accreditation—is 97% black, with small percentages of whites and Hispanics, and the vast majority of students are eligible for free and reduced price lunch. *Normandy Sch. Dist.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Normandy_School_District. According to the St. Louis Post-Dispatch, the Normandy high school had the second highest rate of discipline in the state in 2014. Elisa Crouch, *Normandy High: The Most Dangerous School in the Area*, ST. LOUIS POST-DISPATCH (May 5, 2013), http://www.stltoday.com/news/local/education/normandy-high-the-most-dangerous-school-in-the-area/article_49a1b882-cd74-5cc4-8096-fcb1405d8380.html.

17. See, e.g., COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* (2008) (accompanying interactive maps showing the historical patterns of law, policy, and local practice to secure advantages for white communities over blacks are available at <http://mappingdecline.lib.uiowa.edu/map/>); RICHARD ROTHSTEIN, *ECON. POLICY INST., THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <http://www.clime.newark.rutgers.edu/sites/CLiME/files/EPI%20making-of-ferguson.pdf> (analyzing the particular politics and policies that coalesced in reaction to demographic changes across St. Louis County).

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

discrimination in housing and reducing segregation in relationships that go beyond housing alone. Left unresolved, however, is the precise basis for extending Title VIII to other institutional barriers to opportunity, such as infrastructure spending, school choice, or criminal justice. The recent AFFH rule, already a part of the original Act, clearly encompasses the descriptive analysis of metropolitan equity theory. Missing so far is the enforcement authority that would complement its remedial thrust and make it more than aspirational.

I argue that the Fair Housing Act can and should be read to include a much greater scope of cognizable issues than housing, because the anti-ghettoization/integration interests that were earlier understood to be at the heart of the Act's passage have had important, though limited, success across a changed landscape.¹⁹ In Part II, I re-canvass the Fair Housing Act's historical antecedents, legislative history, and early case law in order to demonstrate how its two prongs clearly contemplated a broader scope by half. The Kerner Commission Report on Urban Disorders and Congress's response to the assassination of Dr. Martin Luther King were not simply a call to end discrimination in the sale or rental of housing. They were part of a weakly enforced legislative expectation of racially integrated suburbs that rarely ever materialized. I then define and analyze a spectrum of fair housing case law to determine the elements of more "systemic" litigation efforts to overcome segregation. Part II concludes with an analysis of how the encouragement of the *Inclusive Communities Project (ICP)* disparate impact decision and HUD's AFFH rule only suggests but does not demonstrate a broader scope for the Act. The problem reflects changes in the way racism is conceived now and whether sedimented privileges can be made constitutionally actionable.

19. According to an assessment using slightly different variables, roughly forty percent of such cases have succeeded between 1968 and 2013. See Seicshnaydre, *supra* note 7, at 363.

That problem requires theoretical attention. In Part III, I re-frame it by articulating a theory of place-based inequality whose spatial analysis of disparate institutional functioning supports both metropolitan equity and fair housing remedies. Relying on examples of empirical research (some original) and other sources, I show the convergence between metropolitan equity's interdisciplinary approach to opportunity and the Fair Housing Act's unrealized goals. In Part IV, I analyze this convergence to argue for the Act's extension into areas distinct from, but related to, housing, such as transportation, tax-base sharing, and inter-district educational choice policies. I conclude with the hope that this analysis will encourage governmental entities to view their obligations to fair housing more seriously, embolden fair housing advocates to test the equitable potential of the Act, and offer principles that will aid courts and policymakers in resolving future conflicts.

I. FAIR HOUSING'S TWO IDEAS IN HISTORICAL AND LEGAL PERSPECTIVE

A. *Complementary Purposes, Necessary Divergence*

The twin ideas were born in the violent tumult of persistent discrimination in housing opportunity, thick patterns of resource segregation, and deepening racial isolation. Congress was not particularly trained in reading riots, but the accompanying demands that were articulated by leadership in cities that saw unrest were comprised of a narrative that consistently sought both anti-discrimination and integration with the economic opportunities available beyond the walls of the "ghetto." Underlying the legislative response was an assumption that eliminating discrimination in housing choice would lead to integrated communities, because discrimination caused segregation.²⁰ However, case

20. See, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988) ("Congress saw the antidiscrimination policy as the means to effect the

law reveals a more ambiguous causal pathway—even conflict—between the two ideals²¹ against a history that, as Justice Kennedy recounts in the recent *ICP* opinion,²² is as relevant today as it is familiar.

1. Evidence from the Fire Next Time

One problem with our collective grasp of the civil rights struggles of the 1960s, filtered as they are through the grain of black and white photographs and the imaginations of Hollywood writers, is that we tend to frame from the South. Sit-ins, Selma, and Freedom Rides resulted in legal and cultural changes that are still felt today. By 1967, however, the year before passage of the last Civil Rights Act, the story had moved North. What became a default destination of the Great Migration,²³ the “ghetto” was a northern city phenomenon, where the cumulative marginalizing effects of redlining, urban renewal, and public housing had become the singular experience of African American life and struggle.²⁴

antisegregation-integration policy.”).

21. *Id.* at 1105 (Newman, J., dissenting) (“This statute was intended to bar perpetuation of segregation. To apply it to bar maintenance of integration is precisely contrary to the congressional policy ‘to provide, within constitutional limitations, for fair housing throughout the United States.’”) (citation omitted).

22. *Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 125 S. Ct. 2507, 2515 (2015) (“*De jure* residential segregation by race was declared unconstitutional almost a century ago, . . . but its vestiges remain today, intertwined with the country’s economic and social life.”).

23. *See generally* Craig Heinicke, *African-American Migration and Urban Labor Skills: 1950 and 1960*, 68 *AGRIC. HIST.* 185 (1994).

24. As the poet and playwright LeRoi Jones (later Amiri Baraka) wrote in *Home*, the exodus of whites from the city meant that the city had become by the early 1960s an inheritance distorted by racism. After naming several cities, Jones writes:

In these places life and its possibility, has been distorted almost identically. And the distortion is as old as its sources: the fear, frustration and hatred that Negroes have always been heir to in America. It is just that in the cities, which were once the black man’s twentieth century “Jordan,” *promise* is a dying bitch with rotting eyes.

LEROI JONES (AMIRI BARAKA), *cold, hurt, and sorrow (streets of despair)*, in *HOME*:

All of its manifestations—from segregated schools to drugs, crime and welfare dependency—were contained in the confines of housing. Yet even before the post-war housing programs and War on Poverty, the idea of blackness had become synchronous with traits antithetical to “the good life” in the view of Americans who saw themselves as white. This was especially true of crime and violence. As the historian Khalil Gibran Muhammad describes, twentieth century urbanization witnessed a battle over the meaning of criminality that was waged by intellectuals and politicians alike, using crime statistics and divergent views of nature, to distinguish crimes by European immigrants from crimes by African Americans.²⁵ What emerged was the criminalization of blackness, a pathology of behaviors played out on the streets of Northern cities. Muhammad writes, “[f]or white Americans of every ideological stripe—from radical southern racists to northern progressives—African American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety.”²⁶ These views would accumulate in attitudes about residential space and become calcified and codified in their most explicit structure, segregation. By the middle of

SOCIAL ESSAYS, 115, 115 (Akashic Books 2009) (1966).

25. See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010). Muhammad reminds us of the constructions of race and worthiness for the American Dream on both sides of a century-long racial divide that would inform ideas about residential choice.

The harvest of white ethnic succession—economic mobility, suburban home ownership, union membership, and whites-only schools, playgrounds and recreation centers—sown in the seeds of Progressive era reforms and crime prevention fueled a growing antiliberal sentiment that northern blacks were still their own worst enemies because immigrants by dint of hard work escaped slums in spite of poverty, nativism, and police misconduct.

Id. at 13.

26. *Id.* at 4.

the 1960s, the Civil Rights Movement would force this linchpin of inequality to a Congressional vote.

In January 1966, Dr. Martin Luther King launched the Southern Christian Leadership Conference's (SCLC) "first sustained Northern movement" in Chicago, demanding an end to discrimination in jobs, housing, and schools.²⁷ He faced resistance to his nonviolent message by more militant urban blacks and white backlash so violent in Northern suburbs that he abandoned his march on a Chicago suburb, Cicero, Illinois. "I have never in my life seen such hate," King said after being beaten during a march through a white neighborhood. "Not in Mississippi or Alabama. This is a terrible thing."²⁸ Indeed, nearly half of African Americans lived in Northern cities by that time, many in a public housing project. These were the neighborhoods that revolted in riots after King was assassinated in 1968, leading to passage of the Fair Housing Act. That visceral history of the Northern ghetto finally motivated Congress to act. Unlike other civil rights landmarks, however, the tepidness of the original federal fair housing architecture has ensured that the idea of a ghetto—a racially isolated repository of structural inequality—is not as archaic as the name suggests.

Fair housing was a response to an already sedimented place-based inequality, expressed through a desperate combination of chaotic uprisings, nonviolent protests, and backdoor prodding. At the time of the civil disorders, the social and institutional geography of the country reflected a clear binary between blacks in inner-city neighborhoods and whites in suburbs. The counterweight to this residential segregation by race is often confused for simple residential *integration* by race. Then, as now, this is too facile. Blacks were not so much segregated from white people as they were

27. TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68*, at 500–22 (2006).

28. *Id.* at 511.

excluded from the opportunities connected to the institutions where whites lived. As Malcolm X said in his autobiography, inclusion among the institutions that conferred better life prospects was a “human rights” objective for black people:

Respect as *human beings*! That’s what America’s black masses want. That’s the true problem. The black masses want not to be shrunk from as though they are plague-ridden. They want not be walled up in slums, in the ghettos, like animals. They want to live in an open, free society where they can walk with their heads up, like men, and women!²⁹

Because the resources supporting social mobility followed the residential choices of whites, open housing choice demanded the right to reside where those resources were. Because systemic forms of discrimination prevented blacks from living within the boundaries of those resources, fair housing demanded the right to be free from discrimination. Thus, even in the midst of urban riots and accelerating white flight to the suburbs, the synthesis of anti-discrimination and anti-segregation determined the fair housing idea. The SCLC push for “jobs, housing and education” combined all the institutional connections that were denied from African American mobility as a result of discrimination.³⁰ Courts would soon use the language of avoiding further “ghettoization.”

This synthesis had several antecedents. Nondiscrimination in housing was the underlying principle

29. MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 278 (1965). *See also* BRANCH, *supra* note 27, at 507. Compared to drives for open schools or open employment, “[h]ousing showed contrasting potential, even though relatively few black people wanted or could afford to live in white neighborhoods.” *Id.* at xcvi.

30. *See, e.g.*, STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER* 155, 155–64 (1967) (“The core problem within the ghetto is the vicious circle created by the lack of decent housing, decent jobs and adequate education. The failure of these three fundamental institutions to work has led to alienation of the ghetto from the rest of the urban area as well as to deep political rifts between the two communities.”).

in the nation's first fair housing law, § 1982.³¹ By 1962, President Kennedy's Executive Order 11,063—"Equal opportunity in housing"—enshrined the synthesis in its preamble,³² followed by anti-discrimination provisions mechanized by the threat of a withdrawal of federal housing-related funds. This threat mechanism soon became Title VI of the 1964 Civil Rights Act, under which any recipient of federal financial assistance was prohibited from discriminating on the basis of race.³³ This purse-strings

31. Section 1 of the Civil Rights Act of 1866 states: "All citizens of the United States shall have the same right, in every State and Territory, as it is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (later codified at 42 U.S.C. § 1982). Just prior to passage of the Fair Housing Act, the Supreme Court decided an important case that suggested anti-segregation and the problem of the ghetto might be more appropriately subject to § 1982, based on the Thirteenth Amendment.

[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. . . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live where a white man can live.

Jones v. Alfred Mayer Co., 392 U.S. 409, 442–43 (1968). The Court distinguished the two laws, calling § 1982 a "general statute applicable only to racial discrimination in the rental and sale of property" and the FHA "a detailed housing law, *applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.*" *Id.* at 416–17 (emphasis added).

32. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962) ("WHEREAS such discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their unalienable rights to life, liberty, and the pursuit of happiness . . .").

33. Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964). The 1964 Act provides in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* Additionally,

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is

prohibition is repeated in Title VIII's AFFH provision.

Meanwhile, the post-war exodus of whites to middle-class suburbia was digging in and solidifying gains through non-racial local legislation—primarily zoning. Just as Congress in the 1960s sought ways to dismantle ghettoization through racially explicit non-discrimination and anti-segregation law, homogenous white suburban communities were altering zoning ordinances and regulating the housing landscape to erect significant barriers to entry by blacks, other minorities, and low-income renters through facially neutral exclusionary zoning ordinances.³⁴ The rise of “localism,” discussed in Part III, became a lasting feature of place-based inequality.³⁵

authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Id. at § 2000d-1.

34. As Richard Briffault explained:

[I]n many metropolitan areas exclusionary ordinances had region-wide effects. By 1970, more than 99% of the vacant and developable land in northeastern New Jersey was zoned to exclude multifamily housing. The minimum floor space required of new homes in that part of the state was one-third greater than that set by United States construction standards. In Bergen County, 27,000 acres of developable land were zoned for single-family housing and 131 acres for apartments. In Connecticut's Fairfield County, 89% of the vacant land was subject to minimum lot requirements of one acre or more. Between 1952 and 1968, the average size of a legally developable lot in New York's Westchester County rose from 0.3 acres to 1.5 acres. As a result, the county, which had been zoned for a projected maximum population of approximately 3 million in 1952, had been downzoned to a population maximum of approximately 1.75 million in 1969—a 40% drop during a period of rapid population growth.

Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41 (1990).

35. See David D. Troutt, *Katrina's Window: Localism, Re-segregation and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1111–12 (2008).

2. The Twin Ideas in the Act's Legislative History

As Justice Kennedy noted in *ICP*,³⁶ the Kerner Commission Report was especially influential in crafting the Fair Housing Act—sponsored by two of the report's authors, Senators Edmund Brooke and Weaver. Open housing as the means to access opportunity was central to the analysis. Commissioned to educate the nation about the causes beneath the violent riots and uprisings that had taken place across multiple cities in 1967, the report was quite clear that the site of marginalized opportunity was the “ghetto,” a segregated repository of discrimination, whose isolation threatened the promise of a democracy. Again, the Report describes the “ghetto” as both a tangible, demarcated geographic trap and a symbolic space of social and economic negation. “What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”³⁷ This immediate acknowledgment of the ghetto as a racially contested space—

36. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015) (“*De jure* residential segregation by race was declared unconstitutional almost a century ago, . . . but its vestiges remain today, intertwined with the country's economic and social life.”).

37. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>. This aspect of the Commission's findings had partisan repercussions in Congress, as fair housing and Great Society legislation was being proposed by the Johnson Administration. The language of white responsibility for black misery invited backlash in many Congressional districts. As Marvin Weinbaum notes:

The Kerner recommendations were easily viewed as class legislation. Namely, black America was designated as the prime, or at least the most visible, recipient of any federal generosity. The Commission's admonition that the crisis of the cities would intensify in the face of national inaction was viewed by some legislators as a form of blackmail against the middle-class white taxpayer.

Marvin J. Weinbaum, *Congress and the Commissioners: A New Species of Oversight*, in *THE KERNER REPORT REVISITED* 127 (Phillip Meranto ed., 1970).

less frequently quoted than the Kerner Report's famous observation about two separate and unequal societies—is instructive for its institutional focus. The ghetto is the sum of its institutions, and few of them provide for the opportunity of its residents. On the other hand, the Report found that institutions in suburbia played the opposite role, fueling and sustaining markets of educational and economic mobility.

[F]uture jobs are being created primarily in the suburbs, but the chronically unemployed population is increasingly concentrated in the ghetto. This separation will make it more and more difficult for Negroes to achieve anything like full employment in decent jobs. But if, over time, these residents began to find housing outside central cities, they would be exposed to more knowledge of job opportunities. They would have to make much shorter trips to reach jobs. They would have a far better chance of securing employment on a self-sustaining basis.³⁸

The Kerner Commission and others recognized that fair housing is fundamentally concerned with ameliorating the harsh material consequences of segregation. Integration—or “anti-ghettoization”—was perceived as the way to affect that. The Report's wide-ranging and systemic analysis suggested the need for omnibus legislation, which Congress—even after the assassination of Dr. Martin Luther King—was perhaps unable to deliver. Its recommendations did little more than confront, but not resolve, the problem of coordinated programming among different levels of government, a federalist dilemma for undoing marginalization that operated at multiple, complex levels of society.³⁹ Thus, an

38. For a full account, see Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 384 (2007).

39. Kitsos and Pisciotte noted this underlying dilemma for national legislation when they observed:

In the face of the bewildering proliferation of both community demands and local, state, and federal programs, mayors and city councils need to create new mechanisms to aid in decision-making, program-planning,

underlying tension in turning the fair housing idea into national legislation was—and is—the question of whether it could function as a civil rights statute of general applicability.⁴⁰

As we will see next, anti-ghettoization arguments permeated Senate hearing testimony on a bill that began as H.R. 2516, a civil rights workers' protection law already passed by the House.⁴¹

3. Early Judicial Understandings of the Federal Fair Housing Idea

Senator Mondale's language figured prominently in early FHA decisions. In 1972, the Supreme Court decided a standing case, *Trafficante v. Metropolitan Life Insurance Co.*,⁴² that endorsed two important housing policy ideas: the nexus between discrimination and segregation as well as the Act's interests in promoting broader societal benefits. Two tenants—one white, one black—of a large, San Francisco housing complex sued to enjoin discrimination against nonwhite tenants.⁴³ They alleged three injuries arising from

and coordination. At this time, however, no assistance is available to develop these new and critically necessary institutional capabilities or to support the required research, consultants, staff, or other vital components of administrative or legislative competence. The Commission recommends, therefore, that both the state and federal governments provide financial assistance to cities for these purposes as a regular part of all urban program funding.

Thomas Kitsos & Joseph Pisciotte, *State Legislative Reaction to the Kerner Commission Report: The Case of Illinois*, in *THE KERNER REPORT REVISITED*, *supra* note 37, at 99.

40. This is a complaint made by several courts. *See, e.g.*, *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005) (post-acquisition habitability); *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D. Pa. 1978) (unequal police services).

41. *See* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 150 (1969).

42. 409 U.S. 205 (1972).

43. *Id.* at 206–07.

segregated living environments—the loss of “the social benefits of living in an integrated community,” missed business opportunities that would have accrued from interracial living, and embarrassment and alienation resulting from the stigma of living in a “white ghetto.”⁴⁴ The lower courts had found that § 804 (discrimination in the sale or rental) and § 810 (aggrieved persons) did not allow standing for such suits and rejected their claims.⁴⁵ While not deciding on the merits, the Court reversed, supporting not only the need for broad standing under an Act whose aims must typically be enforced by “private attorneys general,” but the aims themselves. “While members of minority groups were damaged the most from discrimination in housing practices,” Justice Douglas wrote, “the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.”⁴⁶ In other words, fair housing represents a broad interest in integrated living that is frustrated by race discrimination and enforceable even by those only indirectly discriminated against.

Trafficante’s oft-quoted use of Senator Mondale’s words—that “the reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns”⁴⁷—established the connection between the Act’s anti-discrimination goals and its anti-segregation goals. The next year, this construction would control the decision in a Second Circuit public housing case, even in the face of equities that would seem to counsel a contrary result. In *Otero v. New York City Housing Authority*,⁴⁸ displaced black and Latino public housing tenants sued to enforce an earlier

44. *Id.* at 208.

45. *Id.*

46. *Id.* at 210.

47. *Id.* at 211. The Court also quoted Senator Javits, who said in support of the bill that the victim of housing discrimination is “the whole community.” *Id.*

48. 484 F.2d 1122 (2d Cir. 1973).

decision by the housing authority that would put them ahead of mostly white Jewish housing applicants for assignment in new housing on Manhattan's Lower East Side. The minority plaintiffs had been moved out of their homes for redevelopment purposes and promised apartments in the new development. For the housing authority, the interest at stake was avoiding the risk of racial concentration by keeping a mostly integrated neighborhood balanced. Assigning minorities to the new units might invite racial tipping and set the neighborhood on a course toward ghettoization.⁴⁹ The tension pit the authority's constitutional obligations to promote integration against its own regulations favoring displaced low-income tenants. Integration won. What is especially noteworthy about the decision is its reliance upon what it calls the housing authority's "constitutional and statutory" duty "to act affirmatively to achieve integration in housing."⁵⁰ This duty to affirmatively further fair housing is contained in two parts of the Act and, as we will see later in Part III, has become central to reviving the anti-segregation interest in fair housing.⁵¹ The court discussed how the duty compels a housing authority from siting public housing projects in areas already racially concentrated (something housing authorities routinely did).⁵² It summed up the Act's interest

49. *Id.* at 1135 ("The 'tipping point,' or percentage of concentration of non-white residents in a given area that will cause white residents to flee")

50. *Id.* at 1133.

51. *See* 42 U.S.C. § 3608 (2016).

52. *See Otero*, 484 F.2d at 1133 (discussing *Gautreax v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970)); *see also* *Crow v. Brown*, 332 F. Supp. 382, 383 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (describing the extreme concentration of public housing in majority black neighborhoods across only eight of Atlanta's 132 square miles); *Recent Cases—Administrative Law—Urban Renewal—HUD Has Affirmative Duty to Consider Low Income Housing's Impact upon Racial Concentration—Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), 85 HARV. L. REV. 870, 870–80 (1972) (addressing numerous legislative and judicial responses to the phenomena of public housing being concentrated in existing or soon-to-be racially isolated areas).

in ensuring opportunity access through anti-discrimination and anti-segregation: “Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”⁵³

These goals also had the effect of inscribing existing federal housing law with Title VIII’s anti-segregation policy. For instance, in *Shannon v. U.S. Department of Housing and Urban Development*,⁵⁴ plaintiffs successfully sued HUD for failing to administer its housing insurance program procedures in a way that would affirmatively further fair housing.⁵⁵ The Housing Act of 1949 made no such requirement for urban renewal projects. At issue were changes to an urban renewal project that would alter the original plan of single-family homes for sale to one of mostly subsidized rental housing for low-income tenants (i.e., ghettoization) without a public hearing. Plaintiffs argued that § 3608(d)(5) applied to the statutory definition of a “workable program for community improvement,” and required HUD to take racial concentration into account before insuring an amended housing plan in Philadelphia.⁵⁶ The Third Circuit’s language on the interplay is instructive, showing how the progression of federal civil rights acts began with anti-discrimination and continued toward anti-segregation:

Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary, in examining whether a plan presented by a LPA [Local Public Agency] included a workable program for community improvement, could not act

53. *Otero*, 484 F.2d at 1134.

54. 436 F.2d 809 (3d Cir. 1970).

55. *Id.* at 821–22.

56. *Id.* at 816–17.

unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.⁵⁷

As *Trafficante*, *Otero*, and *Shannon* demonstrate, the early case law was concerned with the very objects of policy focus with which Congress and HUD struggled: How to effectuate balanced and integrated communities across jurisdictional boundaries through an Act whose explicit terms only prohibited racial discrimination in housing-related transactions. *Trafficante* is also significant for its holding with respect to standing, interpreting the Act as requiring the broadest possible reach in order to satisfy the Act's objectives.⁵⁸ These cases, therefore, can be read to

57. *Id.* at 816. In language eerily prescient of conflicts to come, the court discussed the then-previous tendency to focus on land use issues in a destructively colorblind way:

Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.

Id. at 820–21. The practice would become the *sina qua non* of localist resistance to integrated communities discussed at Section I.B.1.

58. The Court held that standing under the Act was defined “as broadly as is permitted by Article III of the Constitution . . . insofar as tenants of the same housing unit that is charged with discrimination are concerned.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (internal quotation omitted). “The language of the Act is broad and inclusive,” the Court wrote, and “the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.” *Id.* at 209–10. Standing challenges figure prominently in most of these cases.

establish a certain logic to the anti-ghettoization prong of fair housing litigation: wage increasingly broad attacks on the segregative effects of particular forms of housing discrimination while pushing the boundaries of standing in order to demonstrate the broad zone of interests covered by the Act. This branch of recorded decisions began with smaller cases⁵⁹ yet grew dramatically in the form of much larger, decades-long anti-segregation cases, such as *United States v. Black Jack*,⁶⁰ *Gautreaux*,⁶¹ *United States v. Parma*,⁶² *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,⁶³ *United States v. Yonkers Board of Education*,⁶⁴ *NAACP v. Secretary of HUD*,⁶⁵ *Resident*

59. See, e.g., *Gladstone v. Vill. of Bellwood*, 441 U.S. 91, 110–11, (1979) (where village sued a real estate firm under the FHA for discriminatory renting practices that caused racial segregation, the Court held that the village had Article III standing to bring its claim partly on the basis of “[a] significant reduction in property values,” because such a reduction “directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services”); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (finding racial steering to avoid integrated community).

60. 508 F.2d 1179, 1186–87 (8th Cir. 1974) (invalidating Missouri city’s zoning ordinance that prohibited multi-family housing).

61. 296 F. Supp. 907 (N.D. Ill. 1969), *aff’d*, 436 F.2d 306 (7th Cir. 1970).

62. 494 F. Supp. 1049, 1099–101 (N.D. Ohio 1980) (enjoining city’s pattern and practice of promulgating policies designed to discriminate against residency by blacks).

63. 558 F.2d 1283 (7th Cir. 1977).

64. 624 F. Supp. 1276 (S.D.N.Y. 1985).

65. 817 F.2d 149 (1st Cir. 1987). Here, the NAACP sued HUD for failure to enforce the AFFH obligation in the provision of Urban Development Action Grant (UDAG) and Community Development Block Grant (CDBG) funds to Boston, which contributed to segregation, a lack of open housing for blacks, a lack of affordable housing, and the maintenance of segregated housing markets through acts and omissions that trapped black renters in place. *Id.* at 151–52. Reversing the trial court’s denial of a private right of action, the First Circuit said the city’s conduct amounted “both to a violation HUD’s ‘minority housing needs’ regulation and to a violation of HUD’s Title VIII duty to ‘affirmatively further’ the Act’s policy.” *Id.* at 151. Further, the anti-segregation aim of the Act was violated. “This broader goal suggests an intent that HUD do more than simply not discriminate itself; it reflects a desire to have HUD use its grant programs to assist in ending

Advisory Board v. Rizzo,⁶⁶ and *NAACP v. Town of Huntington*.⁶⁷ Most were filed before the 1988 amendments to the Act (though the litigations continued for many years), only to see a revival under the “affirmatively furthering” idea in the 2000s. Together they point to a fair housing typology that we will explore next in which some cases seek narrower antidiscrimination remedies while others seek systemic anti-segregation reform.⁶⁸ It is the systemic end of the fair housing spectrum that comes closest to what I will describe as metropolitan equity advocacy in Part III.

B. “Systemic” Fair Housing Litigation in Context

As approaches to fair housing matured, the distinction between cases brought to end discrimination in housing and cases brought to effectuate more systemic desegregation became more important. Under the Act, both required a finding of racial discrimination. But housing discrimination

discrimination and segregation, to the point where the supply of genuinely open housing increases.” *Id.* at 155.

66. 564 F.2d 126, 130 (3d Cir. 1977) (affirming disparate impact case of discrimination against Philadelphia for racial discrimination in the siting and assignment policies for public housing on § 3604(a), but not § 3608(d)(5) grounds).

67. 844 F.2d 926, 928–29 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988) (affirming disparate impact case of discrimination against Long Island municipality for discriminating against blacks in construction of multifamily affordable housing only in “urban renewal areas” and discriminatory refusal to rezone).

68. Seicshnaydre offers a different distinction, describing disparate impact cases that target “barrier” regulation and others that target “improvement” regulation.

A housing barrier regulation may operate in one of several respects: to prevent the construction of housing that will likely be used by minority groups in places that currently lack minority residents; to confine housing that will be used by minority group members to neighborhoods where minority households already predominate; or to otherwise deny minority households freedom of movement in a wider housing marketplace.

Seicshnaydre, *supra* note 7, at 360–61. The distinction is useful, particularly to show how “barrier” regulations tend to further segregation. For these purposes, I prefer “systemic” to describe a spectrum of litigation strategies meant to advance the anti-segregation purpose of the Act. Systemic outcomes are also more congruent with metropolitan equity remedies discussed in the next Part.

as an instrument of exclusion could have different effects on opportunity depending on the theory of the case. The theory of the case often reflected differences in the scope of remedies sought, demanding both productive and disruptive reform. The key to understanding the difference between cases on one end of the spectrum or the other involves a focus on many factors. Chief among them are:

- the character of the opposition to fair housing;
- the number of institutions implicated in the discrimination;
- the extent of non-housing institutions implicated in any outcomes sought by plaintiffs;
- the extent of history attacked by the case; and
- the nature of the fairness sought by the relief.

I illustrate these factors in some of the case law next. Keep in mind that many of the most systemic cases include a claim based upon the AFFH clause in § 3608, which we will examine later in this Part. This connection became more explicit last year when HUD finally released the final AFFH rule and its associated compliance architecture.

1. How Anti-Segregation Cases Became Systemic Assaults, A Spectrum

Housing discrimination is not always systemic, a fact reflected in the longstanding critique that the FHA is too atomized in protecting individual plaintiffs from harm.⁶⁹

69. See Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POLY REV. 375, 384 (1988) (“[I]ndividual litigation victories rarely can address large-scale patterns and practices of discrimination.”); see also John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1127 (1998) (“The rights-based strategy of fair housing, as enforced by HUD and in the courts, is an ideological victory that nonetheless has had insignificant effects in desegregating the metropolis and thereby improving the material life of the ghetto poor.”); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 805 (2008) (“[M]ost people who experience

Sometimes discriminatory effects can be confined—part of a societal pattern of exclusion no doubt, and therefore an act to preserve those patterns—relative to other discriminatory conduct. Thus, the owners of an apartment complex that refused to rent to blacks in Columbus, Mississippi engaged in cognizable housing discrimination that, despite its contributions to segregated housing markets, sits at the narrow end of the fair housing spectrum.⁷⁰ Many tester cases share this place on the spectrum of discrimination.⁷¹ After the FHA was amended in 1988 to include specific protection for people with disabilities,⁷² successful actions against construction defendants for failure to adequately accommodate physically challenged residents benefited particular plaintiffs while prosecuting a new legal norm of access on behalf of all disabled people.⁷³ Discrimination against persons based on family status was also added to the

discrimination fail to act . . . [T]hey may not know that they have been victims of discrimination.”); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26 (1993) (offering the argument that “legal rights are *essentially* individualistic, at least in the U.S. constitutional and legal culture, and that progressive change requires undermining the individualism that vindicating legal rights reinforces.”).

70. *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 779–80 (N.D. Miss. 1972); *see also* *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990); *United States v. Reddoch*, 467 F.2d 897 (5th Cir. 1972); *United States v. Harrison*, 188 F. Supp. 2d 77, 79 (D. Mass. 2002); *Oliver v. Foster*, 524 F. Supp. 927 (S.D. Tex. 1981); *Morgan v. Parcener’s Ltd.*, 493 F. Supp. 180 (W.D. Okla. 1978); *United States v. Gilman*, 341 F. Supp. 891 (S.D.N.Y. 1972).

71. *See, e.g.*, *Cabrera v. Jakobovitz*, 24 F.3d 372, 377–78 (2d Cir. 1994) (testers show Brooklyn realtors and landlords collude to discriminate by tenant’s race and steer clients to certain neighborhoods); *United States v. Habersham Props., Inc.*, 319 F. Supp. 2d 1366, 1369–70 (N.D. Ga. 2003).

72. 42 U.S.C. § 3604(f)(3)(A), 3604(f)(3)(C) (2012).

73. *See Petty v. Portofino Council of Crowners, Inc.*, 702 F. Supp. 2d 721, 725–26 (S.D. Tex. 2010); *United States v. Quality Built Constr.*, 309 F. Supp. 2d 756, 759, 767 (E.D.N.C. 2003); *United States v. Pac. Nw. Elec., Inc.*, No. CV-01-019, 2003 WL 24573548, at *1, *45 (D. Idaho Mar. 21, 2003); *Elliott v. Sherwood Manor Mobile Home Park*, 947 F. Supp. 1574, 1575–76, 1577 (M.D. Fla. 1996); *McKinney Found. v. Town of Fairfield*, 790 F. Supp. 1197, 1200, 1201 (D. Conn. 1992).

Act in 1988,⁷⁴ prohibiting discrimination against families that was often a proxy for, or used in tandem with, race and socioeconomic exclusion.⁷⁵ The Act can also be used to prevent one's home from becoming a hostile living environment on the basis of gender.⁷⁶ All of these examples show discriminatory conduct that marginalized people by their race, disability, family status, and gender, which in the aggregate contributes to a larger diminution in opportunity across social spheres. But the particular means of discriminating is institutionally specific and less far reaching, with opposition that hardly organized. The fairness demanded by plaintiffs is straightforward: treat me and others like me equally.

Further on the spectrum are cases in which the anti-segregation nature of the claim against housing discrimination is clearer. These cases may even implicate the very history of the previous cases. For instance, the wholesale removal of housing affordable to Latino day laborers in a Long Island town through zoning action was accomplished by organized institutional (local government) policy, but also with the hindsight of decades of housing discrimination against blacks in that very region.⁷⁷

74. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 42 U.S.C.).

75. *See, e.g.,* Jancik v. Dep't of Hous. and Urban Dev., 44 F.3d 553, 554 (7th Cir. 1995) (family status and racial discrimination in a suburban Chicago suburb); Morgan v. Sec'y of Hous. & Urban Dev., 985 F.2d 1451, 1453 (10th Cir. 1993); Soules v. U.S. Dep't of Hous. & Urban Dev., 967 F.2d 817, 822–24 (2d Cir. 1992). *But see* Easthampton Ctr. v. Twp. of Easthampton, 155 F. Supp. 2d 102, 121–22 (D.N.J. 2001) (FHA claim fails in light of SmartGrowth and tax ratables concerns).

76. *E.g.,* United States v. Gumbaytay, 757 F. Supp. 2d 1142, 1145–46, 1150 (M.D. Ala. 2010) (Attorney General and female tenants sued apartment complex owner, manager, and agents for serial acts of sexual harassment in connection with housing conditions).

77. Rivera v. Vill. of Farmingdale, 784 F. Supp. 2d 133, 136–38 (E.D.N.Y. 2011); *see* Hous. Rights Ctr v. Donald Sterling Corp., 274 F. Supp. 2d 1129, 1132, 1134 (C.D. Cal. 2003).

Advertising cases sit further down the spectrum because of the institutional reach their practices may be presumed to have.⁷⁸ Advertising involves commercial campaigns to create lasting mental associations among as broad an audience as the advertiser can reach.⁷⁹ As *United States v. Hunter*⁸⁰ first demonstrated, advertising implicates at least two institutions in creating market perceptions, the press and the housing vendor.⁸¹ Finally, pattern and practice cases by their nature sit even further down the spectrum.⁸² They represent routinely organized opposition to the Act's goals of inclusion, the conduct deemed "regular" represents policy carried out by at least two, but sometimes multiple, institutions and, because they occur over time, represent the defendants' investment in historically exclusionary practices.

Systemic fair housing cases are a different order of magnitude because, in addition to the factors listed above, they seek both to produce significantly greater access to the institutions responsible for conferring opportunities *and* to disrupt a range of institutional practices that exclude protected groups from opportunity. The productive and disruptive character of these suits is important. An FHA cause of action that challenges segregative public housing siting policy is seeking to produce greater access for public

78. See 42 U.S.C. § 3603(c) (2012); *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 259 (7th Cir. 1996); *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 645–46 (6th Cir. 1991).

79. For an interesting analysis of fair housing advertising case dynamics, see Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69 (1995).

80. 324 F. Supp. 529 (D. Md. 1971).

81. *Id.* at 530, 533.

82. Section 814 of the Act defines a pattern or practice as "resistance to the normal enjoyment of any of the rights granted by this subchapter." 42 U.S.C. § 614(a) (2012). Such alleged resistance must be proved to be more than "isolated or . . . sporadic" acts of discrimination. *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992).

housing tenants to attend better neighborhood schools, shop in better stores, benefit from better-connected information and employment networks, and enjoy more peaceful norms of interaction with law enforcement. In terms of housing alone, it is often designed to relieve chronic overcrowding. Thus, the productive character of systemic litigation affects multiple institutions in both the discrimination and the outcome, attacks historical patterns of behavior, and reinforces a notion of fairness based on equal access.

The disruptive character of systemic litigation is also important as a means of achieving greater opportunity through inclusion. The same public housing lawsuit, if successful, may disrupt voting constituencies and electoral boundaries. Recall that some early FHA cases almost interchangeably discussed anti-segregation and anti-ghettoization as statutory goals. Segregation is a leading cause of ghettoization, but segregation and ghettos are not the same thing. Ghettos, as the Malcolm X quote stated, are isolated, dehumanizing places. When it comes to supermarkets, the availability of insurance, and opportunities for public school teaching, they are “antimarkets”—often offering the least goods and services at premium cost.⁸³ Thus, ghettos were (and are) places of negation, where public law dominates⁸⁴ yet private market dynamics rarely benefit consumers. Anti-ghettoization is, therefore, a process of undoing neighborhood negation. Fair housing litigation that facilitates more racially diverse and socioeconomically unpredictable migratory streams disrupts

83. David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 429 (2000).

84. This is meant quite literally. Because of high rates of public social services use, residency in publicly regulated subsidized housing, heavy use of public hospitals for primary health care, enrollment in public schools, and, most importantly, disproportionate rates of involvement with the criminal justice system, residents of ghetto neighborhoods interact with and are regulated by more public institutions applying public law than anyone else in the United States. *Id.* at 477–78.

these institutional truisms. Not surprisingly, the opposition to these cases is fierce and sustained. Opponents see historic patterns of residential organization being fundamentally challenged. The number of institutions that may be foreseeably altered by the outcome is beyond simple prediction. And the notion of fairness is reparative, a truly equitable construct that goes beyond simple equality and distribution, demanding more for others at the cost of sharing. Thus, even as blunt instruments, systemic litigation may be disruptive of entrenched patterns of inequality.

Examples of systemic cases do not abound, but they are legendary, if not for their transformative outcomes, then at least for their scope, duration, and potential. The *Yonkers* case⁸⁵ challenged the siting of the city's only public housing projects exclusively in the predominantly black southwestern sector (as well as its segregated system of neighborhood schools) over three decades.⁸⁶ The district court found that the ward system had strengthened the resistance of neighborhood groups in all but the weakest (most minority) neighborhoods, and a pattern and practice of segregative intent over housing and school policy had become an institutional norm of local government decision making.⁸⁷ With HUD funding, Yonkers city officials were creating ghettos by ensuring the concentration of poverty and the weak local institutions that accompany it. The judicial remedy was intended to disrupt these institutional arrangements.⁸⁸

85. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).

86. *Id.* at 1376–77.

87. *Id.* at 1373. The court found pattern and practice, “the very essence of which is the recognition that the illegal basis of actions may emerge clearly only when the actions are viewed together.” *Id.* at 1374.

88. The particular strategy of creating or recreating ghetto areas *within* cities is hardly unique to Yonkers. See, for example, the use of downzoning techniques in Philadelphia to impoverish a project for middle-income minority residents in *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 129–33 (3d Cir. 1977).

Two early FHA cases show concerted attempts by multiple institutions to maintain the ghetto on the other side of municipal boundaries. In *United States v. City of Parma*,⁸⁹ HUD attacked longstanding policies by local officials to maintain an all-white Ohio suburb through opposition to all forms of public and affordable housing, enactment of exclusionary zoning ordinances, rejection of federally subsidized low-income housing development, and a refusal to comply with Community Development Block Grant (CDBG) requirements.⁹⁰ Perhaps even more stark was the organization of resistance to integrated communities in *United States v. Black Jack*.⁹¹ White residents of unincorporated land outside of St. Louis learned that townhouses affordable to residents of St. Louis ghettos would be built there by a religious development group, and successfully petitioned the state to incorporate.⁹² The St. Louis County Council accepted the application over the objections on legal, fiscal, and planning grounds of its own planning department.⁹³ Once Black Jack became a municipality, its council speedily passed exclusionary zoning ordinances that barred the development project.⁹⁴ Not only did this exclusion have a clear racial impact (Black Jack's population was only one to two percent black), but, the appellate court noted, the enactment of the ordinance followed a predictable history of segregation by multiple public and private institutions in the region.⁹⁵ These

89. 494 F. Supp. 1049 (N.D. Ohio 1980).

90. *Id.* at 1051–52.

91. 508 F.2d 1179, 1181 (8th Cir. 1974).

92. *Id.* at 1182–83.

93. *Id.* at 1182.

94. *See id.* at 1182–83; *United States v. City of Black Jack*, 372 F. Supp. 319, 323–34 (E.D. Mo. 1974).

95. The Eighth Circuit quoted from the district court opinion when it wrote:

The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis

extraordinary (but not unusual) multi-institutional efforts to attack historic segregation by white residents in two U.S. municipalities show how systemic litigation under the Act aims not just at the crude instruments of inequality, but at systems. Moreover, the systemic cases typically foreground *Otero's* anti-segregation command.

Finally, the mobility cases in some instances span the entire history of the FHA and have come to crystalize the goals of anti-segregative systemic lawsuits. Cases like *Gautreaux* and *Thompson* are perhaps better known for the systemic goals contemplated by their remedies than their strategic origins. In *Gautreaux*,⁹⁶ liability for its racially discriminatory and explicitly ghettoizing tenant selection and assignment policies required the Chicago Housing Authority to reverse its residential planning assumptions and place low-income families in high opportunity and low minority areas (disfavoring “Limited Public Housing Area” and favoring “General Public Housing Areas”).⁹⁷ The demarcations were tied to census tract data (initially 1970).⁹⁸ The linchpin of fair housing here was racial and poverty deconcentration.⁹⁹ The most systemic move came from the Supreme Court’s decision in a companion case to disrupt the assumption created by *Milliken v. Bradley*¹⁰⁰ that

metropolitan area was . . . “in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments”

City of Black Jack, 508 F.2d at 1186 (quoting City of Black Jack, 372 F. Supp. at 326).

96. *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969).

97. *Id.* at 737.

98. *Id.*

99. Beyond race and class, the court sought a dispersal of public housing itself. “[Chicago Housing Authority] shall not concentrate large numbers of Dwelling Units in or near a single location.” *Id.* at 739. No census tract should contain more than fifteen percent of public housing units. *Id.*

100. 418 U.S. 717, 745–46 (1974) (limiting the remedy to the district where disparate treatment was found.); see also *Bradley v. Milliken*, 620 F.2d 1143,

any remedy must be limited to the Chicago city limits.¹⁰¹ This paved the way for truly regional residential planning for inner-city public housing residents and the prospect for regional mobility that was among the original purposes of the Act. As a matter of both fair housing law and policy, *Gautreaux* stands for the proposition that the benefit of fair housing entails mobility to areas of (suburban) high opportunity. While this is plainly anti-ghettoization, it is not absolutely desegregation.

Filed more than a quarter-century after *Gautreaux*, *Thompson v. HUD*¹⁰² squarely attacked the post-*Brown* history of segregation by HUD and the City of Baltimore. The exclusively black, poor, and isolated environments resulting from years of public housing policy had, by the mid-1990s, represented the stubborn durability of ghettoization in the era after white flight from cities.¹⁰³ The theory of fair housing in the case may be the most complete demonstration of systemic litigation in the anti-segregation vein. Some strategic choices may have been inevitable given the statute of limitations. The historical wrongs alleged by plaintiffs against the local governmental defendants were time barred, leaving only federal defendants. This required a statutory claim against HUD for “its failure adequately to consider a

1151–53 (6th Cir. 1980) (requiring the district court to take all measures to remedy the unconstitutional segregation despite the inability to completely remedy the situation without a multidistrict approach).

101. *Hills v. Gautreaux*, 425 U.S. 284, 297–306 (1976). Ultimately, the Court found that *Milliken* merely prevented the restructuring of local governments that did not violate the constitution. *Id.* at 297–98. It did not prevent the court from requiring HUD to operate outside of Chicago where it had the authority to do so. *Id.*

102. 348 F. Supp. 2d 398 (D. Md. 2005).

103. In 1995, the Schموke administration in Baltimore was dealing with competing crises, including an absolute need for affordable housing, reduced federal involvement in its production, and the results of rapid demographic change. Revitalization and desegregation were considered competing interests for such mayors, and Judge Garbis found no intent to discriminate. *Id.* at 444–50.

regional approach to desegregation of public housing”¹⁰⁴ in violation of § 3608(e)(5), the agency’s duty to administer its programs in a manner to affirmatively further fair housing policy. As Judge Garbis noted, this anti-segregation obligation merely began with the duty not to discriminate, but did not end there.¹⁰⁵ With common-sense reasoning, the court found liability for a failure to imagine public housing options beyond the increasingly racially homogenous borders of Baltimore itself, “effectively wearing blinders” to the adjacent region, even if the intent to discriminate was unclear.¹⁰⁶ The case is known for finding FHA liability in HUD’s failure to desegregate through regionalization and for the ensuing program of housing vouchers across counties adjacent to Baltimore.

We learn a lot about systemic litigation by examining the plaintiffs’ myriad claims, though most were unsuccessful. The *Thompson* case was brought against three mayoral administrations, HUD, and the Housing Authority of Baltimore County, and alleged intentional discrimination in violation of the Equal Protection Clause, the FHA, and other Acts in the siting of public housing and tenant assignment policies, the erection of a chain-link fence around one predominantly black housing project that abutted a white neighborhood, demolition without replacement policies, and pattern and practice violations. Plaintiffs did not explicitly allege concerted action among so many defendants, but rather a pattern of intersecting institutional practices that together supported segregated housing patterns within the city.¹⁰⁷

Thompson is notable for an expansion of § 3604(a) and (b) claims, and an intriguing argument to overcome statute

104. *Id.* at 408.

105. *Id.*

106. *Id.* at 409.

107. *Id.* at 407–08. A comprehensive and incisive account of *Thompson* can be found in Roisman, *supra* note 38.

of limitations issues amid claims of historic discrimination. § 3604(a) states that it is unlawful “[t]o refuse to sell or rent . . . or otherwise make unavailable or deny . . . a dwelling to any person because of race.” The court noted that a government entity can effect a constructive denial of a housing opportunity, especially as housing agencies turn to more “intangible” housing programs and subsidies.¹⁰⁸ Considering § 3604(b), which prohibits discrimination “in the provision of services or facilities in connection” with housing, the court affirmed an expansive reading of actionable housing services discrimination.¹⁰⁹ Though not dispositive of the outcome in *Thompson*, the court’s favorable view of constructive denials of housing opportunity and housing-related services under the Act supports broader interpretations of the Act’s reach. Further, the court affirmed plaintiffs’ assertion of the “dissipation of vestiges” theory to extend the statute of limitations. Given the history of segregation and segregatory policy by local government in Baltimore, there were plenty of past violations that plaintiffs wanted to claim as continuing violations. But evidence of a past violation was not admissible to prove a continuing violation, according to the court. However, the court said that the present violation may be the government’s failure to remedy the *continuing vestiges* of the prior violation. Thus, proof of the past violation “would be admissible to establish the fact of the past violation as an element of a ‘dissipation of vestiges’ claim.”¹¹⁰

These details matter. They provide some insight into how the Act’s scope may expand, even in the face of statute of limitations challenges. The answer appears to be the use

108. “Indeed, in an era where housing authorities are transitioning from the provision of ‘hard units’ to the administration of more intangible housing programs involving vouchers *etc.*, a broad reading of § 3604(a) is appropriate to continue to hold government entities accountable under the subsection.” *Thompson*, 348 F. Supp. 2d at 415–16.

109. *Id.* at 416.

110. *Id.* at 426.

of empirical data to establish relationships of inequality that arise from active discrimination, legacy segregation, or both acting in concert.

Information analysis of structural inequality is central to the Court's disparate impact ruling in *ICP*, as we will see next. It is also the very soul of HUD's recent rule on AFFH, the clearest statutory pronouncement that Title VIII is an anti-segregation law.

2. *ICP* and The Role of Disparate Impact Analysis

The Supreme Court gave a considerable boost to the public's contemporary understanding of legacy segregation when it decided *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.¹¹¹ The case was widely presumed to be an opportunity for the conservative justices to disallow proof of disparate impact in FHA claims because the justices had accepted two previous FHA cases on that question (both settled), a question that was not in conflict among the circuits.¹¹² Kennedy's opinion for a 5-4 majority sometimes recalled the spatial dichotomy that prevailed in the era of the Act's passage, describing the *ICP*'s allegation of "granting too many credits for housing in predominantly *black inner-city areas* and too few in predominantly *white suburban neighborhoods*."¹¹³ The facts required the Court to choose between two possibly contradictory federal statutes, the FHA and the Low-Income Housing Tax Credit.¹¹⁴ The latter specifically provided for placing affordable housing in already low-income areas. The majority held that the FHA's statutory purpose as a means

111. 135 S. Ct. 2507 (2015).

112. See *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (granting certiorari on the question of whether disparate impact claims are cognizable under the FHA); see also *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (granting certiorari on the question of whether disparate impact claims are cognizable under the FHA).

113. *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2514 (emphasis added).

114. See *id.* at 2513 (discussing 26 U.S.C. § 42(m)(1)(B)(ii)(III), (d)(5)(ii)(I)).

to eliminate racial isolation held sway. Central to the holding was the fact that the Act anticipated changing modes of discrimination by allowing claims under a theory of disparate impact. According to the Court, “[i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”¹¹⁵ This language is unusual, especially at this time, as is the majority’s recognition that discriminatory housing patterns are systemic. Yet it follows from the majority’s understanding of Congress’s intent in related civil rights laws. Like employment and age discrimination statutes, wrote Justice Kennedy, “antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”¹¹⁶ Thus, the Court affirmed the fundamentally consequentialist framework of disparate impact claims of housing discrimination.

However, by leaving disparate impact intact as a mode of proof in fair housing cases, the Court validated the central empirical role of disparate impact analyses in opportunity claims. If *ICP* had outlawed disparate impact in Title VIII matters, it arguably would have cast doubt on the larger use of data about disparities and disproportionate burdens that is central to the revival of AFFH. As we will see shortly, the AFFH rule is a data-driven mechanism for integration (with the use of HUD data, no less). In Part III, we will see how the move toward increasingly complex empirical demonstrations of facts on the ground characterizes metropolitan equity analyses. The *ICP* Court did not modify

115. *Id.* at 2522.

116. *Id.* at 2511.

HUD's recent disparate impact rule.¹¹⁷ It tightened causation requirements in ways that will be tested by judicial interpretation in future cases.¹¹⁸ Yet in doing so it validated the larger role for analytical proof of structural inequality.

Finally, the *ICP* decision also illustrates the original concept of merging the FHA's twin ideas—that is, that eliminating the denial of housing opportunity by race will eliminate segregation. Justice Kennedy employed strong language affirming the Act's dual purposes and recognizing the work ahead. "Much progress remains to be made in our Nation's continuing struggle against racial isolation."¹¹⁹ However, the *ICP* Court dealt with segregation as a source of inequality caused by discriminatory policy and not the larger ill of segregation for its own sake. While *ICP* is arguably an example of systemic fair housing litigation (by challenging a practice that may lead to habitual re-segregation),¹²⁰ it is just barely so, with plaintiffs able to

117. See *Inclusive Cmty. Project, Inc.*, 135 S. Ct at 2514–15 (describing the disparate impact definition and test in HUD regulations); Implementation of the Fair Housing Act's Discriminatory Effects Standard, Executive Summary, 78 Fed. Reg. 11,460 (Feb. 15, 2013) ("Under this test, the charging party or plaintiff first bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. If the charging party or plaintiff proves a prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. If the respondent or defendant satisfies this burden, then the charging party or plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.").

118. *Inclusive Cmty. Project, Inc.*, 135 S. Ct at 2523–24 (finding that facts or statistical evidence will be needed to demonstrate a causal connection when pleading).

119. *Id.* at 2425.

120. Note, however, that being able to leave the ghetto for the suburb was one of the quintessential routes to equal opportunity that the Act was originally meant to achieve. See 114 CONG. REC. 2277, 3421 (1968) (statements of Sen. Mondale).

challenge a single Department of Community Affairs' policy of tax credit allocation in high-minority, low-opportunity areas. This source of segregation is less common than the cumulative legacy of public and private policies that have shaped residential organization in the United States. For that to be reached, there must be a more affirmative obligation to promote integration.

3. Anti-segregation and HUD's Affirmatively Furthering Fair Housing Rule

One significance of the 2015 HUD final rule on AFFH (the "Rule") is as a policy document resolving questions of the Act's true underlying interest in "fair housing," its purpose, and permissible scope. The interest, according to numerous references throughout the Rule, is opportunity access. Yet advancing that interest is achieved under the Rule through the other half of the Act's purpose: active and studied anti-segregation planning. Thus, the Rule acknowledges the weakness of the previous attempts¹²¹ to inform recipients of the problems associated with fair housing through the Analysis of Impediments (AI) process, and replaces it with a better tool, the Assessment of Fair Housing (AFH), for documenting and overcoming such barriers to opportunity. The breadth of the definition of AFFH is almost limitless:

[A]ffirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, *replacing segregated living patterns with truly integrated and balanced living patterns*, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's

121. HUD, A NEW ASSESSMENT PROCESS TO AFFIRMATIVELY FURTHER FAIR HOUSING 2 (2015), https://www.huduser.gov/portal/publications/pdf/affht_userFriendlyGuide.pdf ("the parameters for the [Analysis of Impediments] are not clear enough, HUD provides no data, and the standards of review are not transparent").

activities and programs relating to housing and urban development.¹²²

What remains for later discussion is how far this commitment goes in extending the scope of relevant activities.¹²³ For now, it is worth examining how the definition of AFFH dislodges the anti-segregation aspect of the Act from the anti-discrimination prong.

The Rule elevates anti-segregation by two means, directly and indirectly—through the requirements for using federal funds (direct) and the compliance process (indirect). The Rule directly emphasizes anti-segregation by declaring it the purpose of the AFH¹²⁴ and developing an even more extensive set of data analyses than before. Under the Assessment Tool,¹²⁵ for instance, very little about community and regional planning is *not* also fair housing. Add in the fact that a fairness standard is implied along with an opportunity interest over all, and it is even harder to imagine any housing-related program that is not also a consequential part of fair housing.

The AFH makes at least four substantive requirements of recipients. First is the analysis of fair housing, using HUD-provided data to study trends in segregation, racially concentrated areas of poverty, significant barriers to opportunity access, and disproportionate housing needs

122. 24 C.F.R. § 5.152 (2016) (emphasis added).

123. See discussion *infra* Part III.

124. “The AFH’s analysis, goals, and priorities will address integration and segregation; racially or ethnically concentrated areas of poverty; disparities in access to opportunity; and disproportionate housing needs based on race, color, religion, sex, familial status, national origin, and disability.” 24 C.F.R. § 5.154(d) (2016).

125. See HUD, ASSESSMENT OF FAIR HOUSING TOOL 1–5, app. C at 7, <https://www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf> (assessing community regional characteristics, such as transportation and location of employers under the fair housing analysis).

experienced by protected classes.¹²⁶ This, as we will see in the next Part, is a quintessential metropolitan equity inquiry—here as an open-ended investigation for any and all recipients of HUD funding. Second, is an “assessment of fair housing issues” that elaborates on the preceding requirements.¹²⁷ This is followed by the identification of fair housing priorities and goals, which include prioritizing contributing factors in the applicant’s discussion.¹²⁸ Goals, and the strategies for achieving them, must be formulated and defended.¹²⁹ All of these requirements must be subjected to community participation and public comment. There are additional compliance requirements for civil rights laws and equal employment opportunity.¹³⁰

Indirectly, the Rule elevates the anti-segregation interest in the way that its compliance provisions work. Before the Rule, the AI was a voluntary effort made by the recipient and kept by them. Recipients now must incorporate the AFH into their consolidated plan and submit it to HUD as certification that they do indeed affirmatively further fair housing. Even then, HUD may reserve the right to challenge compliance or seek additional assurances.¹³¹ The Department effectively keeps a recipient’s developed record of segregation and may do nothing, reject it, or demand modifications.

Mirroring so much metropolitan equity work, the comprehensive goals of the AFFH process (racially balanced communities of opportunity) and expanded scope (a wide variety of institutions important to opportunity production) indicate a modernized view of inequality that is structural and complex. The Rule clearly delineates a concept of fair

126. 24 C.F.R. § 5.154(d)(2) (2016).

127. *Id.* § 5.154(d)(3).

128. *Id.* § 5.154(d)(4).

129. *Id.*

130. *See id.* § 570.904(a)–(b).

131. *Id.* §§ 5.166(b), 570.304(a).

housing that encompasses far more than housing:

A program participant's strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.¹³²

It has the potential to require far more substantial anti-segregation initiatives by municipalities and other recipients than ever before.

But what really compels compliance? The consequences are far from clear. The AFFH contains no private right of action as other violations of the Act do, though HUD may still be sued under the Administrative Procedure Act for failure to administer its programs in a manner that affirmatively furthers fair housing.¹³³ Not being accepted appears to be the

132. *Id.* § 5.150.

133. P.R. Pub. Hous. Admin. v. HUD, 59 F. Supp. 2d 310, 324 (D.P.R. 1999). See also *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1537 (11th Cir. 1984) (describing two bases for suing HUD: when the Department discriminates and when the Department fails to enforce compliance with the Act against a recipient of whose discrimination it is aware).

This has been a consistent complaint from fair housing advocates about the drafting of the final rule. The National Commission on Fair Housing and Equal Opportunity, for instance, argued the following:

[T]he Fair Housing Act contains no administrative procedure for HUD to accept a complaint based on Section 3608 In addition, because the Act does not include violation of Section 3608 as one of the provisions that the Department of Justice has authority to enforce, the federal government has no ability to enforce Section 3608 in court. Also, even in private actions brought in court, the deferential standards of review under the Administrative Procedure Act make it very difficult to prove liability against the federal government. Finally, because of sovereign immunity, even if they are successful in their injunctive relief claims,

only threat, and even that does not appear to doom a recipient's funding. Against a backdrop of resistance at least two generations old, the AFFH rule contains everything necessary to a housing-based idea of equal access to opportunity except a reliable enforcement mechanism.

4. Privilege and the Constitutionality of Race Consciousness: Injury vs. Remedy

The analyses in this Part would not be complete if we failed to acknowledge the constitutional role of race-conscious remedial action by courts and agencies responsible for housing policy, especially in the context of systemic litigation. This may be proclaiming the obvious, but unlike many areas of law affecting racial inequality, fair housing has survived contests over intentionality that have privileged "color-blind" framing of inequality as "societal" or "economic" rather than racial. This seems true for two primary reasons.

First, the compelling governmental interest against both racial discrimination and segregation are, as we have seen in this Part, well-established in the legislative history,¹³⁴ Congressional amendments,¹³⁵ executive orders,¹³⁶ and agency action.¹³⁷ Despite the strong pull of the color-blind frame, a governmental interest in the policy of fair housing makes at least pleading racial injury easier than, say,

civil rights plaintiffs may not be able to recover damages from federal and state entities for violations of § 3608.

NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING app. A (Dec. 2008), <http://www.civilrights.org/publications/reports/fairhousing/emerging.html>.

134. See discussion *supra* Section I.A.2.

135. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 42 U.S.C.).

136. See Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962); see also Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (Jan. 20, 1994).

137. See, e.g., Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).

seeking racially integrated schools or workplaces. Cases brought in both the anti-discrimination and the anti-segregation veins must show specific racial impact. Proof of disparate impact depends upon demonstrating patterns of racially discriminatory decision making and the resulting causation of measurable racial impact, to the exclusion of other primary causes, a framework left undisturbed by the Court in *ICP*. Similarly, HUD's recent AFFH rule reminds users at multiple turns to take race into documented account in analyses of fair housing, from racial history, to the history of racialized policymaking, to racially disparate educational and employment outcomes, and the formulation of plans to eliminate those disparities as a condition of HUD's acceptance. At least in the area of federal fair housing law (state laws have taken other approaches),¹³⁸ the constitutional language we use to describe racial inequality in residential organization relies unapologetically upon racial terms, categories, and experiences.

Second, it may be easier to discuss racial injury in fair housing law because lawyers do not believe they have to rely upon race in the remedy phase. Remedies, as we will see later in the discussion of metropolitan equity, tend to be spatial, where racial proxies abound. Siting decisions or portable voucher use can be designated in economic terms (e.g., "low-poverty areas") without reference to the specific racial composition of the geography.¹³⁹ Indeed, many housing

138. For example, the New Jersey Fair Housing Act was modeled after the state Supreme Court's nonracial *Mt. Laurel* doctrine, a complicated affordable housing program based on meeting "fair shares" of regional housing need based on socioeconomic, rather than racial, status. See discussion *infra* Section II.C and accompanying notes.

139. For example, Justice Kennedy's description of the *ICP* plaintiff's allegations uses the language of race and its euphemisms in consecutive sentences:

ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and

programs aimed at some degree of integration use race in everything short of the final outcome, such as marketing of units to racially identifiable applicant pools and the collection of racial data for program administration. Outlier cases, such as *Walker v. City of Mesquite*,¹⁴⁰ may also have contributed to a reticence among civil rights plaintiffs to couch remedies in explicitly racial terms. And remedies that give preference to individuals by race or that employ racial quotas are almost certainly unable to overcome strict scrutiny.¹⁴¹

However, it is worth considering whether the FHA *should* operate on more racially specific remedial terms, and if so, how. Commentators have offered several grounds for

too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty's Project, Inc., 135 S. Ct. 2507, 2514 (2015).

140. 169 F.3d 973 (5th Cir. 1999). The case involved white homeowner associations objecting to racially specific housing programs arising from the consent decree in *Walker v. HUD*, 734 F. Supp. 1231 (N.D. Tex. 1989), in which new housing opportunities were to be built in “predominantly white areas.” *Walker v. City of Mesquite*, 169 F.3d at 977. The white homeowners alleged that such racially specific plans singled them out for various disadvantages arising from the building of public housing nearby. *Id.* at 979. The Fifth Circuit agreed and held that the plan was not narrowly tailored enough to avoid harm to third parties and entertain less onerous alternatives, such as voucher programs. *Id.* at 985. However, a subsequent remedial plan, meant to remove the offending racial language yielded the same siting result but relied on economic indices and measures of segregation. *See Walker v. City of Mesquite*, 402 F.3d 532, 534–35 (5th Cir. 2005); *see also United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (holding racial quotas impermissible for the purpose of “maintain[ing] a fixed level of integration”).

141. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *see also Inclusive Cmty's Project, Inc.*, 135 S. Ct. at 2512 (“Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.”).

using race explicitly,¹⁴² including the interest in “avoiding racial isolation” announced by Justice Kennedy in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁴³ We might consider four other arguments. First, the persistence of racial segregation makes all non-racial alternatives possible. That is, the emphasis on socioeconomic place, mapped opportunity indexes, or other analogous measures effectively mimic racial outcomes only because of the measurable presence of racial segregation. Explicit use of race removes the mask of euphemism and more directly effectuates the compelling interests behind the Act. Second, as we will see more fully in the next Part, colorblind end-runs around anti-segregation programs, such as our system of local sovereignty, have created or reproduced patterns of segregation that may be more sustainable than the *de jure* forms they replaced. Continuing to seek nonracial remedies may indirectly encourage the strategy of nonracial end-runs by reifying the nonracial framework. Third, systemic problems may demand direct remedies. It is precisely the underlying racial network of interacting exclusions in systemic housing cases that demands a more frontal approach to exclusion by race. Fourth, because poverty is not a protected class, race must continue to be available as a proxy for disadvantage. This argument turns the earlier ones on their collective head, but it is no less persuasive as a practical matter. Sometimes race discrimination is the only constitutional route to addressing class discrimination.

There are arguments against race-conscious remedies, too. First, because public buy-in is so important to systemic change, accommodation matters. This argument counsels us

142. *E.g.*, Adam Weiss, Grutter, *Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Suits*, 107 COLUM. L. REV. 1195, 1196–98 (2007).

143. *Parents Involved in Cmty. Schs.*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment); *See generally* Philip Tegeler, *The Future of Race-Conscious Goals in National Housing Policy*, in PUBLIC HOUSING AND THE LEGACY OF SEGREGATION (Margery Austin Turner, Susan J. Popkin & Lynette Rawlings eds., 2009).

to read the prolonged resistance to “balanced and integrated living patterns” as evidence of something more than law can transform, a durable and material expression of socially-constructed identities in conflict. Failure to accommodate these amorphous divisions by projecting racial remedies (and implied explanations) onto them will be counterproductive and contribute to even more cultural polarization than we already have. Second, even if the FHA’s plain language describes clear racial interests, the culture’s language has changed. The common avoidance of racially explicit language in a country where it was once so prevalent is not an insignificant phenomenon, the result only of clever conservative manipulations. Generations now understand these terms differently but without consensus on what they mean. This contributes to an overall confusion that can be counterproductive to fair housing goals. Therefore, where better-understood alternatives exist, use them.

However, there is something else: privilege. Without resolving the arguments on both sides, let me posit that a modern characteristic of racial exclusion that complicates the traditional analysis of race-conscious remediation is the mindset of privilege. Privilege—white and otherwise—is as much the character of resistance to racial inclusion as anything else. The Francis Howell school district parents from the Introduction may speak in a code known to some as racist, but their overt concern is the preservation of privilege. They want to keep the situation they bought, which they understand as access to middle-class opportunities for their children. These are settled expectations for them and millions of Americans, who often regard these social purchases as rights. Is the self-interested preservation of social gains racist because it follows consistent patterns of racial exclusion? Put another way, is defense of a “right” to accumulated privilege—especially asserted by whites—that systematically devalues the presence of nonwhite (and non-Asian) members a manifestation of their racism? This is really a question of the scope of the Act. In 1968 and the first

decades beyond, it is probably fair to say that most of the country recognized “discrimination” and “segregation” as the instruments of racism. The confusion I allude to in the argument above may reflect the transformation from patterns of racially distributed benefits established by overt racism into patterns of entitlement that have been re-established on nonracial terms. This may be less an issue of unconscious racism than it is one of opportunity hoarding along racially unconscious but no less demonstrable lines. This is a significant problem for a framework that relies upon past constructs of harm and liability to accurately portray and dismantle racially identifiable barriers to opportunity today.

Resolving the ultimate issue of the Act’s scope requires the work of the rest of the Article. The resolution of how race consciousness works can only be done here if we properly understand racism itself. Whatever its particular manifestations, racism is at bottom the devaluation of personhood based on race. It requires both the ability to devalue and the capacity to impact important aspects of what it means to be a person. Institutional racism achieves this in material ways. Much of this understanding is conflated in a constitutional—now social—regime in which most racism remains stuck in notions of overtly expressed animus and clear intentionality. Some settings have become so “color-scared” that the mere mention of race earns the speaker the label of “racist.”¹⁴⁴ It is fortunate that a Supreme Court majority in opinions like *ICP* has recognized the persistent institutional character of racism that pervades residential organization in the United States. With judicial recognition of persistent racial devaluations, attempts to justify the hoarding of racial privileges as nonracial entitlements can fairly be viewed as a modern expression of institutionalized racism. They must continue to qualify for race-conscious

144. For instance, later in their meeting, many in the Francis Howell crowd accused a parent concerned with racial exclusion of being a racist for even raising the issue of race. See *The Problem We All Live With*, *supra* note 1.

remediation under our laws. The *Thompson* case exemplifies the calcified layers of once-racial policies at the core of a race-neutral landscape in Baltimore County. The crisis of institutional racism sanitized by nonracial privilege hoarding sits in *Thompson's* doctrinal crosshairs: opportunity denial, under-resourced facilities related to housing and housing policy that failed to dissipate the vestiges of past discrimination out of the unwillingness to cross the jurisdictional boundaries of privilege. Important as it is, however, resolving the question of racism and race-conscious remedies brings us only a little closer to figuring out how the Fair Housing Act may increase equitable access to opportunity across metropolitan America.

C. Conclusion

This Part began with the origins of fair housing law in two ideals, anti-discrimination and anti-segregation, both undeniably freighted with racial terminology and manifest in geography. The analysis proceeded to show how the two goals interact (and occasionally conflict) for the primary statutory purpose of opportunity access and production. Systemic impact litigation showed some of the Act's potential in seeking more than racially balanced neighborhoods but also inclusion in the resources necessary for greater opportunity for residents of isolated "ghettos." The AFFH rules promulgated by HUD codify this idea in a complicated apparatus of regional research tools designed to show not only physical distance between the affluent and economically disadvantaged minorities, but also the distance from resources that the latter experience. Nonetheless, little has effectively moved metropolitan areas beyond the hoarding of residential privilege. These shortcomings of fair housing policy have given rise to multidisciplinary advocacy called "metropolitan equity," the study of disparities in opportunity access across regions. As we will see, these remedial ambitions lack the enforcement power of a civil rights statute, even one as notoriously weak as the FHA. The

problem, I argue, is the lack of a theory of structural inequality underlying, if not uniting, both fair housing and metropolitan equity. We make that theoretical turn in the next Part.

II. A LEGAL THEORY OF STRUCTURAL INEQUALITY, THE EQUITY PRINCIPLE, AND THE EMERGENCE OF A METROPOLITAN EQUITY REMEDIAL FRAMEWORK

Despite the attention given to rising levels of inequality in the United States over the past several years, very few scholars discuss place-based inequality among the causes or cures.¹⁴⁵ This is a glaring omission that may have something to do with the disciplines from which these thinkers come. If the nation's rough idea of inequality can be boiled down to a lack of access to opportunity, then the structure of inequality is more accountable to where one lives than to more popular analyses of the jobs one holds or the income one earns. Market-centric critiques of relative economic opportunity are valuable, but they miss the local environments in which skewed markets are first manifest. Thus, a legal theory of structural inequality has to comprehend the broader environment in order to explain how more proximate geography determines access to economic opportunity. It must say something compelling not just about relative access to financial capital, but about our relative access to the means of developing social and human capital as a means to financial capital. It must also speak to re-segregation, the strongest force dividing people from opportunity based on place. As we have seen, the Fair Housing Act's equal opportunity approach to ending racial segregation is co-extensive with ending racial discrimination in housing. But what if inequality arising from segregation is not as often

145. Not, for instance, such influential scholars as Thomas Picketty or Joseph Stiglitz. Neither discusses residential segregation as a significant contributing factor in rising inequality. *See generally* THOMAS PICKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); JOSEPH STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012).

activated by actionable housing discrimination? What if the most impactful discrimination is tangled amid policies and practices whose motives are at best mixed, if discernible at all? What if some re-segregation outcomes are better understood as the unequally distributed benefits that flow systematically out of intergenerational privilege? That is the problem confronted by the theory of structural inequality that follows.

A. *Structural Inequality Under Law—Place, Institutions, and Inequitable Rules*

1. Localism as Successor Segregation

Before positing a theory of structural inequality, it is important to set forth briefly what happened to sustain segregation after the most overt means of housing discrimination—insurance and mortgage redlining, racially restrictive covenants, blockbusting, steering, and outright discriminatory refusals to rent or sell—were outlawed. It was localism, the form of local governance, or local sovereignty, most associated with suburban municipalities in many parts of the country, especially the Northeast, Midwest, California, and Texas. The 1970s-era jurisprudence of both fair housing and exclusionary zoning is replete with cases in which facially neutral exercises of local sovereignty were challenged—usually unsuccessfully—for their exclusionary and segregative effects.¹⁴⁶ Scholars have explained the deference given these segregative arrangements under the cloak of non-racial local governmental decision making.¹⁴⁷

146. See *United States v. City of Parma*, 661 F.2d 562, 564–65, 578–79 (6th Cir. 1981); see also *Warth v. Seldin*, 422 U.S. 490, 493 (1975); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8–9 (1974); but see also *United States v. City of Black Jack*, 508 F.2d 1179, 1181–82 (8th Cir. 1974); *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 734 (N.J. 1975).

147. See GERALD E. FRUG, *CITY MAKING: BUILDING CITIES WITHOUT BUILDING WALLS* 77 (1999); Briffault, *supra* note 34, at 45–48; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 383–85

They have ably described how jurisdictional boundary making created insiders with voice, and outsiders without, on police power issues of zoning, land use, educational finance, and districting. Others have defended its exclusionary exercises of the police power on legislative (home rule) and democratic grounds.¹⁴⁸ Yet rare has been the assertion of its accountability for the re-segregation that habitually followed mass suburbanization.¹⁴⁹

Re-segregation through suburban localism externalized risk from stronger to weaker municipalities; the latter were unable (or in some cases unwilling) to exclude less desirable uses (power stations, sewage treatment facilities, multifamily housing) and people. Affordable housing—either subsidized housing or housing whose market rates are affordable to lower-income occupants—concentrated in particular towns, almost always nearest the central city. The white flight that characterized the 1950s and 1960s simply fled farther out into the metropolitan periphery. What protected homogeneity under localism, however, was not race-based discrimination (although overt housing discrimination by race continues to occur). It was mainly the pattern of municipal markets, “favored quarters” with well-resourced institutions, that followed wealth and zoning, political power and sheer distance from critical masses of people of color.¹⁵⁰ Rational planning principles and basic truisms of public finance helped to normalize localism as a way of life. “Our localism,” as Richard Briffault called it,¹⁵¹ did not have to be understood consciously as racial

(1990); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1874 (1994).

148. See generally WILLIAM A. FISCHER, *THE HOME-VOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

149. Troutt, *supra* note 35, at 1145–46 (2008).

150. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2003, 2012 (2000).

151. Briffault, *supra* note 34, at 5.

separation. It was merely the rational preservation of household investments actualized with predictable consistency according to the same demographic patterns. Thus, what localism did was to instantiate many of the cultural values supporting resistance to integration in the 1960s by monetizing the financial value of segregation and rendering it self-executing. That the resulting system of preferences is race neutral by its terms makes it almost impossible to reform.

Most importantly, the racially and economically segregated system of preferences was almost impervious to legal remedy. Racially neutral exercises of local control over community character and basic services consistently received judicial support under rational basis review. Even the more liberal state supreme court education finance cases of the 1980s defer to the importance of preserving local control in spite of the resource inequality they produce between districts.¹⁵² Similarly, in the exclusionary zoning realm, even the handful of states that scrutinized the extra-local effects and regional cost-shifting associated with such land regulation left undisturbed the fundamental primacy of local control.¹⁵³ As we will see, the critique of localism would

152. *E.g.*, *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982) (“The historical development of public education in Colorado has been centered on the philosophy of local control.”); *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 788–90 (Md. 1983); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 367–69 (N.Y. 1982); *Bd. of Educ. of the City Sch. Dist. of Cincinnati v. Walter*, 390 N.E.2d 813, 821–22 (Ohio 1979); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1146, 1149 (Okla. 1987); *Olsen v. State*, 554 P.2d 139, 146–47 (Or. 1976), *superseded by constitutional amendment*, OR. CONST. art. XI, § 11a.

153. *See, e.g.*, *Robert E. Kurzius, Inc. v. Vill. of Upper Brookville*, 414 N.E.2d 680, 682–85 (N.Y. 1980) (sustaining five acre minimum lot requirement); *see also* *Suffolk Hous. Servs. v. Town of Brookhaven*, 511 N.E.2d 67, 69–71 (N.Y. 1987) (sustaining local zoning that made no provision for multifamily housing); *N. Shore Unitarian Universalist Soc’y, Inc. v. Incorporated Vill. of Upper Brookville*, 110 A.D.2d 123, 124, 128 (N.Y. App. Div. 1985) (facially valid zoning ordinance not invalidated where market forces prevent multifamily home construction); *Blitz v. Town of New Castle*, 94 A.D.2d 92, 99–100 (N.Y. App. Div. 1983) (describing the rational basis review to which a zoning ordinance is subjected).

become unduly tied up in the quest for regionalism (or a “New Regionalism”) when, as the next section demonstrates, localism is best understood as merely one engine of persistent structural inequality.

2. The Theory of Structural Inequality

Table 1. Structural Inequality—Theoretical Elements

Interest	Equal access to opportunity
Source of Opportunity	Public and private institutions
Measures of Inequality	Resources (fiscal, in/tangible)
Lens	Comparative formal and informal rules and customs
Standard	Equity (appropriate fairness)
Units of Analysis	PLACE: Metropolitan regions, race, and class
Outcomes	Fairer rules, lower disparities

Structural inequality is the organization of spatial inequality. The table above summarizes the key elements of the theory of structural inequality and represents a reverse-engineering of the inequalities described earlier. Before we discuss it, consider a tale of three municipalities that stretch in a line from a central city in perpetual near-renaissance. All three represent important trends in place-based regional inequality. Adjacent to the City is an inner-ring or “first suburb” that had once been a working- to upper-middle class suburb, but has seen successive waves of white flight and declining tax base since even before the City’s defining civil unrest in 1967. Between 2000 and 2010, black and Latino students have remained 99% of the town’s school district population,¹⁵⁴ the percentage of kids qualifying for free and

154. *Student Demographics*, EDUC. LAW CTR., (Oct. 14, 2016), <http://www.edlawcenter.org/research/data-research.html> (select “Historical Data” then Select District “Irvington Township” and Select School Year “1999–

reduced meal lunch (a measure of poverty and near poverty) is 74%,¹⁵⁵ and median household income has risen modestly to \$38,165¹⁵⁶ from \$36,575 in fourteen years.¹⁵⁷ Town #1 is 85.4% black,¹⁵⁸ 66.6% renter,¹⁵⁹ and had a 2014 family poverty rate of 28.4%.¹⁶⁰

Town #2 is just a few miles down some of the main thoroughfares that form a megalopolis away from the City. It represents the upper half of a place urban scholar David Rusk and I call a “DIMI,” a diverse and inclusive, moderate-income municipality.¹⁶¹ Its median income of \$116,014 shows that it is more substantially middle income than moderate¹⁶² (the regional median was \$99,631 in 2010).¹⁶³ Its 3:1 ratio of

2000”); *Id.* (select “Current Data,” then select race under “Select Race/Ethnicity”).

155. *Id.* (select “Current Data,” and refer to “Students in Special Programs” and select indicator “Free/Reduced Lunch”).

156. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1901/0600000US3401334450 (last visited Oct. 13, 2016) (2014 Irvington, N.J. Income Census Data).

157. *American FactFinder*, U.S. CENSUS BUREAU http://factfinder.census.gov/bkmk/table/1.0/en/DEC/00_SF3/DP3/0600000US3401334450 (last visited Oct. 13, 2016) (2000 Irvington, N.J. Income Census Data).

158. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP05/0600000US3401334450 (last visited Oct. 13, 2016) (2014 Irvington, N.J. Race Census Data).

159. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP04/0600000US3401334450 (last visited Oct. 13, 2016) (2014 Irvington, N.J. Housing Census Data).

160. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1702/0600000US3401334450 (last visited Oct. 13, 2016) (2014 Irvington, N.J. Poverty Census Data).

161. See discussion *infra* Section II.C.

162. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1901/0600000US3401343800 (last visited Oct. 13, 2016) (2014 Maplewood, N.J. Income Census Data).

163. TOGETHER NORTH JERSEY, FAIR HOUSING & EQUITY ASSESSMENT REPORT (2015) http://togethernorthjersey.com/wp-content/uploads/2015/08/FHEA_Report_031715.pdf.

owners to renters¹⁶⁴ and availability of some, mostly market rate rental apartments suggests a tradition of inclusiveness that is more than accidental and a fragile state of racial integration. In fact, this town stands out for its overt embrace of diversity, which sometimes means that its realities, such as racial achievement gaps in its schools, frustrate a proud mythology and are often downplayed. Town #2 is 30.2% black,¹⁶⁵ 22.2% renter,¹⁶⁶ and had a 2014 family poverty rate of 5.8%.¹⁶⁷

Town #3 sits along the same county arteries but has seen its racial diversity increase primarily through the addition of Asians (15.7%) to its overwhelmingly white population (80.1%).¹⁶⁸ It is a classic suburb: affluent and stable. Between 2000 and 2010, the percentage of black and Hispanic school children in its highly ranked schools has barely changed at 3%.¹⁶⁹ Nor has the percentage of children receiving free and reduced lunch increased beyond 2%.¹⁷⁰ But job growth in a

164. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP04/0600000US3401343800 (last visited Oct. 13, 2016) (2014 Maplewood, N.J. Housing Census Data).

165. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP05/0600000US3401343800 (last visited Oct. 13, 2016) (2014 Maplewood, N.J. Race Census Data).

166. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP04/0600000US3401343800 (last visited Oct. 13, 2016) (2014 Maplewood, N.J. Housing Census Data).

167. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1702/0600000US3401343800 (last visited Oct. 13, 2016) (2014 Maplewood, N.J. Poverty Census Data).

168. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP05/0600000US3401346380 (last visited Oct. 13, 2016) (2014 Millburn, N.J. Race Census Data) (the Asian population is primarily Chinese and Asian Indian).

169. *Student Demographics*, *supra* note 154 (select “Historical Data” then Select District “Millburn Township” and Select School Year “1999–2000”); *Id.* (select “Current Data,” then select race under “Select Race/Ethnicity”).

170. *Id.* (select “Current Data,” and refer to “Students in Special Programs” and select indicator “Free/Reduced Lunch”).

municipality scaled primarily for single-family homeownership has risen dramatically. Nevertheless, Town #3 is only 1.9% black,¹⁷¹ has a median income of \$165,944,¹⁷² and a poverty rate of just 2.9%.¹⁷³

There are several observations to make about the comparative status of these towns that help to define a theory of structural inequality. The first is that we are comparing them at all and doing so within a regional lens.¹⁷⁴ Although each pretends to stand on a separate but equal existential footing—a home rule grant, the common interest in stability, governed by local sovereignty—they have a historic relationship to each other that is often competitive, adversarial, and occasionally cooperative. This is because the character of localism in a regional context reflects societal beliefs in free enterprise. Each place is born equal with certain unalienable rights to compete in a metropolitan competition for tax base, effective exclusions, and stable growth. Town #3 wants never to be Town #1. Town #1 bears the burdens that Town #3 has effectively disowned and still cannot believe how like the central city it has become. Town #2 is an ambivalent buffer between them, wanting to become neither, providing grist for both.

Second, they exist on a spectrum of racial and economic segregation “so deeply imbedded in the national psyche that many Americans, [African Americans] as well as whites,

171. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP05/0600000US3401346380 (last visited Oct. 13, 2016) (2014 Millburn, N.J. Race Census Data).

172. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1901/0600000US3401346380 (last visited Oct. 13, 2016) (2014 Millburn, N.J. Income Census Data).

173. *American FactFinder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S1702/0600000US3401346380 (last visited Oct. 13, 2016) (2014 Millburn, N.J. Poverty Census Data).

174. How we define that region for purposes of metropolitan equity framing is another matter.

have come to regard it as a natural condition.”¹⁷⁵ The central city in this example happens to be Newark, New Jersey, and the three towns happen to be Irvington, Maplewood, and Millburn. Particulars of our DIMI study of Northern New Jersey are relevant later. For now, in the Greater Newark region, like Ferguson, Missouri and its relationship to metropolitan St. Louis, or the Dallas or Cleveland or New Orleans metro areas, it is important to note how a similar pattern holds: poverty has spread to close-in suburbs (sometimes as a result of gentrifying central cities) along with much greater numbers of black, Latino, and recent immigrant residents. Economic growth has accelerated in more homogenous white and increasingly Asian suburbs farther away. The twin paths do not cross or, if they do, not for long.

Third, the prospects for a life of middle-class opportunity—“mobility”—are generally as strong as each of the towns’ public and private institutions that connect people with opportunity (i.e., human and social capital). These institutions are rooted in place. This is an important aspect of the theory of structural inequality advanced here. Many accounts of place-based economic disadvantage focus on poor places, including the relative efficacy of key institutions there. But this is to examine only half of the picture of structural inequality. If we focus only on Irvington’s challenged institutions, we have an analysis of inner-ring decline. But if we compare Irvington’s institutions with the same institutions in Millburn, we have an analysis of metropolitan inequality. When we add in the institutional dynamics in Maplewood, we have a more formidable basis for reaching conclusions about *how* opportunity is destabilized or preserved. Therefore, a theory of structural inequality

175. Richard Margolis & Diane Margolis, *The Ghetto and the Master Builder*, in NAT’L COMM. AGAINST DISCRIMINATION IN HOUS., HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS (1967). I replaced the word “Negroes” that appears in the original text with the more contemporary “African Americans.”

sees key public and private institutions as the sites and sources of opportunity production or denial.¹⁷⁶

a. Institutions

The focus on institutions has long played a role in the discourse on inequality in other disciplines. The sociologist C. Wright Mills famously observed how people's lives are enacted within the institutions to which they have access. "Much of human life consists of playing roles within specific institutions. To understand the biography of an individual, we must understand the significance and meaning of the roles he has played and does play; to understand these roles we must understand the institutions of which they are a part."¹⁷⁷ Because the focus in sociology is often on the effect of social structures on inequality,¹⁷⁸ the definition of an institution sometimes seems to differ from how a lawyer might define one. Mario Smalls and Scott Allard distinguish "organizations" (e.g., schools, churches, welfare agencies, childcare centers) from "institutions" ("formal rules or informal norms governing the behavior of individuals and organizations," e.g., rules about parole release).¹⁷⁹ Although the differences are not great, I prefer the more simplified "institution" for a legal theory of structural inequality. The crux of the legal analysis—beyond the identification of the relevant institutions—is the formal and informal rules that govern activity within each organization, since that is more

176. See generally Scott W. Allard & Marion L. Small, *Reconsidering the Urban Disadvantaged: The Role of Systems, Institutions, and Organizations*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 6 (2013).

177. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 161 (Oxford Univ. Press, 2000).

178. See, e.g., ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 14 (2003) ("There are many definitions of social structure, but they generally stress regular patterns of interaction, often in forms of social organization. The key building blocks are groups (or, in one common definition, 'collections of people who interact on the basis of shared expectations regarding one another's behavior'.") (citation omitted).

179. Allard & Small, *supra* note 176, at 9.

typically the focus of legal inquiry. The question is not only *what* are those rules and operating norms, but *why* do they operate differently based on place. Thus, we focus on comparisons of key institutions in order to assess the disparate outcomes their rules produce and to subject the operation of those rules to an equity standard.

Next, a theory of structural inequality has to identify which institutions are indeed key to opportunity access. The challenge is to recognize the diversity of institutions that affect life prospects differently in different places yet to try, where possible, to isolate those that are common to community life in most places. Therefore, traditionally public institutions such as schools, public safety, parks and recreation, transportation access, and housing policy are most important. They consume the bulk of locally generated tax revenues and fit within many of the powers of local government. They are also central to notions of residential preference. People choose to live in communities where that choice represents an investment in their children's college and career readiness, quality of life, convenient commute times, a sense of democratic fulfillment, if not participation, and, very importantly, an appreciating asset in the home. Public institutions encourage private markets through economic development projects, infrastructure spending, crime control, the provision of public goods, and tax incentives. This in turn attracts job growth, health care providers, shopping and food districts, and the proliferation of important community institutions, like churches, childcare, and the arts. In this way, the public sphere is inextricably connected to the private. Yet in places where residents have fewer choices, public institutions can signal the market in other ways. Public social services offices that serve a low-income clientele, for instance, are an amenity for central cities because of their proximity to the poor but a disamenity in a prosperous suburban town. Therefore, structural inequality becomes, at least from helicopter height, a comparison of relative institutional strengths as

well as the actual institutions available to residents.

b. Institutional Resources

Those relative strengths can be measured in *resources*. A sound tax base provides the revenues for an ample school budget, for example, but of course funding is not the only resource that determines the quality of a learning environment. Effective leadership, experienced teachers, advanced training, and the capacity to offer a wide range of instruction using up-to-date materials in a modern facility are also resources affecting educational outcomes. At least as important a learning resource is the presence of middle-income peers, classmates ready and able to learn, and an absence of violence or other serious safety concerns.¹⁸⁰ The resources that support strong educational institutions, therefore, are often only indirectly connected to funding. A similar distinction holds between the financial and intangible resources associated with other community institutions.¹⁸¹

Since resources can be measured both quantitatively (e.g., tax base per capita) and qualitatively (e.g., a pervasive sense of safety), the types of institutional resources that are most meaningful are those that produce access to opportunity by contributing to the growth of an individual's social capital. One's social capital reflects one's level of

180. JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY STUDY* 193, 290, 325 (1966); LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION* (Teachers College Press 2010); JAMES E. RYAN, *FIVE MILES APART: ONE CITY, TWO SCHOOLS AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 15 (2010); *See also* SARAH AMY & MELISSA TOOLEY, *THE EDUCATION TRUST, BUILDING AND SUSTAINING TALENT: CREATING CONDITIONS IN HIGH-POVERTY SCHOOLS THAT SUPPORT EFFECTIVE TEACHING AND LEARNING* 1, 2 (2012) (http://edtrust.org/wp-content/uploads/2013/10/Building_and_Sustaining_Talent.pdf).

181. *See, e.g.*, Nicole P. Marwell, *Privatizing the Welfare State: Nonprofit Community-Based Organizations as Political Actors*, 69 *AM. SOC. REV.* 265, 274 (2004).

engagement with diverse social networks where we gain local information, develop shared interests, and make collective decisions. But it is not magic. The social capital we acquire within institutions needs the bonds of social inclusion. For example, sociological experiments from the mixed-income, mixed-race context have shown that when former public housing rental tenants in Chicago shared mixed-income residential developments with middle-income dwelling owners in the same development, the benefits of integration only went so far.¹⁸² As Robert Chaskin's work shows, mixed-income communities reveal a mixed record on creating "truly balanced living patterns" because the institutional rules and norms created to foster social capital made public housing tenants feel watched, ignored, and excluded.¹⁸³ Thus, under structural inequality theory, we examine institutional rules and connections for the purpose of developing a more inclusive sense of collective efficacy. For the wealthy, this is often taken for granted. For the poor, the reliance on institutional resources can be more important in determining access to opportunity.

c. Institutional Rules and Norms Against an Equity Standard

So far (and referring to the summary Table 1 at the beginning of this Section), structural inequality theory privileges the interest in equality of opportunity and opportunity access. It recognizes that this interest is typically advanced or retarded in and by important public and private institutions common to most communities. For

182. See Robert J. Chaskin, *Integration and Exclusion: Urban Poverty, Public Housing Reform, and the Dynamics of Neighborhood Restructuring*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2013, at 237, 250–52.

183. *Id.* at 256 ("Thus, integrationist efforts aimed at normative and cultural integration . . . are experienced by many low-income and relocated public housing residents as mechanisms of exclusion, control, and stigmatization that, rather than promoting their positive social integration, lead them to withdraw to avoid negative sanctions and protect their eligibility to continue to live in the development.") (citations omitted).

each institution, we can objectively measure the resources available to people there—even if we sometimes disagree about what constitutes a resource—and make some judgments about the relative resource strength of institutions. But how those resources are deployed matters, too; the last example about public housing tenants suggested that the very rules meant to increase a sense of connection and social capital worked to stigmatize and exclude them. The critical inquiry for a legal theory of structural inequality entails identifying and interrogating the formal and informal rules governing those institutions that are at least partly responsible for producing unequal outcomes, which we look at next.

Assume for illustration that the relevant institution is public education. We understand that the governing rules are essentially the same for weak and strong schools, flowing from notions of local autonomy in the administration and financing of schools but subject to state education laws. The differences in educational outcomes, however, reflect how those rules affect relative resources (e.g., ability to attract and retain well-trained teachers, facilities, extracurricular support, etc.) in different places. Therefore, the structural inequality analysis of public educational institutions would entail an interrogation of how the school financing disparities result from facially equal but substantively unequal laws rooted in localism. We will expand upon the public school example momentarily, but the next step is to introduce the standard by which an interrogation of comparative institutional rules occurs under structural inequality theory: equity.

If equity is the standard, what is equity? The term “equity” is almost as ubiquitous as it is amorphous, though it is an ancient legal principle that we sort of know when we see. Its ambiguity may be intentional, since equity usually resonates with a sense of fairness, and fairness is usually the fact-dependent subject of compromise. We read it expressly in the term “fair housing.” We fall back upon it when

equitable relief is allowed in the absence of legal remedies.¹⁸⁴ Family law scholars argue its necessity over strict notions of equality.¹⁸⁵ In some feminist scholarship, equity is a contested alternative to equality that more fully evokes notions of justice.¹⁸⁶ The push for equitable frameworks over equality has for a long time characterized school finance litigation¹⁸⁷ as well as environmental justice,¹⁸⁸ where

184. Black's Law Dictionary begins its lengthy definition of equity like this: "Justice administered according to fairness as contrasted with the strictly formulated rules of common law." *Equity*, BLACK'S LAW DICTIONARY (6th ed. 1990).

185. See, e.g., Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385, 1410 (2013) ("[T]he legal concept of 'equality'—alone—is inadequate to achieve real justice in family law issues. Equitable considerations also are indispensable. Indeed, usually equity must predominate for a fair outcome to be achieved in many (most) family cases and policy issues.").

186. See, e.g., Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60 ALA. L. REV. 1133, 1136 (2009) ("Equity is not the same as equality, and at the same time, not all inequality can be seen as inequity. The notion of inequity adopted by [the World Health Organization and the Pan American Health Organization] is that of 'unnecessary, avoidable and unjust inequalities.' Therefore, while equality is an empirical concept, equity represents an ethical imperative associated with the principles of social justice and human rights.") (citation omitted); Maria Herminia Graterol & Anurag Gupta, *Girls Learn Everything: Realizing the Right to Education Through CEDAW*, 16 NEW ENG. J. INT'L & COMP. L. 49, 70 (2010) ("[E]quity often evokes ideas of 'justice' and 'fairness' that may be grounded on patriarchal ideologies and the concept of formal equality.") (citation omitted).

187. See, e.g., Alexandra Rose, Comment, *For the Kids: A Place for Equity in Kansas School Finance Litigation*, 63 KAN. L. REV. 1205, 1232 ("Equity is a broad concept encompassing many areas but can be generally understood as a 'body of principles constituting what is fair and right.' Equity comes in many forms, but those most important to school finance are horizontal and vertical equity. Horizontal equity aims to decrease disparity between similarly situated school districts. Vertical equity aims to treat differently situated districts differently by moving the bottom up. Scholars today believe that horizontal equity should not be the courts' only focus; instead, the courts should focus on vertical equity.") (citations omitted).

188. See, e.g., Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1267 (1998) ("The underlying premise of environmental equity is that fairness in environmental decision-making would result in even distribution of environmental risks and burdens, with all groups bearing a proportionate share."); Duncan A. French, *International Environmental Law and the Achievement of Intragenerational*

fairness is often seen not in terms of absolute equality but rather in terms of fulfilling proportionate needs and balancing proportionate burdens. This aspect of proportionality associated with equity but not equality is also behind many critiques of conservative approaches to civil rights.¹⁸⁹ For structural inequality theory, *equity is the exercise of fairness necessary to finding the appropriate balance of equality based on demonstrable, proportionate need*. Put simply, when one applies equity to equality, one is not seeking to get the same thing as other persons, but the *necessary* things in order to enjoy the opportunities that others often take for granted.

Disability law provides the purest example of equity, since we demand (through the Americans with Disabilities Act¹⁹⁰) equal access for people challenged by a physical

Equity, 31 ENVTL. L. REP. 10469, 10476-77 (containing a well-articulated analysis of the importance of equity-based thinking in the context of environmental policy); Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375, 380 (1994) (“Environmental equity’ is the equal distribution of environmental risks (including risks associated with hazardous waste facilities) across race, ethnicity and income. As stated by the Environmental Protection Agency (EPA): ‘Environmental equity is an important goal in a democratic society. It involves ensuring that the benefits of environmental protection are available to all communities and an environmental policy-making process that allows the concerns of all communities to be heard, understood, and addressed.’”).

189. For instance, when Chief Justice Roberts wrote in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007), that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” critics asserted that he was simplifying equality, locking in a status quo that disproportionately favors already advantaged groups in society at the expense of those whose inequality of opportunity is manifest. See Ronald Turner, *The Way to Stop Discrimination on the Basis of Race . . .*, 11 STAN. J. C.R. & C.L. 45, 87–88 (2015).

190. See generally Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012). “[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . .” *Id.* at § 12101(a)(2). “[T]he Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such

disability, but we satisfy that demand by making costly accommodations that many of us will not use. Let's take a more difficult example of disability, the relative incidence of student psychological trauma, to show the equity principle in institutional and comparative practice. Public schools in both Irvington (working class) and Millburn (wealthy) generally follow the same formal state rules about education, though many policies differ depending on the school, the district, its leadership, and the student body. All schools are subject to federal disability laws that protect the rights of children of all abilities to a free and appropriate education.¹⁹¹ However, schools in high poverty areas like Irvington's East Ward educate high rates of children who are classified as requiring special education under disability law but perhaps many more whose learning capacity is diminished by the effects of psychological trauma.¹⁹² Psychological research has long

individuals . . .” *Id.* at § 12101(a)(7); *see also* Fair Housing Act § 6(f)(1)–(3), 42 U.S.C. § 3604(f)(1)–(3) (defining unlawful discrimination against handicapped persons to include the failure to permit individuals to make reasonable modifications to a residential unit when necessary due to handicap, or to construct an adaptable design in multifamily units, containing “an accessible route into and through the dwelling . . . light switches, electrical outlets, thermostats, and other environmental controls in accessible locations . . . reinforcements in bathroom walls to allow later installation of grab bars; and . . . usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space”).

191. *See* Individuals with Disabilities Education Act § 682(d)(1)(A), 20 U.S.C. § 1400(d)(1)(A) (2012) (describing the Act's purpose as “ensur[ing] that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living”); *see also* 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”); Rehabilitation Act of 1973, 29 U.S.C. §§ 701–97, 701(b), 794a.

192. *See* U.S. COMM'N ON CIVIL RIGHTS, MINORITIES IN SPECIAL EDUCATION, 65–80, 86 (2009) (addressing overrepresentation of racial and ethnic minorities receiving special education classification). *See also* 20 U.S.C. § 1412(a)(24) (“The State has in effect . . . policies and procedures designed to prevent the inappropriate identification or disproportionate representation by race and

demonstrated the disproportionate rates of psychic trauma among children from poor neighborhoods relative to their more affluent peers. While trauma affects school kids in all districts, including high-opportunity areas like Millburn,¹⁹³ trauma caused by shootings and other community violence, parental separation, domestic abuse, and other factors is far more pervasive among Irvington's classrooms. These "complex" traumas have a destructive effect on both cognitive development and academic performance (and many other aspects of life prospects).¹⁹⁴ As a matter of legal obligation in the best educational interests of children, prevalence of trauma and resulting impairment makes early identification and intervention by school personnel critical.

Unfortunately, the same institutional rules governing the accommodation of school children suffering the effects of complex trauma operate differently depending on the school's composition and available resources. In low-poverty schools, there is evidence that children's psychological needs are met with greater resources. In high-poverty schools, on the other hand, psychological trauma is rarely addressed, leaving students at significant risk of poor academic outcomes.¹⁹⁵ Because a lot of childhood trauma is manifest

ethnicity of children with disabilities . . .").

193. See *Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL, www.cdc.gov/violenceprevention/acestudy/ (last visited Apr. 1, 2016).

194. See NAT'L CHILD TRAUMATIC STRESS NETWORK, *Complex Trauma, in CHILDREN AND ADOLESCENTS 5* (Alexandra Cook et al. eds., 2003) (defining complex trauma as both "exposure to traumatic events and the impact of this exposure on immediate and long-term outcomes"). See also CHERYL LANKTREE ET AL., *INTEGRATIVE TREATMENT OF COMPLEX TRAUMA FOR CHILDREN (ITCT-C): A GUIDE FOR TREATMENT OF MULTIPLY-TRAUMATIZED CHILDREN AGED EIGHT TO TWELVE YEARS 9* (2008) ("Complex trauma is typically defined as a combination of early and late-onset, multiple, and sometimes highly invasive traumatic events, usually of an ongoing, interpersonal nature. In most cases, such trauma includes exposure to repetitive childhood sexual, physical, psychological abuse, and/or family violence, often in the context of concomitant emotional neglect and harmful social environments.").

195. See Complaint & Demand for Jury Trial at 1, *Peter P. v. Compton Unified Sch. Dist.*, No. CV 15-3726, 2015 U.S. Dist. LEXIS 134772 (C.D. Cal. Sept. 29,

through disruptive, sometimes violent behavior, it often contributes to school suspension and other educational disruption. School suspension is in turn highly correlated with dropping out, criminal activity, and incarceration—the so-called “school-to-prison pipeline” that typifies diminished opportunity. Equity would require that the resource allocations necessary to effectuate the disability rules’ objectives be increased for high-poverty schools, but that is rarely the case.¹⁹⁶ Hence, because of where the schools are located, the same legal rules do not work as effectively for the children most in need.

What the example further demonstrates is that equality, like inequality, is an *outcome* that can be measured in finite terms, but equity is a *process* that directs the achievement of equal outcomes. Right now, we can speculate that the Millburn schools devote greater resources to helping children who are experiencing significant psychological trauma cope and perform academically than the Irvington schools can. But even equal resources would discount the relative need because Irvington’s children face more trauma. Equity is the principle that should govern how the difference is made up.

Finally, the equity standard helps us to comprehend the character of intersectionality in structural inequality. Even more than institutional racism, structural inequality involves the cumulative force of inequitable rules denying opportunity among multiple institutions at once. “Structure”

2015).

196. Another example compares the substance and availability of Advanced Placement courses by district composition. Advance Placement classes follow a state standard under laws applicable to all schools, but while they are commonplace at Millburn High School, they are less so and with different substantive elements at Irvington High. The inequity of this inequality of challenging coursework, so critical to college achievement and mobility prospects, is revealed in stark terms between a poor black district and a rich white one. But even more of the detailed operation of informal institutional rules is revealed by, for example, Advance Placement eligibility and tracking trends in a racially and economically mixed high school like Columbia High, which serves Maplewood. Complaint at 7, *NJCLU v. S. Orange-Maplewood Sch. Dist.*, https://www.aclu.org/sites/default/files/assets/ocr_complaint_vs_somdsd.pdf.

refers to the layers of institutionalized race and class disparities operationalized in *place*. The primary institution responsible for affecting one's access to places with relatively helpful or destructive institutions is housing policy. As an institution, housing policy is a diffuse example of intersectionality in inequality. Housing policy is divided among public agencies when it is subsidized, sited, and approved by local government through zoning and land use policies, and built and maintained by private markets. Because housing policy implicates not only education policy but also parks and recreation policy, infrastructure policy, economic development policy, health care policy, transportation policy, and many others associated with belonging to a particular place, fair housing involves most directly the civil rights interest in overcoming structural inequality.

3. Contrasting Structural Inequality with Fair Housing

Table 2: Structural Inequality and Fair Housing Compared

Elements	Structural Inequality	Fair Housing
Interest	Equal access to opportunity	Equal access to opportunity
Source of Opportunity	Public and private institutions	Housing and related urban development
Measures of Inequality	Resources (fiscal, in/tangible)	Racial discrimination and racial concentration
Lens	Comparative formal and informal rules and customs	Intent claims; Disparate impact evidence
Standard	Equity (appropriate fairness)	Rights-based equity
Unit of Analysis	PLACE, Metropolitan regions, race, and class	Dwelling units to "regions"
Outcomes	Fairer rules, fairer distribution of resources, less disparate opportunity statistics	Fewer claims, more integration, better opportunity statistics

Having set out a legal theory of structural inequality, we can now contrast it with the theory of opportunity access and denial that is embedded in the Fair Housing Act. Similar but not the same, the comparison will facilitate the connection between fair housing and metropolitan equity, the ultimate goal of this Article. As Table 2 illustrates, the two theories

share the same legal interest, equality of opportunity. However, the primary *source* of opportunity is different. Structural inequality theory posits institutions (including housing) while fair housing singles out housing opportunity. Note how the Act's focus on housing helps to determine a different measure of the problem—the absence of discrimination and the presence of integration, rather than the presence of effective resources. The Act's anti-discrimination/anti-segregation measures then drive the legal frameworks for addressing them—proof of intent or disparate impact to show either racial discrimination or unjustified racial concentration. The two frameworks also differ on the standard. Fair housing carries a rights-based, not equity-based, standard—harder to enforce today, but certainly much clearer than fairness. The difference in units of analysis is also telling. Fair housing may be limited to a single unit of housing or expandable to a “region.” Structural inequality is always concerned with larger units of analysis, particularly trends at the metropolitan level.

This is in part a reflection of their different underlying ideas about causation. Contemporary structural inequality is born of a facially colorblind policy tradition characterized by the sedimentation of intergenerational privilege and the vestiges of overt race discrimination. It attributes the cause of much inequality to systems of localism that reproduce resource and residential segregation without using explicitly racial rules.¹⁹⁷ Indeed, much of what makes structural inequality so persistent today is the unabashed hoarding of

197. The fact that continuing institutionalized racial *norms and customs* are active causes of inequality is not fatal to this argument about rules. “Rules” are defined here as laws, which are clearly defined, albeit under-enforced; however, as the Justice Department’s investigation of Ferguson, Missouri demonstrated, norms and customs of administration in institutions (e.g. courts and law enforcement) can bend those rules toward racial discrimination easily and systematically. See U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 63 (2015) (inferring a relationship between historical bias in Ferguson and the wielding of law enforcement discretion to the detriment of the African American population).

privileges that the holder regards as the product of merit alone. On the other hand, fair housing was born in the time of overt racial conflict over space where causation was—and was legally required to be—a matter of clearly identifiable policies with at least demonstrable racial impact. Finally, the two theories are different in terms of the outcomes they seek. Fair housing law seeks less discrimination and better opportunity statistics institutionalized through residential integration (“truly balanced living patterns”). Integration *per se* is not central to the goals of structural inequality theory. Rather, this theory seeks lower disparities and better opportunity statistics resulting from fairer rules and more integrated resources.

The theory of structural inequality contains elements common to fair housing and metropolitan equity. The comparison reveals their potential for merger. Merging the two will entail a different orientation toward the statutory scope and the nature of remedies available under the Act, as I discuss in Part III. Before doing so, it is important to understand the gist of metropolitan equity studies as a movement that emerged out of the civil rights impasse on housing opportunity and the entrenchment of structural inequality.

B. *The Parallel Framework of Metropolitan Equity: A Primer in Context*

Metropolitan equity is the multidisciplinary analysis of place-based structural inequality and disparate impacts, combined with a normative push for change. The study and advocacy of metropolitan equity (also called “regional equity”) has coalesced since the early 1990s around a belief that more and better information about regional inequities can empower reform.¹⁹⁸ This approach rigorously documents

198. See Xavier de Souza Briggs, *Introduction* to THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 1–2 (Xavier de Souza Briggs ed., 2005).

disparities in “opportunity structures” across regions. Regions are viewed as ecological wholes with interdependent parts. Scholar-activists like Manuel Pastor see the work in the social movement terms of more equitable economic development policies pursued through political coalitions of diverse regional constituencies.¹⁹⁹ Analyses can be employed as organizing tools against an identified threat to particular poor and working-class communities. The threat may arise from a crisis, but more often from the cumulative effects of threatening trends, such as racial re-segregation. These threats to social equity are recognized as a threat to “sustainability” because the costs of regional inequalities can no longer be contained in poorer areas, as burdens multiply with population trends.

Thus, the quest for regional equity engages in revitalizing inner-city and older suburban neighborhoods and urban markets as assets and key building blocks of a healthy region. It reforms local, regional, and state policies and practices in order to advance social and economic equity within a region. And it links the needs of economically isolated and racially segregated residents with the opportunity structures throughout the region.²⁰⁰

If federal fair housing law can be criticized as being too individualized and atomistic, metropolitan equity research is the opposite—community focused, comprehensive, and full of large numbers. It is an equitable framework that may, but

199. See, e.g., Cynthia M. Duncan, *From Bootstrap Community Development to Regional Equity*, in *BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT AMERICAN METROPOLIS* 11 (M. Paloma Pavel ed., 2009) [hereinafter *BREAKTHROUGH COMMUNITIES*] (“A *regional equity* approach to development combines *community* efforts to build strong institutions and better infrastructure with *regional* policies to foster equitable public and private institutions.”); MANUEL PASTOR, JR., CHRIS BRENNER & MARTHA MATSUOKA, *THIS COULD BE THE START OF SOMETHING BIG: HOW SOCIAL MOVEMENTS FOR REGIONAL EQUITY ARE RESHAPING METROPOLITAN AMERICA* (2009).

200. M. PALOMA PAVEL, *Introduction* to *BREAKTHROUGH COMMUNITIES*, *supra* note 199, at xxxv.

often does not, lend itself to legal remedies for more systemic litigation. More often, empirical case studies of regional economic growth areas,²⁰¹ such as trends in concentrated poverty,²⁰² the demographics of suburban migration and fiscal decline,²⁰³ and recessionary effects on wealth²⁰⁴ have influenced state and federal policy. Racial concentrations are closely watched and often mapped.²⁰⁵ Graphic geographies of opportunity support research from myriad disciplines—history²⁰⁶, public health,²⁰⁷ sociology²⁰⁸ and social theory.²⁰⁹ In contrast to the decidedly urban focus of earlier

201. See generally, e.g., CHRIS BRENNER & MANUEL PASTOR, *JUST GROWTH: INCLUSION AND PROSPERITY IN AMERICA'S METROPOLITAN REGIONS* (2012).

202. Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century: An Update and Analysis*, 41 *DEMOGRAPHY* 23, 23–24 (2004).

203. See generally MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* (2002).

204. See generally THOMAS M. SHAPIRO, *THE HIDDEN COSTS OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 200 (2004).

205. See *Equity Blog*, POLICYLINK, <http://www.policylink.org> (last visited Oct. 24, 2016); *Metropolitan Studies Program*, BROOKINGS INST., <http://www.brookings.edu/about/programs/metro> (last visited Oct. 24, 2016); *Program for Environmental and Regional Equity*, UNIV. OF S. CAL., <http://dornsife.usc.edu/pere/> (last visited Oct. 24, 2016).

206. See generally COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* (2008); KEVIN MUMFORD, *NEWARK: A HISTORY OF RACE, RIGHTS, AND RIOTS IN AMERICA* (2007); MELANIE SHELL-WEISS, *COMING TO MIAMI: A SOCIAL HISTORY* (2009); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (Princeton Univ. Press, 2005); *THE NEW SUBURBAN HISTORY* (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

207. See generally, e.g., Douglas S. Massey, *Segregation and Stratification: A Biosocial Perspective*, 1 *DU BOIS REV.* 1 (2004) (positing causal links between segregation and allostatic load among the concentrated poor).

208. See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposures & County-Level Estimates* 1 (2015), http://www.equality-of-opportunity.org/images/nbhds_exec_summary.pdf (discussing place-based prospects for upward mobility in children). See also Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, *EQUALITY OF OPPORTUNITY* (August 2015), http://equality-of-opportunity.org/images/mto_paper.pdf.

209. See generally RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 4–5 (2011).

scholarship,²¹⁰ metropolitan equity research reflects a relationship to the city, especially central cities, that ranges from disinterested to indispensable, with a decided lean toward emerging suburban dynamics. Demographic change and the suburbanization of poverty has wrought a new emphasis on the region.

However, if there are common threads to the diverse work in this field, they are these: i.) the use of a comparative lens in looking at relative disadvantage; ii.) the conviction that spatial dynamics are often responsible for persistent inequality; iii.) the expectation that residential organization skews toward both racial and socioeconomic stratification unless affirmatively redirected; and, iv.) the necessity of promoting fairness (specifically, equitable burdens and benefits) as a principle of regional reform.²¹¹ Perhaps the biggest influence for metropolitan equity research so far has been its tacit inclusion in HUD's Analysis of Impediments (AI) and more recent Assessment of Fair Housing (AFH) guidelines.²¹² However, its methodologies are common to disparate impact analyses.

Though metropolitan equity generally seeks to alter unequal arrangements and is therefore remedial, its study and advocacy have tended to lean away from traditional legal remedies, even litigation (except for empirical accounts of disparate impact). This tendency reflects several factors,

210. See generally PETER MARRIS & MARTIN REIN, *DILEMMAS OF SOCIAL REFORM: POVERTY AND COMMUNITY ACTION IN THE UNITED STATES* (2d ed. 1982); JOHN H. MOLLENKOPF, *THE CONTESTED CITY* 6–7 (1983); see also, Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 *J. AM. INST. PLANNERS* 216, 216–18 (1969).

211. See generally DAVID DANTE TROUTT, *THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND A VISION FOR A MORE EQUITABLE AMERICA* (2013).

212. For instance, the HUD Assessment Tool was issued in connection with the final rule on affirmatively furthering fair housing and serves as a template for preparing the required Analysis of Fair Housing. See *Fair Housing Assessment Tool*, U.S. DEP'T HOUS. & URBAN DEV., <https://www.huduser.gov/publications/pdf/AFFH-Assessment-Tool-2014.pdf>.

including disillusionment with federal law and the failures of civil rights statutes as tools for structural change, the high costs of litigation, and internal criticisms of the “regnant,” or elitist, distancing of litigators from their civil rights clients. Surprisingly, legal scholarship has been ambivalent to embrace its claims.²¹³ Thus, metropolitan equity advocacy has stood parallel the law, referencing it for the purpose of critique but finding little of use in it for achieving results on the ground. This, I argue, partly reflects a need to imagine a greater potential scope of the FHA.

Nevertheless, the goal of metropolitan equity studies is to facilitate a regional framework of remediation that can overcome structural inequality. If we look back to the theory of structural inequality factors set forth earlier in this Part, we see that most are identical to the research design of metropolitan equity: the interest in opportunity access for

213. Since regional equity analyses surfaced in the academic literature in about the late 1990s, mainstream legal scholarship has focused less on its equitable dimensions. Most local government law scholars tended to ignore metropolitan equity or associated it with something called “the New Regionalism,” the latter inviting lengthy dismissals about the effectiveness (or the political likelihood) of metropolitan government, intergovernmental cooperation, and consolidation. These writers often concluded, with some analytical force, that regionalism will not work. Somehow this seemed to become the dominant discourse on metropolitan equity in local government law, though its normative aims were thinly defined and its focus on equity fleeting. *See, e.g.*, DAVID L. KIRK ET AL., *OUR TOWN: RACE, HOUSING AND THE SOUL OF SURBUBIA* (1995); NEAL R. PEIRCE, *HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD* (1993); Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL’Y. REV. 11 (1997); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003); Edward A. Zelinsky, *Metropolitanism, Progressivism & Race*, 98 COLUM. L. REV. 665 (1998) (reviewing DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993)). More hopeful about the equity-enhancing potential of more centralized governmental solutions include Bollens, *supra*; Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL’Y & L. (1998); Robert H. Frelich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. L. 183 (1997); Georgette C. Poindexter, *Beyond the Urban-Suburban Dichotomy: A Discussion of Sub-Regional Poverty Concentration*, 48 BUFF. L. REV. 67 (2000).

communities (as a proxy for individuals), the primacy of comparative geography on a regional scale, quantification of the disparities in institutional resources (mostly housing policy) and interrogation of the rules that reproduce disparities, and the guiding use of fairness as the relevant standard. It is the outcomes that are less clear. What specific outcomes does metropolitan equity seek?

So far, the list of remedies has been limited. Most efforts tie back to an interest in inducing greater racial and economic residential integration. Desegregating the metropolitan area is implicitly viewed as the means to open pathways to greater institutional resources, like stronger schools and the improved services that come with more robust tax bases. This inclusive character of equity is evident in efforts to spread the availability of housing vouchers into the growth centers of suburbia, or to push for fair share affordable housing arrangements in more states. The fact that demography is rapidly shifting in favor of non-whites across most of metropolitan America supports policies that recognize the interdependency of places and thus, sharing in costs and growth more equitably. Clearly, the metropolitan equity approach can expand to as many institutional practices as affect inequality of opportunity. But will it join fair housing law?

This compact summary of a broad field not only demonstrates clear links to the theory of structural inequality earlier in this Part, but also to the express goals of the FHA. This, I believe, is causal. While the Act has had extraordinarily limited success in achieving its goals, that record of failure and its consequences have been closely tracked by researchers committed to their revival. Much of that work can be collapsed into housing policy “directed to affirmatively connect affordable housing to neighborhoods of opportunity, whether they are in a revitalized inner city or

in an affluent suburb.”²¹⁴ This is anti-ghettoization redux. Thus, metropolitan equity scholars have studied the benefits of *Gautreaux*-inspired mobility programs. Philanthropic organizations have long pledged to support the work of housing equality that litigation could not bring about. And the research methodology associated with spatial inequality has indeed supported the disparate impact evidence brought in cases such as *ICP* and others. It is capable of more.

C. *The Respective Roles of Race and Integration*

Two questions remain for this Part: What is the role of race in remedying structural inequality through fair housing? And, what is the particular role of integration? My answer is that we go where empirical reality takes us, which happens to be consistent with the sometimes outdated terms of the Act. Integration has a more mixed relevance, but its usefulness as a remedy, I suggest, requires an updated definition consistent with the Act’s original goals.

Although the subject of race and racism is treated with color-blind, even “color-scared,” ambivalence in many official accounts of inequality, federal fair housing law continues appropriately to center race and racism by its very terms. Under the Act, few burdens of access to opportunity are cognizable without pleading a racial injury. This is an overlooked benefit of the FHA, because it comports with empirical realities. Metropolitan equity analyses of unequal regions demonstrate the persistent significance of race as the most common factor alongside income in determining access to strong institutions. National statistics on discrete aspects of economic condition and democratic participation are routinely characterized by a racial divide—in

214. John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 617 (2008).

unemployment,²¹⁵ foreclosure rates,²¹⁶ incarceration,²¹⁷ voting access,²¹⁸ etc. As Justice Kennedy observed in *ICP*, we are duty bound in the housing context to recognize the continued centrality of race and racism.

Conversely, the failure to recognize race in the fair housing context can lead to persistent racial segregation despite significant efforts to the contrary. New Jersey's *Mt. Laurel* doctrine provides a singular fair housing example of what happens when income is deliberately substituted for race. Almost nothing in the "fair share" doctrine announced by the New Jersey Supreme Court in 1975 focuses on remedying the segregative effects of exclusionary land use policies. The court nodded to racial exclusion in a case

215. Irrespective of the universal fluctuations in joblessness, Black Americans are consistently unemployed at twice the rate of White Americans. *Unemployment Rates by Race and Ethnicity, 2010*, BUREAU OF LABOR STATISTICS (Oct. 5, 2014), http://www.bls.gov/opub/ted/2011/ted_20111005.htm. See also *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/web/empsit/cpsee_e16.htm (last visited Oct. 26, 2016).

216. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 635 (2010) (analyzing independently collected data and concluding that seventy-seven percent of foreclosures between 2006 and 2008 occurred in metropolitan statistical areas (MSAs) wherein seventy-five percent or more of the nation's African American, "Hispanic," and Asian populations reside).

217. Data from June 30, 2010, estimated that the Black incarceration population in all federal, state, and local jails and prisons was 4347 males and 260 females per 100,000, as compared to 678 white males and 91 white females. LAUREN E. GLAZE, U.S. DEP'T OF JUST., CORRECTION POPULATIONS IN THE UNITED STATES, 8 (2010) (identifying that the same study found 1775 Latino males and 133 Latino females were incarcerated per 100,000).

218. U.S. GOV'T ACCOUNTABILITY OFFICE, ELECTIONS: ISSUES RELATED TO VOTER IDENTIFICATION LAWS, GAO-14-634, at 25 (2015) (analyzing the impact of identification requirements at voting locations and noting that approximately twenty percent of African Americans nationwide may lack a driver's license and seventy percent are without a passport, with the numbers of individuals holding valid, non-expired identification being even lower). Civic engagement by Black Americans is diminished due to numerous restrictions. Disenfranchisement of incarcerated and formerly incarcerated persons disproportionately bars minorities from the right to vote.

brought by that town's NAACP, but included many other categories of prospective residents priced out by restrictive zoning ordinances.²¹⁹ A “fair share” legal architecture was born, aided by “Mt. Laurel courts” designed to hear builders’ remedies cases and eventually codified in the state’s 1985 Fair Housing Act.²²⁰ New Jersey’s notion of fair housing was not premised on a requirement of racial inclusion. Today, the regulatory apparatus that began with the establishment of the Council on Affordable Housing (COAH) compels municipalities to certify compliance with a complex formula (still contested) of affordable housing creation—but without regard to race.²²¹

The result, in short, has been a numbers game of highly specialized lawyers, planners, and consultants trying to prove compliance—but very little racial integration. Indeed, David Rusk and I studied fourteen northern New Jersey counties in order to determine the current distribution of racially mixed census tracts.²²² The results were consistent

219. S. Burlington Cty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 717 (N.J. 1975) (“Plaintiffs represent the minority group poor (black and Hispanic) seeking such quarters. But they are not the only category of persons barred from so many municipalities by reason of restrictive land use regulations. We have reference to young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments.”) (citation omitted).

220. S. Burlington Cty. NAACP v. Mount Laurel Twp., 456 A.2d 390, 420, 452–53 (N.J. 1983) (explaining the “fair share” obligation and the need for availability of a builder’s remedy unless sound environmental or planning concerns provide sound reason for a denial). See also N.J. STAT. ANN. § 52:27D-302 (West 2016) (highlighting the centrality of the Mount Laurel decisions to the creation of New Jersey’s Fair Housing Act).

221. *In re Adoption of N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 42, 51 (N.J. 2015) (addressing COAH’s blatant failure to function as the FHA intended and reinstating the courts as the “forum of first resort” for all matters concerning obligations under the *Mount Laurel* decisions).

222. David Rusk & David D. Troutt, *Diverse & Inclusive, Moderate-Income Municipalities (DIMIs): Elusive Stability in Northern New Jersey Suburbs*, (2015) (on file with the author).

with other findings about a lack of racial penetration by blacks and Latinos in New Jersey.²²³ We showed that only among municipalities that fall well below the median state income level does one find census tracts that have at least a ten percent population of blacks, Latinos, and whites. (Asians tended heavily to live among whites.) As one moves further up the income scale to the median and beyond, only a handful of communities could meet this minimal measure of racial diversity *notwithstanding their record of building Mt. Laurel housing*. It appears that the wealthier the community, the more successful it was at minimizing its fair share obligation entirely or satisfying it with housing occupied by low- and moderate-income whites.²²⁴

Thus, the continued salience of racial disadvantage coupled with the express racial protections of the federal Fair Housing Act would seem to lead inexorably toward racial integration as the primary remedy for large-scale denials of opportunity access and a legislative interest in anti-segregation. But the public and academic discourse is suspicious of integration. Dominant narratives ignore it. African American writers in particular have sounded skeptical, if not disinterested, in integration for decades. John Calmore, one of the most thoughtful and prolific housing scholars, wrote off the prospect of integrating low-income blacks, and listed several reasons why middle-class blacks were hesitant to seek white neighborhoods.

223. TOGETHER NORTH JERSEY, *supra* note 163.

224. Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 851–52 (2011); see Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1302–05 (1997) (discussing data findings that affordable housing applicant success is skewed in favor of white, elderly applicants); see also N.J. Council on Affordable Hous., Substantive Rules of the New Jersey Council on Affordable Housing, 46 N.J. Reg 924(a), 1011–36 (proposed June 2, 2014), http://www.nj.gov/dca/services/lps/hss/statsandregs/599_for_web.pdf (note, only for data relating to unmet affordable housing obligations).

First, there is a desire to link residence with a sense of community that is missing within the context of predominantly white places, particularly white suburban neighborhoods. Second, there is a profound integration fatigue that is compounded by the alienation and distrust of whites that is associated with the black experience of having “integrated” dominant institutions and parts of society. Finally, the heavy burdens of having to personify “the acceptable Negro” and assimilated token in order to succeed on mainstream terms is taking its toll, a sociological burden I have likened to that of “passing” biologically as white. In short, the quest for material benefits through integration is in acute tension with being able to find within integration a sense of belonging that is enhanced by the accoutrements of dignity, respect, and acceptance.²²⁵

Since then, others have taken at best a utilitarian approach to integration—a necessary step in the sharing of resources but not one to take enthusiastically.²²⁶

On the other hand, both the continued resistance to and demand for housing choice vouchers in predominantly white, high-opportunity areas suggests that the market for integration may be greater than the discourse suggests.²²⁷ It

225. John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1108 (1998).

226. See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM*, at xiii (2004) (“There is much evidence of an emerging ‘post-civil rights’ attitude among black folks. We are ambivalent integrationists.”); John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS L.Q. 655, 682 (2001).

227. See DOUGLAS S. MASSEY, *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* 65 (2013) (highlighting the Mount Laurel case study of the Ethel R. Lawrence subdivision and its demonstration that introduction of affordable housing into a higher-income neighborhood does not increase crime or lower property values); David P. Varady et al., *How Housing Professionals Perceive Effects of the Housing Choice Voucher Program on Suburban Communities*, 15(3) CITYSCAPE: J. POLICY DEV. & RESEARCH 105, 108–09 (2013), <https://www.huduser.gov/portal/periodicals/cityscape/vol15num3/ch5.pdf> (attributing resistance to HCV to underlying racism); U.S. DEP’T OF HOUS. & URBAN DEV., *HOUSING CHOICE VOUCHERS FACT SHEET*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Jan. 15, 2017) (noting the “long waiting periods” associated with HCVs and informing that a public housing agency may close waiting lists when unlikely that new families

is difficult to know exactly what people think, but application rates and waiting lists indicate that a great many people currently living in low-opportunity, segregated communities would willingly exploit opportunities to integrate into higher-resource environments if given the chance.

Yet the larger problem with integration is the failure to define it in relevant contemporary terms that includes the relevant interests of the past. Recall that in the national and legislative discussions leading to passage of the Act, the interests in anti-discrimination and anti-segregation were cast in a dichotomous spatial terminology that seemed unchangeable: ghetto and suburb. These freighted terms carried many implied binaries, such as black-white and poor-middle class. However, there was underlying interest in access to opportunity that should not expire with the disuse of that language. Today, the suburb is not one type of suburb. The ghetto is not only a swath of the inner city. Neighborhood revitalization is often gentrification one step removed. Residential integration is often only as stable as the proverbial snap-shot. Our spatial vernacular for opportunity has changed a lot since 1968. Yet structural inequality theory accounts for the linguistic differences. It clarifies how appropriately modified remedies may be consistent with the Act's interest in access to opportunity.

The re-definition of integration under structural inequality theory begins with the Act's primary focus upon *residency*. Housing is important because, as fundamental shelter from contingency, it represents locational determinism in a market economy. What both prongs of the FHA require, therefore, is the integration of institutional resources (including revenues) that are derived locally from housing and housing-related services. Fairness is not simply

can be assisted “in the near future”); FURMAN CTR. & MOELIS INST., INVESTIGATING THE RELATIONSHIP BETWEEN HOUSING VOUCHER USE AND CRIME 2 (2013), <http://furmancenter.org/files/publications/FurmanCenter-HousingVoucherUseCrime.pdf> (acknowledging community resistance to HCVs and debunking perceptions of a correlation between vouchers and increases in local crime).

a matter of free housing choice; if it were, § 3608 and the AFFH requirement would be erroneous. Fairness concerns the distribution of those resources we expect to flow from housing choice. As the anti-segregation features of the Act show, this distribution of resources should be measured across a regional scope. The integration of resources into lower-income neighborhoods and municipalities would derive from challenging the inequitable rules and norms (and funding levels) operating in any institution that is responsible for some aspect of opportunity access. Metropolitan equity studies help to fill in what these institutions are—transportation planning and spending priorities, infrastructure development, education finance and others. However, *housing is always the anchor*. Opportunity is cultivated in individuals as they pass through these critical institutions and exploit the resources within them. Yet the path to those institutions—and which ones are accessible—naturally begins and ends at home. This will sometimes call for the most direct route to integrated resources, racially integrated neighborhoods. But to end there is an oversimplification of the term and a disservice to the purpose of fair housing. People need to get to resources or resources need to get to them. Thus, in contemporary fair housing law, integration must mean connecting housing-related resources to residency without limitation by race, color, religion, sex, familial status, national origin, or disability.

D. *Conclusion*

This Part posited a theory of structural inequality with features common to both fair housing law and metropolitan equity study and advocacy. Linked by a critique of localism and its excesses in expanding inequality and segregation, the theory identified common interests in opportunity access, a regional focus and outcomes subject to a fairness standard. The differences are important, too, including the measures of inequality and the outcomes sought, especially integration.

However, metropolitan equity studies clearly show the importance of seeing integration in a multi-dimensional way by focusing on resource integration rather than simply residential integration. The analysis has also shown that metropolitan equity, a field that grew up partly out of frustration with fair housing law, has a lot of fair housing in it. The question we take up in the final Part is whether fair housing is fundamentally metropolitan equity.

III. FAIR HOUSING AS METROPOLITAN EQUITY

The analysis so far has shown that metropolitan equity is fair housing. Its emphasis on inclusion without discrimination and the equitable integration of resources within residential environments is fully consistent with the aims of fair housing. The remaining question is whether fair housing can be metropolitan equity. If it were, it would mean that the FHA could address a broader number of systemic, housing-related ills of structural inequality.²²⁸ This enhancement of statutory scope should be possible, I argued in the last Part, given the theoretical bridge that structural inequality extends between systemic fair housing litigation on one side and metropolitan equity on the other. That theory directs us to look at regional disparities in the institutional resources available in different municipalities, to compare rules and norms against an equity standard, and to seek remedies that promote the sharing of benefits and burdens across often segregated regions. Metropolitan equity gets us toward a clearer understanding of the forces sustaining inequality, but it is admittedly short on workable remedies. Fair housing litigation, were it to cover more of the subjects studied by metropolitan equity, could offer the push. The

228. The idea of expanding coverage into many aspects of the overall housing market has a long pedigree. Applying Title VIII to racially restrictive covenants, Judge Wilkey wrote in his concurrence that “Congress was aware that the measure would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole character of the housing market.” *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (Wilkey, J., concurring).

question is what would such a merger entail.

The answer depends upon the seriousness with which courts will consider the Act's anti-segregation/anti-ghettoization purpose. If courts interpret segregation in the narrow residential binaries of 1968, merger will be difficult. If courts see segregation as the housing linchpin to broader institutional denials of access, expansion is more likely. Metropolitan equity asks which institutional rules are susceptible to equity-based scrutiny under Title VIII. For a merger of metropolitan equity and fair housing to occur, inequity must be cognizable under the Act. If it is, we should be able to look at some of the key institutional arbiters of opportunity across a relevant region, subject their rules and norms to equitable examination against the goal of reducing the inequality of opportunity that segregation reproduces—racial concentration, under-resourced institutions, and high poverty rates. Thus, the statutory scope expansion relevant here involves three steps:

1. recognizing equity as a legal norm under Title VIII;
2. extending the reach of the statute's subject matter beyond housing to related residential functions and institutions; and,
3. allowing liability not only for discrimination but for the failure to affirmatively ameliorate the racially disparate effects of continuing segregation.

Before engaging in a hypothetical exercise about what this merger would look like, let's acknowledge what would be the easiest route to more egalitarian, stronger, and more inclusive regions: an active administrative enforcement regime led by HUD. If HUD used its authority under AFFH more aggressively, it could significantly reduce the need for litigation. That is, if HUD put in place a searching and consequential certification process by which recipients of its funds knew that non-compliance would terminate aid, the incentives for promoting more resource-rich communities would be very effective in speeding change. Alternatively, if

Congress were to amend § 3608 and provide a private right of action for litigants to sue recipients for failure to Affirmatively Further Fair Housing, a new set of ameliorative norms might set in among local and state governments.²²⁹ These are both unlikely, but are placeholders in the background of what follows. Nevertheless, each of the hypotheticals described next as well as the legal goals and precedents outlined could conceivably be attached to an AFFH claim.

The remainder of this Part builds toward three hypothetical lawsuits. I begin with a statement of goals for systemic fair housing litigation. Next, I set forth the kind of legal precedents I believe that fair housing advocates practicing metropolitan equity should seek from courts. Third, I lay out for clarity some of the basic statutory provisions one might use, as well as some indication of appropriate plaintiffs and defendants. Fourth, I examine hypothetical controversies in transportation equity and two in property tax fairness—tax-base sharing and inter-district educational choice. I conclude with a note on other approaches. For the sake of argument, I deliberately omit discussing the companion causes of action any litigator would ordinarily bring. I disclaim any attempt to draw up a one-size-fits-all litigation manual. The point, rather, is to stimulate another direction in a discourse on Title VIII that,

229. This was in fact proposed by the National Commission on Fair Housing and Equal Opportunity during the notice period. Specifically, the Commission sought:

[a]n amendment to the Fair Housing Act—defining a discriminatory housing practice to include a violation of the affirmatively furthering provision—would provide several direct remedies including an administrative complaint, an express private right of action in federal or state court, and an authorization for action by the U.S. Department of Justice if the violation amounted to a pattern and practice of discrimination or a matter of general public importance.

NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY (2008), <http://www.civilrights.org/publications/reports/fairhousing/emerging.html>.

after almost fifty years, could use a fresh take.

A. *The Goals of Systemic Fair Housing Litigation*

Earlier I noted that systemic litigation has both productive and disruptive functions. Like the two key purposes of the Act (anti-discrimination and anti-segregation), this type of litigation seeks both to produce significantly greater access to the institutions responsible for conferring opportunities *and* to disrupt a range of institutional practices that exclude protected groups from opportunity. These two functions frame the fundamental goals of lawsuits. First, systemic case theories have to seek a deconcentration of poverty in the region's poorest places. Nothing delimits opportunity like concentrated poverty. Poverty's costs are first internalized by the poor, then spread to the rest of us through lost contributions and higher taxes. Poverty deconcentration is a productive function. The corresponding disruptive function is to make the hoarding of privilege very expensive for those communities that engage in it. Systemic litigation should disrupt the benefits of privilege hoarding by increasing the costs of exclusion.

A second goal of systemic fair housing litigation is to promote constructive interdependency among regional actors. This is a productive function. Inter-local competition is costly and inefficient, an engine of segregation and a purveyor of stratification while ignoring the larger interdependencies shared by municipalities in a region. Metropolitan equity scholars (and other students of inequality) consistently demonstrate that widening inequality is bad for outcomes across entire regions. Litigation that promotes interdependency and shared decision-making over institutional behavior has the added benefit of disrupting zero-sum parochialism.

Third, whenever possible, a goal of systemic fair housing litigation as metropolitan equity should be to foster the grounds for future inclusiveness. This is more a question of building an ethos in which both the public and their local

officials see inclusion as an imperative of changing times. One of the signature problems for Title VIII over the decades has been the failure to disrupt the fundamental notion of the antagonistic “Other”—the wrong town, the wrong neighborhood, the wrong people, all worthy of avoidance. It is an irony of our adversarial process but probably true nonetheless: litigation over the terms of community should seek ultimately to nurture a sense of community.

B. *Legal Precedents Sought*

There are a number of precedents that fair housing litigation might set, guaranteeing the expansion of the Act’s scope on the way to achieving greater metropolitan equity. The first is that *housing is at the hub of many related services whose dependence is so substantial that activity affecting them is commonly considered “housing-related” under the Act.* As we will see shortly, transportation policy is inextricably connected to housing as is education and any fiscal policy that is dependent on the property tax system.

A key precedent aimed at reversing tax base disparities is that, *in racially impacted markets, systems of fiscal capacity that depend upon local property tax assessments may discriminate by race in rendering unequal the provision of services in connection with housing.* Metropolitan equity studies demonstrate that property tax-dependent systems typically drive inequalities that become even more pronounced in areas of racial impact.²³⁰ This can be tied to the process of racial segregation and its resulting economic costs.

There are several helpful education-related precedents that flow from the relationship between schools and housing.

230. See, e.g., CHRIS BRENNER & MANUEL PASTOR, JUST GROWTH: INCLUSION AND PROSPERITY IN AMERICA’S METROPOLITAN REGIONS 2 (2012) (citing studies to show the correlation between growing regional inequality and slower growth); MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 49, 51–53 (2002).

First, *weak schools constrict housing choice and vice versa*. This results from a causal chain in which a court could recognize that policies that diminish housing choice lead to racially segregated school districts, which in turn are primary causes of weak schools. A related precedent that may arise from a separate cause of action is this: *stable neighbors and middle-class classmates are educational resources*. Educators have long understood that neighborhood composition affects classroom composition, and the latter is predictive of educational outcomes. Courts should follow suit.²³¹

C. *Applicable Provisions and Actors*

Although there are multiple provisions of the Act that may be mined for systemic case theories, I focus here on two discussed earlier, § 804(a) and (b), as well as the AFFH clauses in § 808. Prospective theories might be constrained by courts barring post-acquisition claims, an unsettled area of law.²³² Here, the theories rely on asserting constructive denials of opportunity under 804(a) and discrimination in “the terms, conditions, or *privileges* of sale or rental of a dwelling, or in the *provision of services or facilities in connection* therewith” under § 804(b) (emphasis added).

D. *Three Hypothetical Lawsuits*

In the following exercise, I examine how these fair housing expansions into metropolitan equity might work in the context of three hypothetical illustrations. All of these examples mitigate some of the harshest effects of localism.

231. Although I have tried here to frame this discussion away from more traditional racial integration remedies, one precedent flows from the last: *Housing that is intended for families must be integrated because schools must be integrated in order to afford all students the greatest chance for a free and appropriate education*.

232. See, e.g., *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005) (post-acquisition habitability not cognizable under § 3604(b)); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004).

None of them actually require residential integration, though all rely factually on segregated patterns of residential organization. First is transportation spending disparities that result in inadequate transportation alternatives for lower-income, disproportionately minority residents of many regions. The lack of reasonable transportation alternatives disconnects them from areas of jobs and economic growth. Second is metropolitan tax-base sharing, a legislative rule change that Title VIII plaintiffs might seek against an inequitable system of property tax revenues that consistently favor some municipalities in a region over others. The resulting fiscal and services inequalities disproportionately impact minorities. The context for the hypothetical involves the spoils of publicly-funded stadium development. Finally, to reach the situation in St. Louis County that I described in the Introduction, I offer inter-district educational choice as a fair housing claim. I narrow the hypothetical context of this complex field to districts under prolonged state takeovers.

1. Regional Transportation Planning and Spending

What if a predominantly minority suburb was bypassed for a commuter train station after a combination of state actors decided to invest billions in the expansion of an existing rail link into the central city? Putting aside any other claims it might have under applicable transportation and administrative laws, does the municipality have a cause of action under the FHA? From a metropolitan equity standpoint, the example illustrates transportation inequities in services and public spending that tend to compound the jobs-housing mismatch for workers who disproportionately need affordable mass transit options.²³³ Connecting people to

233. For studies on transportation equity, see Yinglin Fan et al., *Impact of Light Rail Implementation on Labor Market Accessibility: A Transportation Equity Perspective*, 5 J. TRANSPORT & LAND USE 1, 1–2 (2010); *Transportation Equity Atlas*, PRATT CENTER FOR COMMUNITY DEVELOPMENT

jobs up and down the commuter corridor, from the interior (inner-ring suburbs) to the exterior (outer-ring suburban job centers), without demanding they pay disproportionately for car travel (car initial cost, maintenance, insurance, tolls) or public transit commuting time (the routes currently take longer because their municipality is on no direct line) is a key goal of elected officials of working-class towns and their constituents. For these commuters, adequate, affordable public transportation is a lifeline to economic opportunity. A policy that excludes them from the benefits of public spending on transportation in favor of wealthier, more politically connected towns would appear to continue a regional trend of winners and losers. Yet a feature of localism is that towns outside the decision-making jurisdictions have little to no say over activities beyond their boundaries.

The plaintiff's claim would be for discrimination under § 3604(b) and (a)²³⁴ under a theory that the transportation initiative discriminates against the minority town and its residents in the conditions and privileges of tenancy "or in the provision of services or facilities in connection" with housing, resulting in a denial of the benefits of non-segregated housing opportunity.²³⁵ The claim recalls the theory of opportunity denial in *Thompson v. HUD* discussed

<http://prattcenter.net/projects/transportation-equity/transportation-equity-atlas> (last visited Oct. 26, 2016) (showing large disparities in commute times between minorities and whites among New York City's five boroughs).

234. 42 U.S.C. § 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." The city would also have grounds to sue HUD directly for violating its duty to affirmatively further fair housing in the administration of its programs, which explicitly include transportation. 42 U.S.C. § 3608(d).

235. 42 U.S.C. § 3604(b) (2012). The city might also assert a § 3604(a) denial of housing opportunity available in the towns receiving the new stations on the grounds that the corresponding higher real estate prices associated with transit-oriented development will have a disparate impact on lower-income minority residents of the bypassed town.

earlier.²³⁶ The legal issues are many, but I will focus on just two: whether the municipality has standing and whether the government's action under its transportation authority violates fair housing interests.

As to standing, the Eleventh Circuit recently articulated an expansive concept of FHA standing in *City of Miami v. Bank of America*.²³⁷ Alleging violations of §§ 3604(b) and 3605(a),²³⁸ the city sued the bank for years of predatory lending in minority neighborhoods, racial discrimination in the form of redlining and reverse redlining that resulted in much higher rates of foreclosure for those homeowners.²³⁹ In a suit for damages, the city asserted a municipal interest in the loss of expected property tax revenues (because foreclosures lower surrounding property values, thus reducing tax assessments) as well as the actual costs of additional city services (because foreclosures attract crime and require upkeep normally paid for by owners).²⁴⁰ Lending discrimination, the city alleged, had eroded property values and hurt the tax base, bringing financial injury to the city.²⁴¹ The circuit court reversed the trial court, holding it “clear as a bell” that standing under the FHA is as broad as Article III standing will bear.²⁴² The city would succeed even under stricter “zone of interests” tests of standing, given the

236. 348 F. Supp. 398 (D. Md. 2005); *see* discussion *supra* Section I.B.1.

237. 800 F.3d 1262 (11th Cir. 2015).

238. “It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3605(a). A “residential real estate-related transaction” includes “the making or purchasing of loans . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling; or secured by residential real estate.” *Id.* § 3605(b)(1).

239. *City of Miami*, 800 F.3d at 1267–68.

240. *Id.* at 1269.

241. *Id.*

242. *Id.* at 1277.

contextual nature of injuries in fair housing cases.²⁴³

The transportation equity hypothetical contains several features similar to *City of Miami*. Like that case, this one shows a city asserting its own interest in not internalizing the costs of policies that have segregative effects (the racial interest) with corresponding financial injury (the economic interest). Not only would transportation development bypassing the minority town further racially segregated residential patterns, but it would favor predominantly white towns over minority towns in the distribution of government benefits. The proof of racial injury would be shown empirically with the kind of disparate impact transportation data common to metropolitan equity analyses.²⁴⁴ One could argue that two aspects of this argument remain unsettled. The first is whether our hypothetical plaintiff-municipality could survive the defense that its injury is too indirect, an element of proximate causation. The other is whether a court would dismiss the action as one seeking post-acquisition (as opposed to pre-transactional) housing-related injuries, a distinction made by at least one circuit court.²⁴⁵ However, the town could also argue that it suffers if future residents will be dissuaded from seeking housing in a transportation-isolated market.

This last point reaches the second major hurdle for the

243. The Eleventh Circuit's *City of Miami* opinion recognized an alternative—but in its view inapplicable—analysis of standing by the Supreme Court in a recent Lanham Act case, *Lexmark v. Static Control Components, Inc.*, in which the Court said that the zone of interests test should be controlled by “traditional tools of statutory interpretation.” 134 S.Ct. 1377, 1386–87 (2014). Even by that standard, the city's interest in non-segregated, “truly balanced living patterns” would suffice.

244. As a practical matter, hypothetical plaintiffs might want to demonstrate some unsuccessful attempt to find affordable housing in the towns targeted for transportation subsidies. See *Evans v. Lynn*, 537 F.2d 571 (2d Cir. 1975).

245. See *Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005). *But see* *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713–15 (9th Cir. 2009) (concerning sewer services).

hypothetical plaintiff: How is transportation policy housing policy under the Act? Here is where the true statutory expansion occurs, with the aid of metropolitan equity analyses. Transportation is already mentioned in § 808 as a linked activity with housing, and transportation considerations are among the planning factors required by the Assessment of Fair Housing.²⁴⁶ What we would expect a regional analysis of housing markets to add is that mass transit, transportation spending, and transit-oriented development are governmental expenditures inextricably connected to housing policy and planning. It is hard to separate the two, especially outside of central cities. This relationship will become even more important amid climate concerns where commuters are sensitive not only about increasing congestion and commuting times but also about over-dependence on fossil fuels. The fair housing argument is that these concerns are even more pressing for lower-income minority workers living in segregated municipalities, since for them environmental concerns mix with concerns about employment access and wealth maximization (property value) to limit opportunity.

2. Stadium Development and Metropolitan Tax-Base Sharing

Sharing the tax gains of localized development across all of a region's municipalities has long been a goal of many metropolitan equity scholars who write in the legislative vein.²⁴⁷ Only a few states such as Minnesota have such a statutory mechanism.²⁴⁸ Since the idea arises out of a need to trim the excesses of localism on behalf of poorer cities and

246. 24 C.F.R. § 5.154(d). See discussion *supra* Section II.D.1.

247. See generally, Myron Orfield & Nicholas Wallace, *The Minnesota Fiscal Disparities Act of 1971: The Twin Cities Struggle and Blueprint for Regional Cooperation*, 33 WM. MITCHELL L. REV. 591 (2007).

248. Charles R. Weaver Metropolitan Revenue Distribution Act, Minn. Stat. Ann. §§ 473F.01–08 (West 2001 & Supp. 2007) (“The Minnesota Fiscal Disparities Act”).

towns whose disproportionately minority populations suffer a disparate impact to their tax base when they lose out on economic growth to more attractive neighbors, it is worth considering whether it could pass muster under the FHA. What if a new sports and entertainment stadium/arena was proposed by state and private actors to be built in a suburb of a large metropolitan area using state redevelopment funds? Municipalities just beyond the benefits boundary sue under the FHA to demand tax-base sharing as a remedy.

From the standpoint of poorer plaintiff municipalities, this action represents a clear instance in which structural inequality theory bridges the gap between metropolitan equity and fair housing. The economic benefits created by a publicly financed arena represents regional opportunity denied by an exclusionary governmental policy.²⁴⁹ The redevelopment policy is the product of several important institutions—taxing authorities, state agencies, local planning boards, special commissions, public-private partnerships—whose rules and norms around stadium development deals are facially neutral but bring decidedly unequal resources to some communities in the region and not others. The have-nots in this hypothetical competition for tax revenues are, in HUD parlance, disproportionately “low-opportunity, racially impacted” municipalities, leading to proof of disparate impact.²⁵⁰ Let’s assume that the real estate nature of the transactions at issue minimize any subject matter concerns about whether the conflict fits within the Act’s scope. Rather, the more pressing legal issue is whether municipalities alleging harm from the stadium deal have grounds to demand reform of the state’s tax policy. After all,

249. For a thoughtful account of some of the negative ripple effects of stadium developments on minority communities historically, see Daniel Judd, *Stadiums Ruin Neighborhoods*, THE NATION (Sept. 3, 2015), <http://www.thenation.com/article/stadiums-ruin-neighborhoods/>.

250. It is well settled that HUD is obligated to evaluate the effects of development on racial minorities living in surrounding areas. *Pleune v. Pierce*, 765 F. Supp. 43, 47–48 (E.D.N.Y. 1991).

in this example it's the lop-sided tax implications of the proposal that give rise to the municipal harms.

Although the claim's success is unlikely, the reasons are instructive. Like the previous example, each plaintiff town here would argue that a policy that discriminates against its tax base in residential transactions disproportionately impacts minority access to opportunity in violation of the Act. But each plaintiff could not claim that the Act entitled it to a right to equal economic benefits from a regional development deal. In other words, the standard sought here by plaintiffs is equity, not equality, of housing-related benefits. Since there is no FHA precedent (yet) for claims of discriminatory denial of benefits among regional actors, court-ordered tax base sharing as a remedy for the inequitable distribution of regional development benefits and burdens would have systemic impact. Thus, the primary legal challenge for systemic litigation of this kind is getting judicial recognition of an equity standard under Title VIII.

3. Inter-district Educational Choice for Districts Under Prolonged State Takeover

A common metropolitan equity assertion is that “housing policy is education policy,” because residency determines district membership in much of the United States. This hypothetical asks whether education policy can also be housing policy under the FHA. Compelling inter-district choice through housing litigation puts integration at the center of the theory of recovery—but school integration, not housing integration. Here, residential segregation—the result of interacting institutional rules and norms—connects metropolitan equity with fair housing as the force that reproduces educational inequality. This relationship has been clear to courts for a long time.²⁵¹ The question is

251. The relationship between segregated housing patterns and segregated schools is long recognized in school desegregation litigation. *See, e.g.*, *Bradley v.*

whether systemic FHA litigation can make it an explicit grounds for remedy.

Although inter-district choice educational plans are too complex for a thorough discussion here,²⁵² we can narrow the hypothetical to highlight the FHA issues. Take the exceptional case of the “failing” urban school district that has been taken over by the state, such as Newark or Camden, New Jersey. The principle of local control of key community institutions has now passed to the state, often for five-year terms (in Newark’s case for over fifteen years) until a threshold for educational sufficiency is reached.²⁵³ Control may be returned to the district when it has demonstrated

Milliken, 345 F. Supp. 914, 940 (E.D. Mich. 1972) (“Where the actions of state defendants and local school authorities throughout the metropolitan area have had the natural, foreseeable, and actual effect of building upon, taking advantage of, and encouraging racially segregated demographic patterns deliberately fixed by governmental action at all levels with the effect of creating and maintaining racial segregation in the public schools, there is a present obligation to eliminate the continuing effects of such violation; and the District Court has the duty, upon default by school authorities, to intervene to secure compliance with the Constitution pursuant to the sound exercise of traditional equity powers consistent with the practicalities of the local situation.”) (citing *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1, 15–16, 20–21, 31–32 (1971)).

252. For more in-depth discussion of the relevant issues, see AMY STUART WELLS ET AL., CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, *BOUNDARY CROSSING FOR DIVERSITY, EQUITY AND ACHIEVEMENT: INTER-DISTRICT SCHOOL DESEGREGATION AND EDUCATIONAL OPPORTUNITY* 9 (2009). See also Neil Kraus, *Concentrated Poverty and Urban School Reform: “The Choice Is Yours” in Minneapolis*, EQUITY & EXCELLENCE EDUC. 262 (2008); Anita Wadhwa, *Crossing the Line & Closing the Gap: Interdistrict Magnet Schools as Remedies for Segregation, Concentrated Poverty and Inequality* (Charles Hamilton Houston Inst. for Race & Justice, Working Paper, 2009).

253. For an overview of school takeover policies, see INST. ON EDUC. L. & POL’Y, *50-STATE REPORT ON ACCOUNTABILITY, STATE INTERVENTION & TAKEOVER*, http://ielp.rutgers.edu/docs/developing_plan_app_b.pdf (last visited Oct. 19, 2016). See also State Legislation: Accountability—Sanctions/Interventions—Takeovers, EDUC. COMM’N OF THE STATES, <http://b5.caspio.com/dp.asp?AppKey=b7f93000695b3d0d5abb4b68bd14&id=a0y7000000CbIWAAS>. The practice may be on the rise, especially in Republican-led states. See Lindsey Layton, *GOP-led States Increasingly Taking Control from Local School Boards*, WASH. POST (Feb. 1, 2016), https://www.washingtonpost.com/local/education/gop-led-states-increasingly-taking-control-from-local-school-boards/2016/02/01/c01a8e4e-bad3-11e5-b682-4bb4dd403c7d_story.html.

that it can educate as other, better-performing districts do. Both metropolitan equity researchers and education professionals understand, however, that a primary reason for the persistence of failed outcomes has been residential segregation. Housing segregation was a primary factor in creating low-performing, overwhelmingly minority schools in the first place. Years later, housing segregation is a primary explanation for the distance between performance outcomes between those schools and their more affluent, overwhelmingly white and Asian schools in other parts of their region. To add one other factual wrinkle to the hypo, the state already has an inter-district choice statute in place. However, it is only voluntary and seldom used. The strongest districts, even several near the one under state control, have declined to participate.

The legal issue is as follows: denied the choice to attend schools outside their home districts despite a condition of officially recognized failing schools, could parents from the urban school district use 3604(b) to sue the state department of education for denying their children the educational opportunities—i.e., “privileges”—ordinarily associated with fair housing choice—i.e., “in the provision of [educational] services . . . in connection therewith”—because of their race, national origin, and familial status?

This lawsuit would set up a monumental clash of localist principles—the right of residentially excluded children to educational choice versus the right of municipal school districts to control attendance—combined with the interest in providing for all children. As a statutory matter, the plaintiff families would have to prove not only which relevant (and timely) state policies caused the segregation. More importantly, they would have to prove that denial of educational opportunity is a foreseeable result of segregation. In other words, they would have to prove that housing policy really is education policy for purposes of the Act. Is school attendance a “privilege” of the sale or rental of a dwelling? It depends on what privilege means and whether

it can be equated with opportunity or simple access to whatever school is available. Is education a “service” normally associated with housing choice? Common sense and innumerable studies of property values would suggest so.

E. *Fraud and Other Systemic Litigation*

Although the Act’s AFFH requirement does not provide a private right of action, governments have been sued for fraudulently certifying that they have met the requirements in return for federal funding.²⁵⁴ The most notable case thus far is *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*²⁵⁵ in which a *qui tam* relator (whistleblower) brought suit against the county under the federal False Claims Act.²⁵⁶ The district court found that Westchester had indeed falsified certification reports by, among other things, producing the required Analyses of Impediments without taking race into account or

254. In *United States ex rel. Anti-Discrimination Ctr. Metro N.Y., Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548, 554-55 (S.D.N.Y. 2009), the court noted:

The distinction between AFFH actions and affordable housing activities is further explained in the HUD Guide:

The two concepts are not equivalent but they are also not entirely separate. When a jurisdiction undertakes to build or rehabilitate housing for low- and moderate-income families, for example, *this action is not in and of itself sufficient to affirmatively further fair housing*. It may be providing an extremely useful service by increasing the supply of decent, safe, and sanitary affordable housing. Providing adequate housing and improving existing neighborhoods are vital functions and should always be encouraged.

Additionally, the provision of affordable housing is often important to minority families and to persons with disabilities because they are disproportionately represented among those that would benefit from low-cost housing. *When steps are taken to assure that the housing is fully available to all residents of the community, regardless of race, color, national origin, gender, handicap, or familial status, those are the actions that affirmatively further fair housing.*

255. *Id.*

256. 31 U.S.C. §§ 3729–3733 (2016).

without certifying steps it would take to ameliorate racial segregation.²⁵⁷ At its core, the *Westchester* case may be the closest thing to a private right of action under AFFH without suing HUD. Seen in the most generous light, Westchester County was found to conflate affordable housing with fair housing.²⁵⁸

Westchester is probably not alone in this conflation, which constitutes a violation of Title VIII's express interests in desegregation and racial equality. The kind of continued racial segregation in Westchester that can be viewed on a map is repeated across metropolitan America, including New Jersey. In fact, New Jersey's racial segregation continues in spite of a state fair housing law that codifies Westchester's conflation of affordable with fair housing.²⁵⁹ Many governmental recipients of HUD funding could be vulnerable to suits such as *Westchester*. In states like New Jersey that have codified non-racial "fair share" housing while reproducing segregation, the state agencies responsible for enforcing fair housing might be sued for failing to administer their fair housing laws in a manner that affirmatively furthers the federal definition of fair housing.

CONCLUSION

The policy of fair housing expressed in the FHA combined the ideals of anti-discrimination and anti-segregation in order to advance an interest in access to equal opportunities that is as relevant today as it was during its violent origins. The empirical parallels between structural inequality now and structural inequality in 1968 are not surprising. Recall that the character of African American disadvantage addressed by Martin Luther King and Malcolm X and described in Part II was institutionally pervasive. Slum conditions in housing itself as well as systemic

257. *Westchester*, 668 F. Supp. 2d at 570.

258. *Id.* at 555.

259. See discussion *supra* Section II.C.

restrictions on affordable options, private discrimination, and inflated costs were paramount. But they were accompanied by a landscape of underfinanced and under-resourced schools, declining infrastructure, inadequate transportation options, prohibitive insurance rates, employment barriers, and often shockingly hostile relations with law enforcement and the criminal justice system. That complex array of crushing deficits continued to occur in the decades that followed. The segregation of people and resources led to a spectrum of inequality bracketed by concentrations of great poverty and great wealth. If nothing else, what the theory of structural, or place-based, inequality demonstrates is the exacting plasticity of an endemic and efficient stratification.

This Article articulated the theoretical and practical bridge between evolving notions of fair housing and the empirically drawn realities of metropolitan equity study and advocacy. The two are joined by a theory of structural inequality, which posits that inequality of opportunity is sustained by place-based disparities in the rules and resources that govern the same key institutions differently, often by race and socioeconomic status. Places, therefore, have opportunity identities that are radically distinct. Housing and housing-related policies represent the key institution—then and now—that sustain these differences. Despite almost fifty years of relative failure, it takes only an expansion of the FHA's scope to imagine equitable solutions for the realization of meaningful inclusion across our metropolitan landscapes.