

1-1-2001

# OPENING THE SUBURBS TO RACIAL INTEGRATION: LESSONS FOR THE 21ST CENTURY

Florence W. Roisman

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Florence W. Roisman, *OPENING THE SUBURBS TO RACIAL INTEGRATION: LESSONS FOR THE 21ST CENTURY*, 23 W. New Eng. L. Rev. 65 (2001), <http://digitalcommons.law.wne.edu/lawreview/vol23/iss1/3>

This Symposium Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

# OPENING THE SUBURBS TO RACIAL INTEGRATION: LESSONS FOR THE 21st CENTURY

FLORENCE WAGMAN ROISMAN

“[M]ove on in . . . these days of challenge to make America what it ought to be.”<sup>1</sup>

“[T]o get beyond racism, we must first take account of race.”<sup>2</sup>

One of the most serious domestic problems we carry forward into the 21st century is profound geographic racial separation, with growing numbers of “white” people living in suburbs increasingly distant from cities, and people of color living in central cities and inner-ring, older suburbs.<sup>3</sup>

---

\* Professor of Law, Indiana University School of Law-Indianapolis.

This article is an elaboration of my speech at the Conference on Increasing Affordable Housing and Regional Housing Opportunity in Three New England States and New Jersey, held on December 10, 1999, at the Western New England College School of Law.

This article, like the speech, is dedicated to the memory of my revered and cherished colleague, David Brady Bryson, Esq. (1941-1999), an inspiring champion of housing justice who long was the mainstay and lodestar of the National Housing Law Project and of legal services housing advocates and clients throughout the United States.

I am grateful to Professors Sharon Perlman Krefetz and John M. Payne for comments on an earlier draft of this article; to Mr. Eric Larson, of the Montgomery County, Maryland Housing Opportunities Commission, for important information; to Victoria A. Deák and Paul Jefferson for research assistance; to Richard Humphrey, Reference/Collection Management Librarian, and Beverly Bryant, Interlibrary Loan Librarian, at the Indiana University School of Law - Indianapolis Library, for superb reference work; to Mary R. Deer for invaluable aid on this and many other projects; and to the staff of the Western New England Law Review for careful and thorough editing. Any errors are of course my responsibility. I hope that readers will call to my attention any mistakes of fact or judgment they perceive in this Article.

1. Sermon by Dr. Martin Luther King, Jr. at the Mason Temple in Memphis, Tenn. (Apr. 3, 1968), *I See The Promised Land*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 279, 285 (James Melvin Washington ed., 1986).

2. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

3. While residential segregation is a problem for minorities other than African-Americans, this Article focuses on African-Americans because segregation is most severe and widespread for them, and because many studies report only on black-white

This problem was highlighted in the 1960s, particularly in response to urban riots in the years from 1963 to 1967.<sup>4</sup> It was famously captured by the Kerner Commission's March 1, 1968 report on civil disorders: "[o]ur nation is moving toward two societies, one black, one white—separate and unequal."<sup>5</sup> The Commission noted that "[d]iscrimination prevents access to many non-slum areas, particularly the suburbs, where good housing exists."<sup>6</sup> The riots following Dr. King's assassination on April 4, 1968 further underscored the outrage of many African-Americans against residential racial discrimination and segregation.<sup>7</sup>

In the 1960s, many people focused on a separate but related problem: the economic exclusivity of many suburbs. Norman Williams and his colleagues produced pathbreaking work demonstrating the paucity of land available for moderate-cost housing in Northern New Jersey;<sup>8</sup> similar studies were published regarding the suburbs of Connecticut, New York City, and other areas.<sup>9</sup> The economic exclusion was related to the racial exclusion because many minorities also were poor, but most of those subject to economic exclusion were whites, not people of color—simply because most of

---

differences. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 77 (1993) (observing that segregation is most severe for African-Americans); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 152-55 (2d ed. 1994) (criticizing the "bipolar black/white model" of race relations).

I use the terms "white" and "race" for their common, unjustifiable significations. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987) ("Many modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations . . .").

4. See REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 19-22 (1968) [hereinafter KERNER COMM'N REPORT]; ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 5.2, at 5-3 (West Group 2000) (reviewing elements of the Commission's lengthy discussion of "the problems of residential segregation and racial slum formation as one of the underlying causes of the urban disorders of 1967").

5. KERNER COMM'N REPORT, *supra* note 4, at 1.

6. *Id.* at 13.

7. PAUL A. GILJE, *RIOTING IN AMERICA* 158 (1996) (noting that the National Commission on the Causes and Prevention of Violence had identified 239 separate urban riots between June 1963 and May 1968; "the rioters . . . reminded whites of the de facto segregation . . . that seemed to be preventing African Americans from escaping the inner city").

8. See Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971).

9. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41-42 (1990) (citing other authorities).

the low-income people in the United States were white.<sup>10</sup>

Remedies were proposed that addressed sometimes the racial problem, and sometimes the economic problem. At the federal level, President Kennedy's Executive Order of 1962<sup>11</sup> and Title VI of the 1964 Civil Rights Act<sup>12</sup> prohibited some forms of racial discrimination and segregation in federally-financed housing; Title VIII of the 1968 Civil Rights Act,<sup>13</sup> enacted in response to Dr. King's assassination, addressed residential racial discrimination and segregation more broadly.<sup>14</sup> Also in 1968, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*<sup>15</sup> made the Civil Rights Act of 1866, 42 U.S.C. §1982, available against acts of private racial discrimination.<sup>16</sup> While these measures forbade discrimination on the bases of race and other categories,<sup>17</sup> they did not forbid discrimination on the basis of wealth; indeed, the legislative history of Title VIII indicated an intention to prohibit discrimination only against people who "can afford" to live in a particular place.<sup>18</sup> These federal initiatives were both preceded<sup>19</sup> and supplemented by litigation

---

10. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1969) [hereinafter DOUGLAS COMM'N REPORT], available at H.R. DOC. NO. 91-34, at 45 ("There are twice as many whites as nonwhites in the Nation's total poverty population.") (footnote omitted).

11. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962), amended by Exec. Order No. 12,892, 59 Fed. Reg. 8513 (Feb. 22, 1994).

12. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (1994)).

13. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631).

14. See SCHWEMM, *supra* note 4, § 5.2, at 5-3 to 5-5 (describing the legislative history of Title VIII). See generally Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969) (same).

15. 392 U.S. 409 (1968).

16. *Id.* at 413 (holding that § 1982 applies to private discrimination in the sale of real property).

17. Title VIII also prohibits discrimination on the bases of color, religion, and national origin. 42 U.S.C. § 3604 (1994). A prohibition of discrimination on the basis of sex was added by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in pertinent part at 42 U.S.C. § 3604). The prohibition against discrimination on the bases of familial status or handicap was added by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified in pertinent part at 42 U.S.C. § 3604).

18. See 114 CONG. REC. 2279 (1968) (statement of Sen. Brooke) (noting that Title VIII "will make it possible for those who have the resources to escape [the ghetto]"); see also *id.* at 9589 (statement of Rep. Halpern) (stating that Title VIII guarantees blacks the right to live "where [they] can afford").

19. See, e.g., *Cohen v. Pub. Hous. Admin.*, 257 F.2d 73, 74 (5th Cir. 1958) (challenging racial segregation imposed by federal agency), *cert. denied*, 358 U.S. 928 (1959), *overruled in part by* *United States v. Jefferson City Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967).

that sought judicial relief from systemic residential racial discrimination and segregation, as in the *Gautreaux* litigation, which began in 1965,<sup>20</sup> the *Mount Laurel* litigation, which began in 1971,<sup>21</sup> and, on occasion, in litigation challenging public school segregation.<sup>22</sup>

Other forms of relief addressed the economic exclusion only, at least explicitly. Real estate developers in Pennsylvania,<sup>23</sup> New Jersey,<sup>24</sup> California,<sup>25</sup> and elsewhere challenged land use requirements that excluded relatively higher-density, lower-cost housing from high-income suburbs. Some state and local legislation addressed economic exclusion: in the spring of 1968, New York State created its Urban Development Corporation and endowed it “with

20. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 908 (N.D. Ill. 1969); see ALEXANDER POLIKOFF, *HOUSING THE POOR: THE CASE FOR HEROISM* xiv (1978) (indicating that the American Civil Liberties Union began the *Gautreaux* litigation in 1965); LEONARD S. RUBINOWITZ ET AL., *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 23 (2000). For a list of housing desegregation cases following *Gautreaux*, see Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE (1999), at 171, 194-96 (listing desegregation cases in which HUD is a defendant).

21. *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 717 (N.J. 1975), [hereinafter *Mount Laurel I*], *cert. denied and appeal dismissed*, 423 U.S. 808 (1975); see DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 61-62 (1995) (discussing the 1971 filing of the *Mount Laurel* litigation by Camden Regional Legal Services).

22. See *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988) (challenging both residential and school segregation). Several authors have discussed the linkages between residential segregation and school segregation. See generally Dennis R. Judd, *The Role of Governmental Policies in Promoting Residential Segregation in the St. Louis Metropolitan Area*, 66 J. NEGRO EDUC. 214 (1997); *Residential Segregation: What Are the Causes?*, 66 J. NEGRO EDUC. 204 (1997) (presenting the testimony of Gary Orfield); William L. Taylor, *The Role of Social Science in School Desegregation Efforts*, 66 J. NEGRO EDUC. 196 (1997).

A recent study of federal archival material has indicated that segregation in federally-financed programs may have resulted directly from efforts to evade the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954). See Arnold R. Hirsch, “Containment” on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War, 26 J. URB. HIST. 158, 160 (2000); Arnold R. Hirsch, *Searching for a “Sound Negro Policy”: A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUSING POL’Y DEBATE 393, 429-30 (2000).

23. See *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765, 766 (Pa. 1970) (invalidating two and three acre minimum zoning); *Appeal of Girsh*, 263 A.2d 395, 398-99 (Pa. 1970) (invalidating zoning that would not allow apartment buildings); *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 612 (Pa. 1965) (invalidating four-acre minimum zoning).

24. See, e.g., *Home Builders League of S. Jersey, Inc. v. Township of Berlin*, 405 A.2d 381, 392 (N.J. 1979) (invalidating minimum floor area requirements).

25. See, e.g., *Constr. Indus. Ass’n (Sonoma County) v. City of Petaluma*, 375 F. Supp. 574, 576, 588 (N.D. Cal. 1974) (invalidating a zoning plan to cap population growth), *rev’d*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

sweeping authority to develop and finance housing of all sorts, including subsidized units,” without regard to local land use regulations.<sup>26</sup> In 1969, Massachusetts enacted its Comprehensive Permit Law,<sup>27</sup> which was emulated by Connecticut in 1989<sup>28</sup> and Rhode Island in 1991.<sup>29</sup> Oregon,<sup>30</sup> California,<sup>31</sup> and Florida<sup>32</sup> require municipalities to adopt plans for affordable housing and otherwise to support lower-income housing. Several local jurisdictions, includ-

---

26. See New York state urban development corporation act, 1968 N.Y. c. 174 § 1 (codified at N.Y. UNCONSOL. LAW §§ 6251-6285 (McKinney 2000)); see also MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 307 (1976).

27. 1969 Mass. Acts ch. 774, § 1 (codified at MASS. GEN. LAWS ch. 40B, §§ 20-23 (1998)).

28. The Connecticut Affordable Housing Appeals Act, 1989 Conn. Acts 311 (codified at CONN. GEN. STAT. § 8-30g (1999)).

29. Rhode Island Low and Moderate Income Housing Act, 1991 R.I. Pub. Laws 154, § 1 (codified at R.I. GEN. LAWS § 45-53-1 to -8 (1999)).

30. See OR. REV. STAT. § 197.303-.320 (1989); Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, 8 HOUSING POL’Y DEBATE 11, 28-29 (1997) (noting that Oregon in 1973 established a mandatory planning program that requires “that every jurisdiction within the UGB [Urban Growth Boundary] provide ‘appropriate types and amounts of land . . . for housing that meets the housing needs of households of all income levels’”).

The Land Conservation and Development Commission, which administers the program, has required that every jurisdiction in the Portland region “zone at least half its vacant residential land for apartments or for attached single-family housing.” *Id.* It is noteworthy that while Portland “has had small minority populations,” nonetheless, it had six census tracts that were more than 50% African-American in 1990. *Id.* at 19.

31. See Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL’Y DEBATE 109, 117 (1997) (noting that the California Government Code was amended in 1975 to require a housing element in each municipality’s general plan, which “shall make adequate provision for the existing and projected needs of all segments of the community”) (citation omitted). A 1980 amendment required each locality to develop “policies and programs to enable it to meet its fair share of regional lower-income household needs.” *Id.*; see Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California*, 64 J. AM. PLAN. ASS’N 150, 155 (1998) (adding that California Community Redevelopment Law contains several effective requirements. Twenty percent of the tax increment that a redevelopment agency earns must be spent on low- and moderate-income housing, and 30% of all new or rehabilitated units produced by a redevelopment agency must be affordable to low- and moderate-income households (with at least half of those affordable to persons of very low income.) In addition, “15 percent of all private and public units built in a redevelopment area must be affordable, with 6 percent affordable to very low-income households.” *Id.*

For additional discussion of California’s program, see Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. L. 63, 78-80 (1996).

32. FLA. STAT. ANN. § 163.3161-.3215 (West 2000). Florida’s Omnibus Growth Management Act of 1985 added the requirement that each jurisdiction in the State produce a comprehensive plan, which must include a housing element that addresses the needs of all current and anticipated future residents at all income levels. Connerly & Smith, *supra* note 31, at 69 (describing the Florida legislation).

ing Fairfax County, Virginia, in 1971, and Montgomery County, Maryland, in 1973, enacted ordinances requiring that a percentage of new units developed be dedicated to low- and moderate-income use.<sup>33</sup> Courts imposed restraints on economic segregation in New Jersey (with the famous *Mount Laurel* decisions of 1975<sup>34</sup> and 1983)<sup>35</sup> and in New Hampshire (in *Britton v. Town of Chester*<sup>36</sup> in 1991). The *Mount Laurel* litigation led the New Jersey legislature to enact the New Jersey Fair Housing Act.<sup>37</sup>

Some of these initiatives have been eliminated: the New York State Urban Development Corporation (“UDC”) was stripped of its power to override local land use regulations;<sup>38</sup> and the Fairfax

33. See MONTGOMERY COUNTY, MD. CODE § 25A (2000); DANIELSON, *supra* note 26, at 111-12 (Montgomery and Fairfax Counties); HERBERT M. FRANKLIN ET AL., IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 131 (1974) (Montgomery and Fairfax Counties and Los Angeles, Cal.); THE INNOVATIVE HOUS. INST., THE HOUSE NEXT DOOR, app. B (1998), <http://www.Inhousing.org/TheHouseNextDoor.htm> (last revised Feb. 7, 2001) (on file with the Western New England Law Review) (summary and background of Montgomery County program) [hereinafter HOUSE NEXT DOOR]; see also Constr. Indus. Ass’n (Sonoma County) v. City of Petaluma, 522 F.2d 897, 901 (9th Cir. 1975) (noting that 8-12% of multi-family housing units in the City of Petaluma must be for low- or moderate-income households); John Emmeus Davis, *Building the Progressive City: Third Sector Housing in Burlington*, in THE AFFORDABLE CITY 165, 182, 198 n.25 (John Emmeus Davis ed., 1994) (noting that Burlington, Vt. enacted an inclusionary zoning ordinance in 1990); Ernest Erber & John Prior, *The Trend in Housing Density Bonuses*, PLANNING, Nov. 1974, at 14 (Cherry Hill, N.J. and Lewisboro, N.Y.). Fairfax County, Virginia currently has such a program. See HOUSE NEXT DOOR, *supra*, app. B.

At least some part of the impetus for these economic initiatives was concern about racial segregation. See, e.g., DANIELSON, *supra* note 26, at 118 (“The ministers who launched the campaign for zoning reform in Fairfax County initially were drawn to the issue by concern over the plight of blacks unable to find housing outside the District of Columbia.”). Part of the impetus for the Montgomery County ordinance came from the advocacy group, Suburban Maryland Fair Housing. See HOUSE NEXT DOOR, *supra*, app. B, at 5.

34. *Mount Laurel I*, 336 A.2d 713.

35. *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*].

36. 595 A.2d 492 (N.H. 1991).

37. N.J. STAT. ANN. § 52:27D-301 to -329 (West 1986); see *id.* § 52:27D-303 (describing the Act as legislative satisfaction of “the constitutional obligation enunciated by the [New Jersey] Supreme Court”); James E. McGuire, *The Judiciary’s Role in Implementing the Mount Laurel Doctrine: Deference or Activism?*, 23 SETON HALL L. REV. 1276, 1292-94 (1993) (describing the enactment of the New Jersey Fair Housing Act).

38. See DANIELSON, *supra* note 26, at 306-22 (describing the creation and restriction of the UDC). *But see* *United States v. Yonkers Bd. of Educ.*, 30 F. Supp. 2d 650, 652-53 (S.D.N.Y. 1998) (describing the current status of the UDC and holding that it “never lost its legislative mandate to build low income housing . . . and has been continuously in a position to effect remedies to those segregative housing problems in Yonkers which it helped to create”).

ordinance was invalidated by the Virginia Supreme Court.<sup>39</sup> Some survive today, but seem to have achieved little.<sup>40</sup> Several others, however, continue to this date and have had substantial impact on land use patterns: these include the Massachusetts statute, the congeries of New Jersey actions labeled “the *Mount Laurel* initiatives,”<sup>41</sup> the Oregon,<sup>42</sup> California,<sup>43</sup> and Florida<sup>44</sup> statutes, and the Montgomery County ordinance.<sup>45</sup> Although these may have originated, at least in part, in concerns for racial justice, each was expressed in terms of economic exclusion only.

To the extent that we have information about the impact of these initiatives, except for the Montgomery County ordinance, the

39. *Bd. of Supervisors (Fairfax County) v. DeGroff Enters., Inc.*, 198 S.E.2d 600, 602 (Va. 1973) (invalidating inclusionary zoning ordinance); see ALAN MALLACH, *INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES* 29-30 (1984) (discussing the case). In 1990, Fairfax County promulgated an Affordable Dwelling Unit (“ADU”) program that applies to some developments of 50 units or more that are subject to rezoning, special exception, site plan, or subdivision plat approval. Fairfax County also has a Moderate Income Direct Sales Program. See *HOUSE NEXT DOOR*, *supra* note 33, app. B, at 3.

40. Among these are the New Hampshire decision and the Connecticut and Rhode Island statutes. See Calavita et al., *supra* note 31, at 111 (noting that little housing has been produced pursuant to *Britton v. Town of Chester*). The Connecticut statute seems to have been emasculated. See *Christian Activities Council, Congregational v. Town Council*, 735 A.2d 231, 245-46 (Conn. 1999). *But see* *Quarry Knoll II Corp. v. Planning & Zoning Comm’n (Greenwich)*, No. CV9804922535, 1999 WL 1293214, at \*15 (Conn. Super. Ct. Dec. 22, 1999) (approving project for elderly persons).

41. N.J. STAT. ANN. § 52.27D-301 to -329; *Mount Laurel II*, 456 A.2d 390; *Mount Laurel I*, 336 A.2d 713; N.J. ADMIN. CODE tit. 5, § 5:91 (2000); see also *Holmdel Builders Ass’n v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990) (interpreting the statutes and regulations); *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (same); *In re Township of Warren*, 588 A.2d 1227 (N.J. Super. Ct. App. Div. 1991) (same), *rev’d*, 622 A.2d 1257 (N.J. 1993). See generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); KIRP ET AL., *supra* note 21; *Mount Laurel Housing Symposium*, 27 SETON HALL L. REV. 1268-1496 (1997); John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685 (1998) (reviewing HAAR, *supra*).

42. OR. REV. STAT. § 197.303-.320 (1989).

43. See Calavita et al., *supra* note 31, at 112 (“[O]nly in New Jersey and California has the experience with IH [Inclusionary Housing] been both diverse and long-lasting.”). A 1994 survey found that in 64 jurisdictions in California, 22,572 lower-income units had been produced, with 2439 more “approved or in the pipeline.” *Id.* at 123. The emphasis in California, as in New Jersey and Massachusetts, has been on “moderate income” homebuyers. See *id.* at 125. Calavita and Grimes report that “[inclusionary housing] in California has produced more than 24,000 units, more than twice the number produced in New Jersey.” Calavita & Grimes, *supra* note 31, at 151. They assert that only New Jersey and California have effective state programs of inclusionary housing, since Massachusetts and Oregon “do not seek to overcome financial constraints as others do.” *Id.* at 166 n.1 (citation omitted). *Id.* (citation omitted).

44. FLA. STAT. ANN. § 163.3161-.3215 (West 2000).

45. See MONTGOMERY COUNTY, MD. CODE (2000).



impact of the initiatives has been to decrease economic segregation only. The initiatives have not ameliorated and indeed may have exacerbated racial inequality and segregation. Although proponents of these measures may have viewed economic desegregation as a way of achieving racial desegregation, that indirect approach usually has failed. The thesis of this Article is that economics cannot be used as a proxy for race, that economic remedies cannot be used to solve racial problems, and that steps in addition to the economic remedies are required to promote racial integration in the suburbs.

This Article focuses on the Massachusetts Comprehensive Permit Law ("chapter 40B"), drawing on the experiences of other jurisdictions for comparison. Part I reviews the origins, goals, terms, and consequences of the Massachusetts statute and shows its failure to address or ameliorate racial segregation. Part II reviews reasons why the failure to ameliorate racial segregation conflicts with the public interest. Part III outlines reasons why racial segregation exists, and Part IV suggests strategies for addressing this problem.

I. THE ORIGINS, GOALS, TERMS, AND CONSEQUENCES OF THE MASSACHUSETTS COMPREHENSIVE PERMIT STATUTE, WITH SOME COMPARISONS TO NEW JERSEY AND MONTGOMERY COUNTY, MARYLAND

The goals of the Massachusetts Comprehensive Permit statute are said to be threefold: to increase the new construction of "affordable" housing; to locate this housing in suburban and rural areas whose zoning laws operated to prevent this construction;<sup>46</sup> and to increase the opportunities for low-income and predominantly-minority families to move, if they choose, from urban to suburban areas.<sup>47</sup>

With respect to the first of these goals, although the statute is credited with producing substantial amounts of subsidized housing,<sup>48</sup> it is not clear that this attribution is warranted.<sup>49</sup> The statute

---

46. ANN VERRILLI, CITIZENS' HOUS. & PLANNING ASS'N, USING CHAPTER 40B TO CREATE AFFORDABLE HOUSING IN SUBURBAN AND RURAL COMMUNITIES OF MASSACHUSETTS 15 (Oct. 1999) [hereinafter CHAPA REPORT].

47. Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. (forthcoming 2001) (on file with Western New England Law Review).

48. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act*, 22 W. NEW ENG. L. REV. (forthcoming 2001) (manuscript at 16, on file with Western New England Law Review) (estimating production of some 18,000 affordable units).

creates no subsidies. It speaks to where, not to whether, subsidized housing is to be sited. The housing that is attributed to the Comprehensive Permit process might well have been produced even without the Comprehensive Permit process.<sup>50</sup> If these subsidies had not been used in the suburbs, they might well have been used for minority families of lower income in the cities.<sup>51</sup>

The second goal attributed to the statute is siting subsidized housing in suburbs. With respect to this goal, the statute has achieved significant success. Professor Krefetz reports that some 18,000 affordable units have been built in at least 173 Massachusetts cities and towns.<sup>52</sup> In 1972, she finds, half of Massachusetts' cities

---

49. This is unfortunate, for there can be no doubt about the need to produce more housing in Massachusetts that is affordable by people who are not rich. In Massachusetts, housing advocates estimate that 100,000 additional units are required to meet the needs of low- and moderate-income Massachusetts residents. The National Low Income Housing Coalition reported that 46% of the renter households in Massachusetts are unable to afford (with 30% of their income) what HUD says is the Fair Market Rent for a two-bedroom unit. See Nat'l Low Income Hous. Coalition, *Out of Reach: The Growing Gap Between Housing Costs and Income of Poor People in the United States* (Sept. 2000), at <http://www.nlihc.org/oor2000/index.htm> (last visited Nov. 20, 2000) (on file with Western New England Law Review) [hereinafter NLIHC]. The comparable figures are 44% in New Jersey, 42% in Connecticut, and 46% in Rhode Island. *Id.* (providing a Data box to view these statistics for any state in the United States).

There are about 100,000 low-income Massachusetts families on waiting lists for subsidized housing. Bruce D. Butterfield, *Kerry Proposes \$2B Housing Trust Fund*, BOSTON GLOBE, Nov. 16, 1999, at C1, available at 1999 WL 6090841. This does not include "tens of thousands of moderate-income families in need of affordable housing." *Id.*; see also Bruce Butterfield, *Urgent Need for State Housing Aid Cited: Advocates Seek Restoration of Budget Cuts*, BOSTON GLOBE, Dec. 23, 1999, at D1, available at 1999 WL 30401645 (reporting estimates of more than 50,000 Massachusetts families in need of rental assistance—the "most severe housing crunch in at least 12 years"); Thomas Grillo, *In Cambridge, A Push for Affordable Housing*, BOSTON GLOBE, Oct. 23, 1999, at C1; available at 1999 WL 6089550.

50. This is especially true of the Low Income Housing Tax Credit developments, for there is intense competition for the tax credit allocations. See E & Y KENNETH LEVENTHAL REAL ESTATE GROUP, *THE LOW-INCOME HOUSING TAX CREDIT: THE FIRST DECADE 12* (1997) (reporting "ferocious competition" for tax credit allocations; agencies receive an average of \$3 in applications for every \$1 available for allocations) [hereinafter LEVENTHAL, LIHTC]; Krefetz, *supra* note 48 (manuscript at 46) (stating that but for the 80/20 and tax credit programs in the 1990s, "the total number of affordable units built would have been only about 500-600 instead of several thousand").

51. See John O. Calmore, *Fair Housing v. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7, 9-15 (1980) (discussing issues raised by siting subsidized housing in non-minority neighborhoods).

52. Krefetz, *supra* note 48 (manuscript at 16-17); see also CHAPA REPORT, *supra* note 46, at 1 (approximating that "14,600 units were built in communities that previously had no subsidized housing").

and towns had no affordable housing; by 1997, only 15% (54) lacked such housing.<sup>53</sup>

This is not to say that the statute has been fully successful with respect to its dispersal goal. The law also was intended to induce each community to make at least 10% of its housing stock subsidized, but only 23 of 351 communities in Massachusetts have met this standard.<sup>54</sup>

Moreover, to the extent that all of the units in these developments are subsidized, they are vulnerable to the criticism that “while fostering [economic] integration at the macroscale, . . . [they are] creating miniature, and often isolated, low-income enclaves within suburbia.”<sup>55</sup> Nonetheless, the evidence justifies Professor Krefetz’s conclusion that the statute “has significantly altered the geography of affordable housing”<sup>56</sup> by enabling the placement of subsidized housing in suburban jurisdictions that presumably would not have had such housing but for this statute.

The third goal attributed to the statute is that of advancing racial desegregation and mobility. There is no evidence that this goal has been achieved at all. The available data regarding occupants of units produced under the Massachusetts statute does not focus on race and ethnicity;<sup>57</sup> but what evidence there is strongly suggests

---

53. Krefetz, *supra* note 48 (manuscript at 18); *see also* CHAPA REPORT, *supra* note 46, at 1 (reporting that 54 communities have no affordable housing at all).

54. Krefetz et al., *supra* note 48 (manuscript at 18) (stating that most of these are cities or inner-ring suburbs). In 1997, 44 communities had between 7 and 10% subsidized housing, and “a number” of these were “middle and upper class suburbs.” *Id.* (manuscript at 19).

55. Calavita et al., *supra* note 31, at 110. Professor Krefetz reports that many of the developments are “100% affordable,” Krefetz, *supra* note 48 (manuscript at 17 n.52), but that many of the developments built since the mid-1980s are mixed-income. E-mail from Sharon Perlman Krefetz, Associate Professor of Government, Clark University, to Florence Wagman Roisman, Professor of Law, Indiana University School of Law-Indianapolis (Mar. 20, 2000) (on file with author).

Furthermore, which suburbs get which units is not decided by a rational process—it is decided by developers, who want to maintain good relationships with communities and want to make as much money as possible. This is not the same as a “fair share” process that requires that every community take a percentage of subsidized units. *Cf.* MICHAEL J. DEAR & JENNIFER R. WOLCH, *LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS* 231-32 (1987) (noting that preemptive zoning legislation is reactive, and therefore not able to balance conflicting goals).

56. Krefetz, *supra* note 48 (manuscript at 6).

57. Indeed, Professor Krefetz identifies as the first of the most important questions for future housing research, determining the race, gender, age, familial status, and previous location of the occupants of the housing that has been built pursuant to the Comprehensive Permit Law. Krefetz, *supra* note 48 (manuscript at 51); *see also* Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit*

that the housing benefits whites far more than blacks, and exacerbates racial segregation.

Professor Krefetz's 1990 report on Massachusetts noted that most of the units built to that date were for elderly people, giving rise to the inference "supported by spotty and impressionistic reports and observations . . . that the beneficiaries are overwhelmingly white and have previously resided in the same community or in its vicinity."<sup>58</sup> Professor Krefetz concluded in 1990 that the statute "has not, for the most part, resulted in any significant 'opening up' of the suburbs to lower income, central city, minority families."<sup>59</sup>

Professor Krefetz's recent study indicates that subsidized housing production in Massachusetts since 1990 continues to favor whites.<sup>60</sup> She reports that the majority of Comprehensive Permit units built in the 1990s have been funded by the Massachusetts Housing Finance Agency ("MHFA"), primarily under the state's 80/20 program or the federal Low Income Housing Tax Credit ("LIHTC") program.<sup>61</sup> Although these programs provide little information about the race and other protected characteristics of the occupants of the units, it appears that many of these units serve people who already live in the communities in which the housing is built—people who are likely to be white. Both Professor Krefetz and the authors of the recent Citizens' Housing and Planning Association ("CHAPA") Report on chapter 40B note that many communities now "work with developers to . . . negotiate conditions

---

*Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1048-49 (1998) (identifying the obligation of state housing finance agencies to collect such data).

58. Sharon Perlman Krefetz et al., *Suburban Exclusion in the 1990s: High Walls, Small Toeholds* 29 (Aug. 30-Sept. 2, 1990) (unpublished paper presented at the 1990 Annual Meeting of the American Political Science Association) (on file with the Western New England Law Review). White suburban communities that object to subsidized housing for families are more likely to be willing to accept subsidized housing for elderly people, who often are perceived as being white and "middle-class," if not "middle-income." See JOHN GOERING ET AL., DEP'T OF HOUS. & URBAN DEV., *THE LOCATION AND RACIAL COMPOSITION OF PUBLIC HOUSING IN THE UNITED STATES* 1-3 (1994) (stating that public housing for elderly people is more likely to be occupied by whites and located in white, non-poor areas). This is true despite the fact that there often is an aversion to elderly people, particularly if they are very old or frail, as there is an aversion to people with disabilities. This may be rooted in the fear of aging, illness, and death. Cf. DAVID SIBLEY, *GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST* 24-26 (1995) (discussing disease as a symbol of defilement).

59. Krefetz et al., *supra* note 58, at 29.

60. See Krefetz, *supra* note 48 (manuscript at 41 n.119).

61. *Id.* (manuscript at 45-46).

that meet local housing concerns (e.g., local preferences).”<sup>62</sup> The Executive Director of CHAPA, introducing the CHAPA Report, said that many of the people occupying these units are members of families who live in those communities. He described the chapter 40B program as “important” for “average families that want [their children] to stay in their towns.”<sup>63</sup> Professor Krefetz found that opposition to chapter 40B applications had decreased, as had Housing Appeals Committee (“HAC”) overruling of Zoning Board of Appeals (“ZBA”) decisions.<sup>64</sup> She attributes this to state and local actors being “‘educated’ by, and mak[ing] accommodations to, each other.”<sup>65</sup> This accommodation suggests that the developments are not producing racial integration.

Moreover, while production has shifted from elderly occupants to families, many of the units have been produced under the Local Initiative Program (“LIP”)<sup>66</sup> and “90% of the LIP projects have been for single-family homes, with the affordable houses reserved for moderate-income households with incomes at the top of the allowable range . . . , and . . . a 70% local preference for the units.”<sup>67</sup>

---

62. CHAPA REPORT, *supra* note 46, at 1; see Krefetz, *supra* note 48 (manuscript at 31) (noting that “most [communities] have been granting C[omprehensive] P[ermit]s with conditions . . . intended to make the projects more acceptable to local sensibilities, e.g., . . . landscaping . . . , lighting, fencing, parking locations”). The Homeownership Opportunity Program, which accounted for approximately 100 Comprehensive Permit applications in 1985-1989, *id.* (manuscript at 36), “was expected to be appealing to suburban communities since it addressed the needs of a ‘deserving’ population of young families, many of whom were likely to have been suburban-born and bred, and it supported home ownership, instead of rental housing.” *Id.* (manuscript at 35).

63. Bruce D. Butterfield, *Affordable Home Goal Unmet, Report Finds*, BOSTON GLOBE, Oct. 21, 1999, at B5 (alteration in original) (citation omitted).

64. Krefetz, *supra* note 48 (manuscript at 28, 30).

65. *Id.* (manuscript at 29).

66. *Id.* (manuscript at 40). LIP is a program sponsored by the Commonwealth of Massachusetts, working together with local towns and cities, which provides “in kind [subsidies] . . . through technical assistance or other supportive services.” MASS. REGS. CODE tit. 760, § 45.01 (1996).

67. Krefetz, *supra* note 48 (manuscript at 41). “[N]early half of all the C[omprehensive] P[ermit]s proposed in the 1990s were LIPs.” *Id.* (manuscript at 40).

“Moderate” income is defined for the Comprehensive Permit program as 80-95% of area median income (“AMI”), Mass. Office of Economic & Market Analysis, Definitions of Incomes, at <http://www.hud.gov/bos/bosdefs.html> (last revised Nov. 5, 1999); 80% of AMI was approximately \$48,000 in 2000, Davis Bushnell, *Affordable Housing Planned at Fort Devens*, BOSTON GLOBE, Jan. 22, 2000, at E1 (discussing “affordable” housing for families with annual household incomes not exceeding \$47,800); NLIHC, *supra* note 49, at <http://www.nlihc.org/oor2000/pl?getstatesandstate=ma.htm>. Housing for this income group is totally inaccessible to the minimum wage earner, whose income is \$10,712 per year, NLIHC, *supra* note 49, the Supplemental Security Income (“SSI”) recipient with \$6,144 per year, Social Security Administration Office of Policy, Office of Research, Evaluation, and Statistics, State Statistics Region 1 (Boston) (Dec. 1999), at

This shows, as Professor Krefetz writes, “that LIPs are a very weak tool for addressing . . . the mobility goal of ‘opening up’ opportunities for lower income, largely minority, city dwellers to move to the suburbs.”<sup>68</sup> She notes that “[w]hile LIPs require an Affirmative Marketing Plan and are supposed to have a minority set-aside requirement of 10-15% of the units, there has been . . . little, if any, monitoring of the outcomes of the plans.”<sup>69</sup> LIP projects require support from local residents, who “typically want to make sure that the housing built serves their ‘deserving’ local families,<sup>70</sup> i.e., moderate-income families, especially young people raised in the town and town employees unable to afford the price of houses in them.”<sup>71</sup> Both the local design of the program and the 70% local preference virtually assure that most of the units will go to whites.

These are the same kinds of results that researchers found in New Jersey. The triple objectives of production, dispersion, and integration are attributed to the *Mount Laurel* initiatives as well as to the Massachusetts statute.<sup>72</sup> In New Jersey, unlike Massachusetts, units that would not otherwise exist have been created because of the *Mount Laurel* initiatives,<sup>73</sup> and, as in Massachusetts, those units

---

<http://www.ssa.gov/statistics/state.fact.sheets/regional.html>, or the single mother with two children whose income from Temporary Assistance to Needy Families (“TANF”) is \$6,780 per year, Center for Law and Social Policy, CLASP Update on Welfare Reform Development (July 2000), at <http://www.clasp.org/pubs/claspupdate/July2000.htm>. Food stamps would be added to this. See Food Stamp Act of 1977, 7 U.S.C. §§ 2011-2032 (1994). Even housing for low-income people—defined in Massachusetts as 50% of AMI—does not help minimum wage earners or recipients of TANF or SSI.

Most federal programs and other jurisdictions define “low income” as not exceeding 80% of AMI and “very low income” as not exceeding 50% of AMI. 42 U.S.C. § 1437a(b)(2) (1994). “Moderate” income may be up to 115% of AMI. See § 1472(h)(2) (defining low- or moderate-income families as not exceeding 115% of AMI).

68. Krefetz, *supra* note 48 (manuscript at 41).

69. *Id.* (manuscript at 41-42).

70. *Id.* (manuscript at 44).

71. *Id.* (manuscript at 43).

72. 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, 1276 (1997) (identifying as three goals of the *Mount Laurel* initiatives: “[t]o increase housing opportunities for low- and moderate-income households; [t]o provide housing opportunities in the suburbs for poor urban residents who had been excluded by past suburban zoning practices; and [t]o ameliorate racial and ethnic residential segregation by enabling blacks and Latinos to move from the heavily minority urban areas to white suburbs”).

73. See John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. (manuscript at 5-60) (forthcoming 2001) (15,000-20,000 units) [hereinafter Payne, *The Mount Laurel Matrix*]; John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Mak-*

have been dispersed to some suburbs that would not otherwise have had below-market housing.<sup>74</sup> As in Massachusetts, however, racial integration and mobility have not been achieved. The units produced by the *Mount Laurel* initiatives generally serve whites who already live in or near the suburbs. A study by Wish and Eisdorfer concluded that the *Mount Laurel* program “has not enabled previously urban residents to move to suburban municipalities and has not enabled Blacks and Latinos to move from heavily minority urban areas to the suburbs.”<sup>75</sup>

The experience in Montgomery County, Maryland, has been different. Since 1973, Montgomery County has had an inclusionary zoning ordinance that currently requires that 12.5-15% of any subdivision or high-rise building of 50 units or more be Moderately Priced Dwelling Units (“MPDUs”).<sup>76</sup> The ordinance also requires that up to 40% of these be offered to the local public housing authority (“PHA”) or to nonprofit sponsors.<sup>77</sup> This “outstanding” program has produced “more than 10,110 affordable housing units”<sup>78</sup> in 25 years, all well-integrated with market-rate housing.<sup>79</sup>

---

*ing the Theory Fit the Facts*, 20 VT. L. REV. 665, 673-74 (1996) (13,000 units that would not otherwise have been created) [hereinafter Payne, *Theory and Facts*]; Wish & Eisdorfer, *supra* note 72, at 1271 (16,000 new units by 1997); *id.* at 1273 n.31 (discussing other studies).

The New Jersey units are not necessarily or usually subsidized housing; they usually are produced by mandatory set-asides combined with density bonuses. For this reason, the New Jersey units, unlike the Massachusetts units, would not likely have been produced were it not for the *Mount Laurel* requirements. See Payne, *The Mount Laurel Matrix*, *supra* (noting that although *Mount Laurel I* anticipated the use of subsidy programs, such programs have seldom been used for *Mount Laurel* housing).

74. See Wish & Eisdorfer, *supra* note 72, at 1302. Note, however, that the provision for Regional Contribution Agreements (“RCAs”) encourages the siting of subsidized housing in cities. N.J. STAT. ANN. § 52:27D-312 (West 1986); see *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621, 641 (N.J. 1986); *In re Township of Warren*, 588 A.2d 1227, 1236 (N.J. Super. Ct. App. Div. 1991).

75. Wish & Eisdorfer, *supra* note 72, at 1305; see also DANIELSON, *supra* note 26, at 278 (“Almost all of the housing built in the suburbs under metropolitan plans served suburban needs, rather than fulfilling the forlorn hope of using fair shares to disperse blacks and the poor out of the older cities.”).

76. MONTGOMERY COUNTY, MD. CODE §25A-8(b) (2000); see FRANKLIN ET AL., *supra* note 33, at 131; HOUSE NEXT DOOR, *supra* note 33, at app. B (noting that subdivisions not normally served by public water and sewer are exempt and discussing amendments to the ordinance since 1973).

77. § 25A-8(b). The public housing authority in Montgomery County is the Housing Opportunities Commission.

78. MALLACH, *supra* note 39, at 218; MONTGOMERY COUNTY DEP’T OF HOUS. & CMTY. AFFAIRS, *The Moderately Priced Dwelling Unit Program: Montgomery County, Maryland’s Inclusionary Zoning Ordinance* (n.d.) (on file with author), available at <http://www.co.md.us/services/hca/Housing/MDPU/summary.htm> [hereinafter MONTGOMERY COUNTY].

Of these, more than 1200 were public housing units for households with very low incomes.<sup>80</sup> Most significantly for purposes of this Article, approximately 55% of MPDU purchasers during 1991-1998 were minorities,<sup>81</sup> and minorities occupy 80% of the units purchased by the PHA.<sup>82</sup>

The failure to achieve racial integration in Massachusetts and New Jersey did not occur because no one was thinking about the problem of racial segregation when the initiatives were devised. To the contrary, although neither the Massachusetts statute nor the *Mount Laurel* initiatives speaks of race, each is rooted in concerns about racial segregation. The Massachusetts legislation originated in 1967, a year marked by considerable racial violence.<sup>83</sup> As the Supreme Judicial Court of Massachusetts has noted, “[t]he legislative history of c. 774 begins with a 1967 Senate Order . . . which directed the Legislative Research Council . . . to [consider] . . . ‘the possibility that the smaller communities are utilizing the zoning power in an unjust manner with respect to minority groups.’ ”<sup>84</sup> It

---

79. Calavita et al., *supra* note 31, at 111; HOUSE NEXT DOOR, *supra* note 33, app. B. As of March 1994, Montgomery County reported that 9511 MPDUs had been produced, of which 6805 were sales and 2706 rentals. See Innovative Hous. Inst., at <http://www.inhousing.org/MPDUtab.htm> (last visited Nov. 26, 2000).

80. See Hous. Opportunities Comm’n, MDPU’s acquired by HOC, 1998-2000 (Mar. 31, 2000) (on file with author) (showing that HOC acquired 1213 MPDUs from 1985 through 2000—1074 rentals, 139 homeownership). Some 1600 units overall have been acquired for this low-income inventory. HOUSE NEXT DOOR, *supra* note 33, app. B at 6.

81. MONTGOMERY COUNTY, *supra* note 78; see Henry R. Richmond, *Comment on Carl Abbott’s “The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree,”* 8 HOUSING POL’Y DEBATE 53, 58 (1997). For 1990-1994, 17-22% of the sales units for each year were purchased by African-Americans; the percentages for Asians were 22-28%; for Hispanics, 8-9%. HOUSE NEXT DOOR, *supra* note 33; see also Christopher Swope, *Little House in the Suburbs*, GOVERNING MAG., Apr. 2000, at 18 (reporting MPDU buyers as 26% Caucasian, 21% Black, 37% Asian, and 14% Hispanic, with the county population 73% Caucasian, 13.4% Black, 10.9% Asian/Pacific Islander, and 8.6% Hispanic). The Montgomery County Department of Housing & Community Affairs reports the percentages of MDPU purchasers for 1998 as 23% Black, 45% Asian, and 11% Hispanic. See MONTGOMERY COUNTY, *supra* note 78, app.

82. See George E. Peterson & Kale Williams, *Housing Mobility: What Has It Accomplished and What Is Its Promise?* in HOUSING MOBILITY: PROMISE OR ILLUSION? 7, exhibit at 74 (Alexander Polikoff ed., 1995).

83. See KERNER COMM’N REPORT, *supra* note 4, at 1 (stating that July, 1967 saw two major race riots, in Newark and Detroit, each of which “set off a chain reaction in neighboring communities”). On July 28, 1967, President Johnson established the National Advisory Commission on Civil Disorders—the Kerner Commission. Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967) reprinted in KERNER COMM’N REPORT, *supra* note 4, app., at 295-96.

84. Bd. of Appeals (Hanover) v. Hous. Appeals Comm., 294 N.E.2d 393, 403 (Mass. 1973) (noting that the council was directed to “undertake a study and investiga-



was “[w]orries about the housing problems of minorities . . . [that] moved exclusionary zoning onto the legislative agenda in the late 1960s.”<sup>85</sup>

Nonetheless, in Massachusetts, as later in New Jersey, the undertaking was transformed from racial to economic terms. The Massachusetts legislative research council reported that “[t]he Research Bureau was unable to uncover any recent comprehensive studies concerning possible ‘anti-minority’ uses of local zoning in Massachusetts, especially in an ethnic or religious minority sense.”<sup>86</sup> The statute that resulted from this study, the Comprehensive Permit Law, did not address race directly: it “was aimed at stimulating and facilitating activities by developers and by local communities to get subsidized housing produced in the suburbs.”<sup>87</sup>

Similarly, although the original *Mount Laurel* litigation had been brought by the NAACP on behalf of “poor black[s] and Hispanic[s],”<sup>88</sup> the New Jersey Supreme Court in *Mount Laurel I* defined both the problem it addressed and the relief it provided in economic rather than racial terms.<sup>89</sup> The court explained that it changed the category of people protected by its ruling because blacks and Hispanics “are not the only category of persons barred by reason of restrictive land use regulations.”<sup>90</sup> The subsequent New Jersey court decisions, statute, and Council on Affordable Housing (“COAH”) regulations continued to express their requirements in economic rather than racial terms.

The conflation of racial exclusion and economic exclusion was a common phenomenon. Since a disproportionate percentage of minorities had low incomes, opening the suburbs to subsidized

---

tion relative to the feasibility and implications of restricting the zoning power to cities and county governments with particular emphasis on the possibility that the smaller communities are utilizing the zoning power in an unjust manner with respect to minority groups”) (quoting 1967 Senate Order, No. 933).

85. DANIELSON, *supra* note 26, at 301.

86. Bd. of Appeals (Hanover), 294 N.E.2d at 403 (citation omitted).

87. Krefetz et al., *supra* note 58, at 23.

88. *Mount Laurel I*, 336 A.2d at 717 (parentheses omitted).

89. Norman Williams & Anya Yates, *The Background of Mount Laurel I*, 20 VT. L. REV. 687, 695-96 (1996) (stating that although the legal services lawyers representing the plaintiffs “had phrased their case largely in racial terms . . . , [i]t was a matter of definite choice by the New Jersey Supreme Court to transmute the *Mount Laurel* case into a challenge to the exclusion of housing for a wide variety of groups”); see also Florence Wagman Roisman, *The Role of the State, the Necessity of Race-Conscious Remedies, and Other Lessons from the Mount Laurel Study*, 27 SETON HALL L. REV. 1386, 1392-94 (1997) (describing the transformation of the case by the court)

90. *Mount Laurel I*, 336 A.2d at 717.

housing was considered essential if the suburbs were to house any appreciable number of minorities. Many people acted as if that which was necessary to achieve racial integration also would be sufficient for that purpose.

At least part of the reason for the transmutation of racial problems into solutions framed in economic terms was a sense that people with power—white people—were not ready to accept racial integration but might accept economic integration. Some members of the Massachusetts legislature and the New Jersey Supreme Court may have thought that they were cleverly disguising the bitter pill of racial integration in a coating of economic integration—a coating that might not be regarded as sugar, but would be accepted more readily than would racial integration. At least part of their expectation seemed to be that remedies expressed in economic terms would nonetheless produce racial integration as a result.<sup>91</sup> Influential texts, like Anthony Downs' book, *Opening Up the Suburbs*, explicitly proposed economic solutions to the racial problem.<sup>92</sup>

There was not much basis for confidence in this diversionary scheme. Suburbs equated subsidized housing with minorities. Indeed, a principal reason for suburban opposition to subsidized housing has been the identification of such housing with minorities—particularly African-Americans.<sup>93</sup> The Massachusetts statute

---

91. See, e.g., DANIELSON, *supra* note 26, at 118 (stating that although the campaign for zoning reform in Fairfax County, Va. began with the concern for racial segregation, its emphasis shifted to “local housing needs, and especially the housing problems of teachers, policemen, and other local-government employees, most of whom were white. The leaders of the campaign justified the shift on pragmatic grounds. They also argued that increasing the stock of lower-cost housing in Fairfax would inevitably benefit inner-city blacks.”); see also ANTHONY DOWNS, *OPENING UP THE SUBURBS* 138-39 (1973) (advising that changes be framed in economic terms first; if that did not work, then shift to racial terms). Part of the impetus for the Montgomery County ordinance, too, came from Suburban Maryland Fair Housing. See HOUSE NEXT DOOR, *supra* note 33, app. B at 1.

A recent case provides a contemporary expression of the same kind of conflation of economics and race. See *Walker v. City of Mesquite*, 169 F.3d 973, 985-88 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (embodying the Fifth Circuit's recommendation that the district court use economic criteria rather than racial criteria to undo the racial segregation in public housing in Dallas); cf. Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309, 1346-47 (2000) (criticizing this approach).

92. See, e.g., DOWNS, *supra* note 91, at vii (defining “opening up the suburbs” to mean inclusion of low- and moderate-income people). The book is, however, replete with references to race. *Id.* at 34-35, 42-43, 44, 69, 131 (noting that the exclusion of low- and moderate-income people reduces opportunities for blacks); see also *id.* at 42-43 (quoting the Kerner Commission's prophecy, *supra* text accompanying note 5).

93. See, e.g., DANIELSON, *supra* note 26, at 31 (noting that a common reason for

was understood as an effort to admit black people to "white" suburbs.<sup>94</sup> Crucial to enactment of the statute was the support of "conservative representatives of Boston's working class ethnic neighborhoods,"<sup>95</sup> who supported the legislation to secure "retribution against the suburban liberals" who had required desegregation of the Boston public schools.<sup>96</sup>

Having opposed subsidized housing because it was associated with blacks, suburbs that were required to accept subsidized housing did so in ways that made it likely that the subsidies would go to whites. As Professor Payne has written:

[T]here are so many more poor White families than there are poor minority ones that, absent a massive infusion of resources into producing affordable housing that has not happened and realistically could not have happened, it was foreseeable that the

---

suburban incorporation was its enhancement of "the capability of a suburban community to exclude subsidized housing, and the blacks who might live in such units"); *id.* at 89-92, 128 (discussing the identification of minorities with subsidized housing); Payne, *supra* note 41, at 1706 ("[T]here was not much doubt, then or now, that racial concerns play a large part in suburban attitudes toward low-income housing.").

94. See, e.g., ROBERT ENGLER, *SUBSIDIZED HOUSING IN THE SUBURBS: LEGISLATION OR LITIGATION?* MASS. DEPT. OF COMMUNITY AFFAIRS 19 (1972) (quoting the chair of the Lexington Planning Board, who stated "that the real issue for some was . . . 'we don't want blacks'" and reassured the audience "that the blacks in Boston did not want to move to Lexington, contrary to the fears of those who felt that Lexington would be deluged with their applications"); *id.* at 26, 29, 32, 38-40 (noting the statement of Mark Slotnick, Executive Director of the Newton Community Development Foundation, that: "[t]he key issue is race—they don't want blacks"); *id.* at 47 (stating that "racial and class discrimination appeared to be the motivating force behind the opposition" in Newton); *id.* at 10. ("[A]s a resident of Lexington [which responded to the state law by zoning for subsidized housing] put it more bluntly, the question was 'whether we pick the blacks or take the ones the state throws at us.'").

95. Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 549 (1992); see also ENGLER, *supra* note 94, at 72-73.

96. Stockman, Note, *supra* note 95, at 549-50; ENGLER, *supra* note 94, at 72 ("The impact of this [racial imbalance] bill was felt primarily in Boston, much to the displeasure of the Boston legislators who felt it was being shoved down their throats by liberal suburban legislators. Four years later they had not forgotten."). Louise Day Hicks, a leader of the white Bostonians who opposed desegregation of the public schools, certainly understood the connection between the issues. "If the suburbs are honestly interested in solving the problems of the Negro," she asked, "why don't they build subsidized housing for them?" J. ANTHONY LUKAS, *COMMON GROUND* 133 (1985) (quoting Louise Day Hicks); Stockman, Note, *supra* note 95, at 549 n.99 (same); see also Krefetz et al., *supra* note 58, at 22-23 (stating that part of the support for the legislation was provided by "a good deal of 'political baggage' left over from the passage in 1965 of the 'Racial Imbalance Act,'" and that part of the motivation was "a desire to create an awkward situation for the Republican Governor . . . and . . . the opportunity for retaliation on the suburban 'armchair liberals' who had voted for the Racial Imbalance law").

lion's share of the housing that could be produced would go first, whenever possible, to White households, which, if suspect because of their poverty, were nonetheless not so frightening to many middle-class suburbanites as poor Black families. These concerns came to pass. The available data, although far from perfect, reveal that minorities have not benefitted from the *Mount Laurel* process in anywhere near the proportion that they ought to have in a colorblind world.<sup>97</sup>

The result of the Massachusetts Comprehensive Permit statute, as of the Mount Laurel initiatives in New Jersey, has been to locate subsidized housing in suburbs that would not otherwise have had such housing, but to use the subsidized housing for whites, predominately those with moderate incomes. In New Jersey, these units are additions to the stock; in Massachusetts, they are units that might well have been built in the cities if the Comprehensive Permit process had not existed.

That the Massachusetts achievement does more good than harm is not clear. It was rooted in good intentions, and has been beneficial for the households who were enabled to stay in or move to the suburbs. It may have spread somewhat more fairly the tax burden imposed by more expensive citizens who now live in wealthier suburbs (although to the extent it is benefiting senior citizens or households with few children, that is not so).<sup>98</sup> Nonetheless, to the extent that the Massachusetts statute diverts subsidies to serve whites rather than minorities, and moderate-income rather than low-income people, it is hard to say that the statute is serving the

---

97. Payne, *supra* note 41, at 1707; see also DANIELSON, *supra* note 26, at 106, 111 (stating that "white suburbanites rather than black city dwellers account for most of those who live in subsidized housing in the suburbs . . . [;]for most suburbanites, . . . perhaps the only persuasive argument for relaxing exclusionary barriers is the housing needs of local residents"); Calavita et al., *supra* note 31, at 125 (noting that inclusionary housing "is either a response to outside (i.e., state) pressure or the product of concerns indigenous to the generally affluent suburbs in which it is being used. Meeting the needs of the moderate-income population—which typically includes large numbers of municipal employees, schoolteachers, police officers, and the like—as well as the struggling children of older suburbanites. . . is clearly a higher political priority than addressing the needs of the very low income population."). In Mount Laurel, the town was seeking to exclude black families who had lived there for generations. See KIRP ET AL., *supra* note 21, at 55; see also HAAR, *supra* note 41, at 17 (discussing the refusal of the town of Mount Laurel to provide for the low-income African-Americans who already lived there).

98. Families with school-age children are the most tax-devouring. See *infra* notes 158-164 and accompanying text for a discussion of the economic considerations of de-segregated housing.

public interest.<sup>99</sup>

Moreover, the Massachusetts statute is likely to exacerbate racial segregation by enabling lower-income whites who might be confined to cities by economics to escape to suburbs, and thus live with other whites rather than with minorities. Indeed, this result was foreseen by Anthony Downs, who urged a focus on “economic rather than racial integration,”<sup>100</sup> although he noted that this would mean that most suburban subsidized units would go to whites. Downs said that “a strategy of dispersed economic integration might accelerate the withdrawal of whites from central cities.”<sup>101</sup>

This analysis suggests that simply siting housing in the suburbs, even if the housing would not otherwise be built, is not necessarily a good thing—indeed, to the extent that it exacerbates racial segregation, it is a bad thing. This is the lesson of the FHA and VA housing programs after World War II, which produced housing that was almost exclusively for whites, and almost always racially segregated, so that the result of the programs was radically to promote the separation of white suburbs from inner cities of color, thus doing “lasting damage.”<sup>102</sup> We should have learned from the FHA and VA programs that if we simply produce suburban housing and do not make that suburban housing available in an integrative and equitable way, we will be doing more harm than good.<sup>103</sup>

Unlike Massachusetts and New Jersey, Montgomery County, Maryland, has achieved some degree of racial integration in a pro-

---

99. There is a further argument that siting subsidized housing in the suburbs shifts jobs and other resources away from blacks. See DANIELSON, *supra* note 26, at 154 (describing this argument). Moreover, such siting may maintain, if not increase, homelessness, by excluding new subsidized-housing opportunities from the central cities. Cf. DEAR & WOLCH, *supra* note 55, at 199 (noting that cities’ “diminished capacity to supply both shelter and services” often leads to homelessness).

100. DOWNS, *supra* note 91, at 138.

101. *Id.* at 141.

102. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 217 (1985). Half of the housing in the all-white suburbs was financed by FHA and VA. See *id.* at 215-16.

103. See *id.* at 206 (“FHA programs hastened the decay of inner-city neighborhoods by stripping them of much of their middle-class constituency.”). See generally CHARLES ABRAMS, *FORBIDDEN NEIGHBORS* 227-43 (1955) (detailing the institutionalized discrimination of the FHA and VA); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 73-77 (1996) (describing white resistance to public housing for blacks in Detroit and its suburbs).

In New York, courts have found that the Urban Development Corporation (“UDC”) played a major role “in perpetuating and fostering” racial segregation. *United States v. Yonkers Bd. of Educ.*, 30 F. Supp. 2d 650, 651 (S.D.N.Y. 1998); see also *United States v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996).

gram that uses economic criteria—and has a preference for persons who live or work in the county.<sup>104</sup> Part of the explanation for this success is that approximately 5% of the units produced (40% of the 12.5-15% that are MPDUs) are offered to the local PHA, whose waiting list includes many minorities.<sup>105</sup> But Montgomery County also is effecting racial integration in its *sales* units, some 55% of which are sold to minorities. This is in sharp contrast to New Jersey, where suburban sales units go to whites, and city sales units to minorities.<sup>106</sup> The Montgomery County experience suggests that more attention to the details of these programs may produce racial integration.

## II. REDUCING RESIDENTIAL RACIAL SEGREGATION IS AN URGENT SOCIAL NEED<sup>107</sup>

Residential racial segregation is deeply embedded in U.S. society. It was slight in 1900, but became very substantial between 1940 and 1950, and continued to be intense and pervasive through 1970.<sup>108</sup> It has decreased in some areas, but remains a serious problem in many places, including Boston, which was a hypersegregated Metropolitan Statistical Area (“MSA”) in 1990.<sup>109</sup>

---

104. See MONTGOMERY COUNTY, *supra* note 78, at 3 (documenting the priority for sale of MPDUs for people who live or work in the county).

105. E-mail from Bernard K. Tetreault, former Executive Director, Housing Opportunities Commission, to Florence Wagman Roisman, Professor of Law, Indiana University School of Law (June 20, 2000) (on file with author).

106. See Wish & Eisdorfer, *supra* note 72, at 1295. However, most of the MPDU units that are purchased by minorities are purchased by Asians. See *supra* note 81 for a statistical analysis of MDPUs by ethnicity.

107. A version of Part II of this Article was published as part of a symposium, *Is Integration Possible? Round II*, 9 POVERTY & RACE (2000). Another version will appear as Florence Wagman Roisman, *Is Integration Possible? Of Course*, in CHALLENGES TO EQUALITY: POVERTY AND RACE IN AMERICA 61-64 (Chester Hartman ed., 2001).

108. See MASSEY & DENTON, *supra* note 3, at 19-22, 42-49; Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 481 n.6 (1995) (reviewing MASSEY & DENTON, *supra* note 3).

109. See MASSEY & DENTON, *supra* note 3, at 221-23 (showing trend in segregation in Boston); *id.* at 74-78 (describing hypersegregation and showing its extent in Boston); see also RODERICK HARRISON & DANIEL H. WEINBERG, U.S. BUREAU OF THE CENSUS, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN 1990 (1992); Nancy A. Denton, *Are African Americans Still Hypersegregated*, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 49, 56-73 (Robert D. Bullard et al. eds., 1994) (reviewing hypersegregation in the 1990s and its effect on African Americans); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 797-801 (1996) (describing hypersegregation); Michael O. Emerson, *Is It Different in Dixie? Percent Black and Residential Segregation in the South*

The enactment of the federal fair housing law in 1968, and the application of § 1982 to private discrimination, have not undone these segregated housing patterns.<sup>110</sup>

The slow pace of desegregation has discouraged some people.<sup>111</sup> Some have concluded that efforts to improve residential opportunities for minorities should focus on “spatial equality” rather than racial integration.<sup>112</sup> The reasons outlined below, however, suggest that it is crucial to continue the struggle to secure residential racial desegregation.<sup>113</sup>

#### A. *Racial Segregation Is Inconsistent with Civil Democracy*

The polity to which we aspire is premised on the equal worth of each human being. Putting ourselves or other people into categories based on the color of one’s skin—or the color of an ancestor’s skin—negates that fundamental principle.<sup>114</sup>

#### B. *Racial Segregation Is Intellectually Insupportable*

“Biological anthropologists, geneticists, and human biologists . . . no longer accept ‘race’ as having any validity in the biological

---

*and Non-South*, 35 SOC. Q. 571, 576-77 (1994) (analyzing relationship of region to segregation); Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 30-41 (1994) (describing racial segregation in the 1980s).

110. See MASSEY & DENTON, *supra* note 3, at 223-29 (discussing the slow pace of desegregation); Farley & Frey, *supra* note 109, at 30-41 (describing segregation levels in various metropolitan areas at the beginning and end of the 1980-1990 decade). *But see* David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 471-72 (1999) (offering a more optimistic view). See *supra* notes 12-15 and accompanying text for a discussion regarding the changes in federal law.

111. See, e.g., LEONARD STEINHORN & BARBARA DIGGS-BROWN, *BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE* (1999).

112. See John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1492-95 (1993); see also Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 464-85 (1996).

113. See PAUL L. WACHTEL, *RACE IN THE MIND OF AMERICA: BREAKING THE VICIOUS CIRCLE BETWEEN BLACKS AND WHITES* 227 (1999) (agreeing with Massey and Denton in “identifying housing segregation [as] an unusually important and powerful factor in our racial impasse”).

114. See Bernard E. Anderson, *Foreword* to WILLIAM A. DARITY, JR. & SAMUEL L. MYERS, JR., *PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945* xii (1998) (stating that “the agony of racism and racial inequality threatens to tear the social fabric asunder”).

sciences.”<sup>115</sup> The concept of “race” was “fabricated out of social and political realities” to impose “on the conquered and enslaved peoples an identity as the lowest status groups in society.”<sup>116</sup> As we reject the goals of conquest and enslavement, we must reject also the tool by which they were achieved—the construction of “racial” identity.

### C. *Racial Segregation Is Silly*

It is ludicrous to consider that one knows anything about another human being when all one knows is the color of that person’s skin—or the color of the skin of an ancestor of that person. As Benjamin Franklin wrote, protesting the massacre of friendly Indians: “[S]hould any Man, with a freckled Face and red Hair, kill a Wife or Child of mine, [would] it . . . be right for me to revenge it, by killing all the freckled red-haired Men, Women and Children, I could afterwards anywhere meet with[?]”<sup>117</sup>

### D. *Racial Segregation Is Wasteful of Human Resources*

One consequence of racial segregation is that the people who are considered “inferior” are confined to particular geographic areas, where schools, jobs, transportation, recreation, public facilities, and other opportunities are degraded. Among those who are so confined, and so deprived of the opportunities to develop their full human potential, are people who could discover cures for cancer, compose great symphonies, develop computers that do not crash, and make many other immense contributions to human good. By cheating people of those opportunities, we cheat everyone of what those opportunities could produce.<sup>118</sup>

---

115. AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* xi (2d ed. 1999).

116. *Id.* at 329.

117. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, 277 (1968) (quoting *A Narrative of the Late Massacres*, in 4 *THE WRITINGS OF BENJAMIN FRANKLIN* 298 (Albert Henry Smith ed., 1905-07)).

118. See WACHTEL, *supra* note 113, at 83 (citing recent estimate that a 13% reduction in housing segregation would produce a 33% “reduction in the differences in economic and educational outcomes for blacks and whites”). Studies of the Gautreaux housing mobility program show that low-income African-American families who moved to well-served suburbs made educational and employment advances that families who stayed in the city did not make. As the principal researcher concluded: “These low-income people had capabilities that were not evident when they lived in the city.” James E. Rosenbaum, *Black Pioneers — Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 *HOUSING POL’Y DEBATE* 1179, 1205 (1991); see also MASSEY & DENTON, *supra* note 3, at 2 (maintaining that residential



### E. *Racial Segregation Is Wasteful of Natural Resources*

Racial prejudice is a principal cause of the abandonment of the cities and the push ever outward to the suburbs and beyond.<sup>119</sup> The race-driven “urban sprawl” imposes immense costs in new highway development, with its destruction of farmland, dangers to biodiversity, increased air pollution (exacerbating respiratory illness and promoting climatic change), and social costs.<sup>120</sup>

### F. *Racial Segregation Is Expensive*

Potential consumers and producers deprived of opportunities impose costs on society instead of contributing to it.<sup>121</sup> Massey and Denton tell us that residential segregation is the single central cause of the congeries of urban ills that we designate with the term “underclass.”<sup>122</sup>

### G. *Racial Segregation Is Unfair*

What one can make of one’s life is largely dependent upon one’s access to high-quality public institutions—schools, healthcare, transportation, recreation—and employment opportunities. There is considerable evidence that when integration does offer those opportunities, the minority people who move to better-served communities benefit from them. Studies of the Gautreaux Housing Mobility Program showed that moving to predominantly white suburbs “greatly improved adult employment, and . . . youths’ educa-

---

racial segregation is a principal cause of the deleterious conditions associated with the “underclass” concept); RUBINOWITZ ET AL., *supra* note 20, at 10.

119. See, e.g., JACKSON, *supra* note 102, at 206-18 (detailing the impact of FHA and VA policies on the destruction of the cities).

120. See, e.g., LEADERSHIP COUNCIL FOR METRO. OPEN CMTYS., *THE COSTS OF HOUSING DISCRIMINATION AND SEGREGATION: AN INTERDISCIPLINARY SOCIAL SCIENCE STATEMENT 5* (1987) [hereinafter LEADERSHIP COUNCIL] (stating that “the aggregate cost . . . for white workers is very high and is the cumulative sum of daily commuting costs, multiple car ownership, more expensive housing and isolation from the rich variety of cultural and recreational opportunities found in a great urban center”); WORLD RESOURCES INSTITUTE, *WORLD RESOURCES 1996-97: A GUIDE TO THE GLOBAL ENVIRONMENT: THE URBAN ENVIRONMENT* 22, 25, 45-47, 67-70, 83-86 (discussing these effects); Neal R. Peirce, *The Economic Drag of Discrimination*, 24 NAT’L J. 770 (1992) (concluding that “new research suggests that by tolerating racial discrimination in and around their communities, Americans have been paying a far higher price for their prejudices than they ever would have dreamed”); Florence Wagonman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 98-104 (1998).

121. See LEADERSHIP COUNCIL, *supra* note 120, at 4.

122. MASSEY & DENTON, *supra* note 3, at viii.

tion.”<sup>123</sup> Among the suburban movers, “many adults were employed for the first time in their lives. . . . Compared with city movers, the children who moved to the suburbs were more likely to be (1) in school, (2) in college-track classes, (3) in four-year colleges, (4) employed, and (5) employed in jobs with benefits and better pay.”<sup>124</sup> Similar results were shown by other studies of low-income people of color who moved to well-served communities.<sup>125</sup>

#### H. *Racial Segregation Is Dangerous*

Studies indicate that the combination of residential racial segregation and concentrated poverty does not simply consolidate crime, disease, and other deleterious conditions but actually enhances and augments them, increasing the amount of violent crime and contagious disease that damages everyone.<sup>126</sup> The likelihood is that dreams deferred will not “dry up like . . . raisin[s] in the sun;” they will explode,<sup>127</sup> and the riots of past years are likely to seem tame compared to any of the new millennium. The Milton S. Eisenhower Foundation recently reminded us that the number of firearms in the United States “has just doubled to nearly 200 million—many of them high-powered, easily concealed models ‘with no other logical function than to kill humans.’”<sup>128</sup> The Foundation’s report notes that violent crime is exacerbated because “America is the most unequal country in the industrialized world in terms of

---

123. James E. Rosenbaum et al., *Can the Kerner Commission’s Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1553 (1993).

124. *Id.*

125. See MARGERY AUSTIN TURNER & KALE WILLIAMS, URBAN INST., HOUSING MOBILITY: REALIZING THE PROMISE: REPORT FROM THE SECOND NATIONAL CONFERENCE ON ASSISTED HOUSING MOBILITY (1998); U.S. DEP’T OF HOUS. & URBAN DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: CURRENT STATUS AND INITIAL FINDINGS (1999); *Moving to Opportunity Research*, at <http://www.wws.princeton.edu/faculty/JeffreyKling/MTO.htm> (last visited March 23, 2001).

126. See ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 144-79 (1985); ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 77-147 (1993) (discussing the connections between drug abuse and deprivation, finding “drugs and inequality . . . closely and multiply linked”); DOWNS, *supra* note 91, at 176-77 (predicting the likelihood of large-scale disorders but not domestic revolution); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 117-23 (1982) (finding that economic inequality generally increases rates of criminal violence).

127. LANGSTON HUGHES, *Dream Deferred*, in THE PANTHER AND THE LASH: POEMS OF OUR TIMES 14 (1967).

128. MILTON S. EISENHOWER FOUND., TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY: A THIRTY YEAR UPDATE OF THE COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 65 (1999).

income, wages, and wealth.”<sup>129</sup> This reinforces the observation that “prejudiced intergroup attitudes—with their potential for periodic eruption in overt intergroup conflict—have now become an extremely serious threat to the continued survival of human society and civilization.”<sup>130</sup>

### III. REASONS FOR THE POWER OF THE SEGREGATIVE IMPULSE AND ITS IMPLEMENTATION

To determine how to promote racial desegregation, we must understand the forces that oppose it. Of many,<sup>131</sup> two deserve particular attention in the context of this Article: the psychological/sociological aversion on the part of many whites to living near people of color,<sup>132</sup> and the institutional investment of power in local communities that enables whites to implement that aversion by barring minorities from entering (or remaining in) certain neighborhoods.<sup>133</sup>

---

129. *Id.* at iii; see also *Symposium, Property, Wealth & Inequality*, 34 *IND. L. REV.* (forthcoming 2001).

130. JOHN DUCKITT, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 250 (1994); see also KERNER COMM’N REPORT, *supra* note 4, at 483 (reporting the testimony of Dr. Kenneth Clark: “I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of ’35, the report of the investigating committee on the Harlem riot of ’43, the report of the McCone Commission on the Watts riot. . . . [I]t is a kind of Alice in Wonderland with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction.”).

131. See MASSEY & DENTON, *supra* note 3, at 83-114 (outlining the continuing causes of segregation); WACHTEL, *supra* note 113, at 220-27 (suggesting that segregation is caused not primarily by economics or black preferences, but by white choice); Roisman, *supra* note 108, at 487-99; James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 278 (1999) (“There is consensus . . . that four factors have played a role: public discrimination, private discrimination, preferences, and income (or socioeconomic status).”).

132. The aversion to living near people of color often is less powerful when there is a clear caste distinction between the whites and the people of color. Thus, the explicit racial zoning ordinances typically allowed people of color to live in “white” neighborhoods if the people of color were “domestic servants.” See *Buchanan v. Warley*, 245 U.S. 60, 71 (1917); A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 *U. ILL. L. REV.* 763, 812-19 (1990). See *infra* notes 142-45 and accompanying text for a discussion of these ordinances.

133. These issues of agency and structure are related. DEAR & WOLCH, *supra* note 55, at 10 (“Any narrative about landscapes, regions, or locales is necessarily an account of the reciprocal relationship between relatively long-term structural forces and the shorter-term routine practices of individual human agents.”); *id.* at 5 (“[W]e have drawn on theories of the duality of structure and agency in social life and the role of political economic factors in social change . . . . This implies a multilevel analysis that accounts for the interaction of macrolevel political economic structures and constraints;

The aversion of many whites to people of color exists independent of economic differences.<sup>134</sup> It has complex causes,<sup>135</sup> and usually is explained (in whispers)<sup>136</sup> by reference to fear of loss of status and lowered property values if people of color live nearby and identification of people of color with crime, drugs, and other undesirable conditions. These concerns stem from a deep-rooted, irrational sense that people of color are bad, immoral, and dangerous—the threatening “other.”<sup>137</sup>

The psychological/sociological aversion of many whites to living near people of color is institutionalized in land use patterns because whites have the power to regulate land use. This control has been effected in a variety of ways. Sometimes it has been imposed by mob violence, as, for example, by the land-related riots in Tulsa, Oklahoma;<sup>138</sup> Detroit, Michigan;<sup>139</sup> and elsewhere.<sup>140</sup> It has been

---

the role of institutions such as the state in translating those structures into policies and programs; and the activities of knowledgeable and capable human agents involved in the social welfare system.”); SIBLEY, *supra* note 58, at 135-36 n.32 (discussing Ian Hacking, *The Archeology of Foucault*, in *FOUCAULT: A CRITICAL READER* 28-40 (David Couzens Hoy ed., 1986)) (“The gist of his argument is that power is exercised often unwittingly by many agents who constitute a web of control. Little acts and gestures contribute to the suppression of people (and ideas), but it is not usually a case of conscious suppression: ‘those ruling classes don’t know how they do it, nor could they do it without the other terms in the power relation—the functionaries, the governed, the repressed, the exiled—each willingly or unwillingly doing their bit’ . . . . [H]ere, as elsewhere, exclusions or suppressions have to be understood in terms of many interconnected acts, some of which have unintended consequences.”).

134. See MASSEY & DENTON, *supra* note 3, at 10-11, 84-88 (reporting that blacks at every income level are more segregated from whites at that income level than are higher-income whites from lower-income whites); WACHTEL, *supra* note 113, at 220-21 (summarizing studies that examine segregation); Roisman, *supra* note 108, at 488 n.48 (providing references supporting the notion that segregation is not due to economics); Ryan, *supra* note 131, at 279 (“[T]he available empirical evidence indicates that income level and socioeconomic status explain only a small portion of the existing residential segregation.”).

135. See DUCKITT, *supra* note 130, at 62-65 (describing elements of prejudice).

136. See Richard F. Babcock & Fred P. Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1068-71 (1963) (calling these the “whispered reasons for exclusion”).

137. See SIBLEY, *supra* note 58, at 19 (“[One] of the main signifiers of otherness . . . is colour.”); *id.* at 49 (“Portrayals of minorities as defiling and threatening have for long been used to order society internally and to demarcate the boundaries of society, beyond which lie those who do not belong.”); WACHTEL, *supra* note 113, at 36 (“otherness”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199-1211 (1995) (describing social cognition theory of discrimination). See generally ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 81-103 (1996) (providing an idiosyncratic, psychoanalytic analysis).

138. See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921*, at 15-16 (1982) (describing the “Negro’s Wall Street”); *id.* at 82-89

enforced by the use of restrictive covenants.<sup>141</sup> Most often, and perhaps most powerfully, land use control has been exercised through zoning.

Zoning has been used for racial exclusion since the nineteenth century. Explicit racial zoning ordinances were imposed first against the Chinese in California<sup>142</sup> and then against African-Americans in many parts of the United States.<sup>143</sup> Although the U.S. Supreme Court held racial zoning unconstitutional in *Buchanan v. Warley* in 1917,<sup>144</sup> such ordinances continued to be enacted and en-

(describing a post-riot effort to displace the Black community); *see also* AL BROPHY, *RECONSTRUCTING THE DREAMLAND: REPARATIONS FOR THE TULSA RACE RIOT OF 1921* (forthcoming 2001); *Tulsa Race Riot: A Report by the Oklahoma Comm'n To Study the Tulsa Race Riot of 1921* (2000), at <http://www.ok-history.mus.ok.us/trrc/freport.htm> (last visited Mar. 23, 2001).

139. *See* HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 310-30 (1988) (discussing the 1943 Detroit riot and the role of land use in causing it). *See generally* DOMINIC J. CAPECI, JR., *RACE RELATIONS IN WARTIME DETROIT* (1984) (same); SUGRUE, *supra* note 103, at 73-77 (same); JUNE MANNING THOMAS, *REDEVELOPMENT: PLANNING A FINER CITY IN POST-WAR DETROIT* 23-25 (1997) (same).

140. *See* SHAPIRO, *supra* note 139, at 143, 175, 189-96, 376-77, 419-20 (discussing role of land use issues in riots); WILLIAM M. TUTTLE, JR., *RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919*, at 181-83 (1970) (discussing the role of housing in the Chicago riot of 1919).

141. *See* *Shelley v. Kraemer*, 334 U.S. 1 (1948); CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959). For other means whites used to control black location, *see* DAVID DELANEY, *RACE, PLACE AND THE LAW: 1836-1948*, at 52-53 (1998) (discussing, *inter alia*, the "selective use of vagrancy laws, . . . withholding social services . . . , discriminating . . . in employment and housing, . . . disenfranchising Black voters, . . . [and] police brutality"); *see also* ELLSWORTH, *supra* note 138, at 109 (quoting Dr. John Hope Franklin) ("[T]here are two ways [in] which whites destroy a black community. One is by building a freeway through it, the other is by changing the zoning laws.").

142. *See In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890); CHARLES I. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 244 (1994).

143. *See* DELANEY, *supra* note 141, at 105-45 (discussing the racial ordinance cases); Higginbotham, Jr. et al., *supra* note 132; Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 299-308 (1983); Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. LEGAL HIST. 179, 181-85 (1968).

144. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917); *see also* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921*, at 789-91 (1984); David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 839-79 (1998); James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 963-73 (1998); William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 975 (1998); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86

forced for decades thereafter.<sup>145</sup>

As explicit racial zoning was being invalidated, Euclidean zoning—comprehensive use zoning—served as an alternative way of achieving, among other things, the separation of classes of people.<sup>146</sup> The trial court that decided the suit brought by the Ambler Realty Company against the Village of Euclid, Ohio recognized that “the result to be accomplished” by the ordinance at issue was “to classify the population and segregate them according to their income or situation in life.”<sup>147</sup> District Judge Westenhaver focused on economic segregation in this observation, but he also explicitly recognized the connection between the racial segregation at issue in *Buchanan v. Warley* and the segregation at issue in *Ambler v. Euclid*.<sup>148</sup>

Euclidean zoning was developed as state and lower federal

COLUM. L. REV. 1622, 1649-51 (1986); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 934-44 (1998)

145. See *City of Richmond v. Deans*, 281 U.S. 704 (1930) (per curiam); *Harmon v. Tyler*, 273 U.S. 668 (1927) (per curiam); *City of Birmingham v. Monk*, 185 F.2d 859, 862 (5th Cir. 1950); see also Roisman, *supra* note 108, at 494 n.73.

146. While *Buchanan v. Warley* was decided in 1917, earlier state court decisions had invalidated racial zoning ordinances. See *Carey v. City of Atlanta*, 84 S.E. 456, 460 (Ga. 1915) (invalidating Atlanta ordinance of 1913); *State v. Gurry*, 88 A. 228, 228-29 (Md. 1913) (per curiam) (invalidating Baltimore ordinance of 1911); *State v. Darnell*, 81 S.E. 338, 339-40 (N.C. 1914) (invalidating Winston-Salem ordinance of 1914); see also DELANEY, *supra* note 141, at 119-22 (discussing these cases); Higginbotham, Jr. et al., *supra* note 132, at 812-20 (same). These three landmark decisions would have encouraged advocates of racial separation to look for tools other than explicit racial zoning.

147. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926) (“In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.”).

148. See *Amber Realty Co.*, 297 F. at 312-13. In *Buchanan*, the Supreme Court held that it would not simply accept the legislature’s decision about what would serve the public interest; the Court scrutinized the legislative justifications and found them wanting. See *Buchanan*, 245 U.S. at 73-82 (agreeing, with respect to the property value argument, that “colored persons depreciate the property owned in the neighborhood by white persons,” but rejecting this as a justification for racial zoning because ill-behaved white people also can depreciate property values). When Euclidean zoning was subjected to judicial scrutiny, the trial court looked closely at the legislative justifications and found them wanting, relying on *Buchanan*. See *Amber Realty Co.*, 297 F. at 312-13. But the Supreme Court in *Euclid*, without even mentioning *Buchanan*, held that if the legislature’s choice were “fairly debatable,” the court must defer to it. *Vill. of Euclid*, 272 U.S. at 388.

courts were invalidating explicit racial zoning; certainly, the timing of the development of "Euclidean" zoning suggests that part of its purpose was to enable local jurisdictions to segregate residents on the basis of race as well as economics.

Moreover, there is evidence of an explicit connection between racial zoning and "comprehensive" zoning.<sup>149</sup> California had led in employing zoning laws to achieve racial segregation; Los Angeles "created America's first use-zoning law,"<sup>150</sup> partly for the purpose of achieving racial segregation. "W.L. Pollard, well-known city planning attorney for the Los Angeles Realty Board and the California Real Estate Association,"<sup>151</sup> explained that "racial hatred played no small part in bringing to the front some of the early districting ordinances which were sustained by the United States Supreme Court, thus giving us our first important zoning decisions."<sup>152</sup> As other communities saw their explicit racial zoning laws invalidated, it cannot have escaped their notice that, as Los Angeles had demonstrated, the defects of explicit racial segregation ordinances could be cured by employing use zoning to achieve the same result.<sup>153</sup>

Regardless of the extent to which Euclidean zoning was intended to achieve racial segregation, Euclidean zoning certainly has

---

149. See Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY*, 23, 33 (June Manning Thomas & Marsha Ritzdorf eds., 1997) ("In the wake of the *Buchanan* decision, racial zoning gave way to the broader notion of a race-based comprehensive planning process"); Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 *CATH. U. L. REV.* 59, 60-61 (1993) (discussing racial zoning and its possible impact on Euclidean zoning); Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 *U. PITT. L. REV.* 367, 410 (1994) (noting that "one would expect racism to have influenced the debate over private residential zoning between 1916 and 1926"); Garrett Power, *The Unwisdom of Allowing City Growth to Work Out Its Own Destiny*, 47 *MD. L. REV.* 626, 669-70 (1988) ("In Baltimore discrimination on the basis of race, national origin, and class was at the heart of zoning's political appeal; it was not an unintended consequence. Nothing has changed.").

150. MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* 82, 82-83 (1987).

151. *Id.* at 83-84.

152. W.L. Pollard, *Outline of the Law of Zoning in the United States*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, May 1931, at 17.

153. Restrictive covenants also were used to replace explicit racial zoning. See Kennedy, *supra* note 144, at 1651 ("In the wake of *Buchanan*, the *Richmond News-Leader* assured its readers that 'what the city was prevented from doing by [statute] can be maintained by custom,' a forecast validated by the longstanding and effective use of restrictive covenants to impose housing segregation.") (footnote omitted).

had that effect. This is because *Euclid v. Amber* authorized states to delegate their police power authority to local subdivisions of the state, each of which has been able to develop land use controls that serve only the perceived interests of each separate locality. Since Euclidean zoning, with its local focus, has been a principal tool of racial as well as economic exclusion, it must be addressed to achieve racial integration.<sup>154</sup>

#### IV. SUGGESTIONS FOR PROMOTING RACIALLY AS WELL AS ECONOMICALLY DESEGREGATED HOUSING IN SUBURBS AND ELSEWHERE

Part I of this Article argued that programs promoting economic integration will not necessarily or ordinarily produce racial integration. Neither the Massachusetts Comprehensive Permit program nor the *Mount Laurel* initiatives has promoted racial integration; indeed, they seem to have exacerbated racial segregation. Only in Montgomery County does a program phrased in economic terms seem to produce racial integration.

The importance of racial integration, discussed in Part II, requires that we consider how to achieve residential racial integration, taking into account the obstacles to doing so, two of which are outlined in Part III. Part IV suggests some means of promoting residential racial integration, considering both agency and structure.

The central need is for re-assertion of state and federal authority: as long as localities control land use decisions, most will act in their perceived, selfish interests, not for the broader common good.<sup>155</sup> States have resumed authority over land use in other, pri-

---

154. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (stating that each municipality "is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will," may determine the course of development within the village).

Ambler Realty had argued that:

The municipal limits of the Village of Euclid are, after all, arbitrary and accidental political lines. . . . If the Village may lawfully prefer to remain rural and restrict the normal industrial and business development of its land, each of the other municipalities, circumadjacent to the City of Cleveland, may pursue a like course.

*Id.* at 374 (argument for appellee); see DANIELSON, *supra* note 26, at 323 ("Suburban political influence is the fundamental reality of the politics of exclusion.").

155. See FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1 (1971) ("The *ancien regime* being overthrown is the feudal sys-



marily environmental, contexts;<sup>156</sup> as Massachusetts, New Jersey, and a few other states have begun to do, this authority must be reasserted with respect to housing.<sup>157</sup> The states must use carrots as well as sticks to achieve this goal.

While part of the opposition to lower-income suburban residents is classist and racist, part of it is based on real economic issues: the separation of needs from resources.<sup>158</sup> "Local dependence on the real property tax . . . plays a crucial role in the suburban quest for political autonomy and community control over land use."<sup>159</sup> The fiscal concerns should be addressed directly—additional costs should not be imposed on suburban jurisdictions that include subsidized housing. To the contrary, these jurisdictions should receive compensatory benefits.<sup>160</sup> Danielson urged "[f]ederal assumption of the full costs of poverty-related programs"

---

tem under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.").

156. See CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 676 (3d ed. 1999) ("[T]he states began to take back some of the powers delegated to their local governments by zoning and planning enabling legislation.").

157. See *Britton v. Town of Chester*, 595 A.2d 492, 496 (N.H. 1991) ("A municipality's power to zone property . . . is delegated by the state, and the municipality must, therefore, exercise this power in conformance with the enabling legislation."); DANIELSON, *supra* note 26, at 177 (citing *Appeal of Girsh*, 263 A.2d 395, 399 n.4 (Pa. 1970)) ("[I]t is intolerable to allow one municipality . . . to close its doors at the expense of surrounding communities and the central city."); *id.* (citing *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765, 768-69 (Pa. 1970)) ("It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.").

158. See MICHAEL N. DANIELSON & JAMES W. DOIG, *NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT* 28-29 (1982) (discussing financial resources as a source of government power); Krefetz, *supra* note 48 (manuscript at 41-44). For a discussion of other reasons for opposition and a study indicating that factors other than affordability influence opposition, see Rolf Pendall, *Opposition to Housing: NIMBY and Beyond*, 35 *URB. AFF. REV.* 112 (1999).

159. DANIELSON & DOIG, *supra* note 158, at 77; *see id.* ("Since property tax revenues are a function of the way land is used, as are the public expenditures necessitated by development, the power to regulate land use is the key to fiscal planning in most suburban jurisdictions . . . . [e]xpensive single-family dwellings on large lots and apartments . . . too small . . . [for] school-age children . . . generally produce local 'profits' . . . . [A]partments with two or more bedrooms, most single-family housing developments, mobile homes, and subsidized housing projects almost invariably involve local expenditures that are substantially greater than the local taxes paid by these kinds of housing.").

160. See *Downs*, *supra* note 91, at 163. Downs suggests:

- (1) Shifting all costs of welfare programs to the federal government;
- (2) Equalizing school financing costs;
- (3) Shifting more local school costs to federal or state governments;
- (4) Providing "bonus" financing to local school districts with low- and moderate-income children;

and “state tax reform to weaken the connection between local wealth and the financing of public education, a link which constitutes one of the strongest fiscal rationales for excluding apartments, small houses, mobile homes, and subsidized projects.”<sup>161</sup> It is curious that the challenges to dependence on local property taxes to pay for education have not often focused on the connection between school financing and racial segregation in the schools.<sup>162</sup> It also is important to consider the connection between that form of school financing and racial segregation in housing, yet another aspect of the school/housing linkage requiring focused action. In addition, all forms of state aid, including the siting of state facilities, should be conditioned on provision of low-income housing and achievement of racial integration.

It also long has been clear that the federal government ought to be active in eliminating these local barriers. The original public housing statute functioned through federal identification of sites and development of housing.<sup>163</sup> This legislation fell victim to fear of the conservative Supreme Court that invalidated early New Deal legislation. By the time the Court became more receptive to New

---

(5) Providing special community service funding to areas accepting additional low- and moderate-income housing;

(6) Developing property value insurance for homeowners near low- and moderate-income housing.

*Id.*

As to the last suggestion above, it is by no means clear that property values are reduced by the presence of low- and moderate-income housing. *See, e.g.*, HOUSE NEXT DOOR, *supra* note 33, at 5 (finding no significant difference in price between non-subsidized homes in subdivisions with subsidized units, and the market as a whole, or between non-subsidized units near or far from subsidized units). Nonetheless, since the fear invariably is advanced, the insurance idea has some merit and has in fact been implemented. *See* JULIET SALTMAN, *A FRAGILE MOVEMENT: THE STRUGGLE FOR NEIGHBORHOOD STABILIZATION* 387, 407 (1990) (discussing the Equity Assurance program in Oak Park, Illinois); Jonathan Eig, *Mixed Results, How Fear of Integration Turned White Enclave into a Melting Pot*, WALL ST. J., Aug. 7, 2000, at A1 (reporting the success of the home equity assurance program in Oak Park, another in southwest Chicago, and similar plans in Baltimore and Syracuse and elsewhere in Chicago).

161. DANIELSON, *supra* note 26, at 341.

162. *See* James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 529 (1999) (noting odd lack of consideration of school desegregation and school finance litigation “in tandem”).

163. *See* LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 102-03 (1968) (discussing the Public Works Administration (“PWA”) program of direct construction of public housing invalidated in *United States v. Certain Lands* (Louisville, Ky.), 9 F. Supp. 137, 141 (W.D. Ky. 1935), *aff’d*, 78 F.2d 684 (6th Cir. 1935), *cert. dismissed*, 297 U.S. 726 (1936)); GAIL RADFORD, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* 85-110 (1996) (offering a fuller discussion of the PWA program).

Deal legislation, the public housing statute already had shifted to local governance.<sup>164</sup>

The 1968 Douglas Commission report recommended powerful federal action: "programs which would build low-rent housing in the suburbs as well as in the cities, provide sites in outlying areas, give States incentives to act where localities do not, lease houses."<sup>165</sup> The Kaiser Committee report of the same year recommended that the federal government be empowered to secure land, "through purchase or condemnation," for lease to developers of subsidized housing,<sup>166</sup> and that "power be granted to the Secretary of HUD to pre-empt local zoning codes."<sup>167</sup> Father Theodore M. Hesburgh, chair of the U.S. Commission on Civil Rights, captured the spirit of these recommendations:

This commission has had it up to here with communities that have to be dragged kicking and screaming to the Constitution. If this country really believes in the Declaration of Independence and the Bill of Rights . . . it ought to spend its Federal dollars in a way that benefits all the people. If a state or a locality is not willing to do that, then we ought to say, "O.K., if you don't want to be part of the federal system we won't help you." It's as simple as that.

And we're not doing it. We're spending millions and millions of Federal dollars on things to which people do not have equal access.<sup>168</sup>

While we must work toward these fundamental changes, there are incremental steps that can be taken now with relative ease. The list that follows is suggestive, not in any sense exhaustive. It is designed to provoke further thought, discussion, and action.

---

164. For a discussion of the public housing program, see Rachel G. Bratt, *Public Housing: The Controversy and Contribution*, in CRITICAL PERSPECTIVES ON HOUSING 335-42 (Rachel G. Bratt et al. eds., 1986) (discussing origins of the public housing legislation); see also JACKSON, *supra* note 102, at 219-30; RADFORD, *supra* note 163, at 177-98.

165. DOUGLAS COMM'N REPORT, *supra* note 10, at 26.

166. THE PRESIDENT'S COMM. ON URBAN HOUS., A DECENT HOME 146 (1969) [hereinafter A DECENT HOME].

167. *Id.* at 143.

168. DANIELSON, *supra* note 26, at 213 (quoting Ben A. Franklin, *Rights Panel Expected to Urge Fund Curb on White Suburbs*, N.Y. TIMES, Aug. 29, 1970, at 10).

A. *Federal, State, Local, and Community Personal and Institutional Leadership Must Explicitly Support Residential Racial Integration*

In the annals of housing desegregation and deconcentration and all other forms of social change, a repeated theme is the importance of individual and institutional leadership.<sup>169</sup> While analysis indicates that federal, state, and local legislatures; agencies; executives; and courts institutionally are unlikely to act in contradiction to suburban prejudices,<sup>170</sup> there have been a number of situations in which the unlikely has occurred.

The enactment of the Massachusetts Comprehensive Permit Law was itself a tribute to leadership as well as political serendipity.<sup>171</sup> In both Massachusetts and California, the production of subsidized housing in the suburbs increased significantly when each state had a governor and housing agency strongly committed to implementing the statutes.<sup>172</sup> The creation of the Urban Development Corporation was due in large part to the determination of Governor Nelson Rockefeller.<sup>173</sup>

Not only state but also local officials have taken unlikely positions, promoting inclusion. The Montgomery County ordinance is a notable example, and there also are other localities that have accepted inclusionary housing programs absent any legislative or judicial mandate.<sup>174</sup> Dedicated local staff has made a significant

169. See DANIELSON, *supra* note 26, at 130; DOWNS, *supra* note 91, at 133.

170. See DANIELSON, *supra* note 26, at 199-242 (Congress and the federal agencies); *id.* at 279-322 (the states); *id.* at 313 (municipalities).

171. Krefetz, *supra* note 48 (manuscript at 6-12); see Stonefield, *supra* note 47 (manuscript at 13 n.28).

172. See DANIELSON & DOIG, *supra* note 158, at 166 (finding that "appointed officials concerned with urban development and regional planning tend to be more oriented than most elected officials toward the advantages of broader coordination"); Calavita & Grimes, *supra* note 31, at 156 (describing state agency enforcement); *id.* at 157 (describing a dramatic shift with change of administration); *id.* at 158 (discussing evidence that "suggests that an effective inclusionary program is dependent not only on the formal structure of the program, but also on the commitment of the public agency responsible for its implementation and monitoring"); Krefetz, *supra* note 48 (manuscript at 6).

173. See DANIELSON, *supra* note 26, at 309-10 (describing "arm-twisting" by the governor); *cf. id.* at 345-47 (describing unsuccessful efforts of leadership); DANIELSON & DOIG, *supra* note 158, at 166 (describing similar efforts by Governor Byrne of New Jersey, who proposed (unsuccessfully) to require compliance with a fair share plan as a condition of state aid for education, sewers, and other programs).

174. See Calavita & Grimes, *supra* note 31, at 151-54. See *supra* note 33 for identification of other local jurisdictions that have inclusionary programs. Some, but by no means most, of these were responses to threatened litigation. See Calavita & Grimes,

difference in encouraging economic inclusion.<sup>175</sup> Leadership from community organizations also has been vital.<sup>176</sup> It is both possible and essential to frame these discussions so as to educate and “appeal to the fair-minded average citizen[s].”<sup>177</sup>

Past leadership on this issue often has focused on the importance of providing subsidized suburban housing for the families and cohorts of suburban residents. Thus, for example, the recent CHAPA Report on chapter 40B was introduced with a paean to its service to suburban families,<sup>178</sup> and Mark Siegenthaler, a member of the state’s Housing Appeals Committee, has been quoted as saying that “[t]he problem of affordable housing in this state has gone well beyond poor people . . . . We are hearing stories that universities can’t attract professors because they can’t afford to buy a house here.”<sup>179</sup> The need now is for talk of far more than suburban self-interest; we need powerful, effective calls for racial justice. We need leaders who will speak directly and forthrightly to the necessity of racial desegregation.<sup>180</sup>

---

*supra* note 31, at 154-55, 162 (“Citizen initiatives launched 6 percent and lawsuits led to 3 percent of inclusionary programs.”) (citation omitted); *id.* at 162-64 (describing litigation threats). See *infra* notes 223-245 and accompanying text for a discussion of litigation strategies.

175. See DANIELSON, *supra* note 26, at 252 (“What was different about the Miami Valley [Ohio] Regional Planning Commission was its leadership.”); Calavita & Grimes, *supra* note 31, at 155 (noting that Orange County had “unusually sophisticated staff . . . who were committed to the establishment of an inclusionary program and determined to ‘make it work;’”—and that in Irvine, California, also in the 1980s, “there was a particularly ‘gutsy’ staff dedicated to the implementation of an affordable housing program”).

176. See DANIELSON, *supra* note 26, at 115, 125-26 (describing the key role played by the League of Women Voters (“LWV”) in the 1970s); HOUSE NEXT DOOR, *supra* note 33, app. B (discussing the role of the LWV).

177. See John M. Payne, *Remedies for Affordable Housing: From Fair Share to Growth Share*, 49 LAND USE & ZONING L. DIG. 6 (June 1997) (describing the “fair-minded average citizen” as “a crucial . . . constituency to reach”); see also WACHTEL, *supra* note 113, at 233 (“[W]e should not simply write off people as opponents, but rather think about how to reach the side of them that is inclined toward change.”).

178. See *supra* notes 62-63 and accompanying text for a discussion of this aspect of the CHAPA Report.

179. See Caroline Louise Cole, ‘Affordable’ Benchmark Hard to Tally, BOSTON GLOBE, Nov. 14, 1999, at 11.

180. One indication of the power of white racial prejudice is the fact that it is easier to promote economic inclusion than racial inclusion, although the powerful moral and legal arguments are for racial inclusion. The Supreme Court has said we have a powerful national commitment to racial equality and desegregation. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 174-75 (1989); *Bob Jones Univ. v. United States*, 461 U.S. 574, 592-94 (1983); *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967). There are no federal laws against economic discrimination. See *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998) (allowing economic discrimination against

B. *Data About the Racial Occupancy of Government-Assisted Suburban Housing Must Be Collected and Reported*

A powerful way of deflecting attention from a problem is to avoid having information about it. “Data are key” for enforcement and monitoring of civil rights requirements;<sup>181</sup> “good-quality, accessible information systems about public expenditures are . . . fundamental components of a monitoring system needed to ensure equity[,] protect civil rights [,]”<sup>182</sup> and achieve compliance with legislative and constitutional mandates.

Massachusetts apparently does not collect or maintain, or require others to collect or maintain data about the race, ethnicity, disability, or other protected status<sup>183</sup> of those who occupy units sited under the Comprehensive Permit statute. Professor Krefetz reported in 1990 that there is little “data available on the occupants of [chapter] 774 housing . . . because no systematic records are kept by the state and no survey of completed projects . . . has been conducted in recent years.”<sup>184</sup> This seems still to be true today.<sup>185</sup>

---

Section 8 certificate holders); *cf.* *Comm’n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 246 (Conn. 1999) (enforcing state laws against economic discrimination); *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104, 1113 (N.J. 1999) (same). Race is a suspect classification, *Korematsu v. United States*, 323 U.S. 214, 216 (1944), but poverty is not, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19, 28 (1973). Nonetheless, people are more comfortable attacking suburban economic exclusion than racial exclusion.

“[O]ne of the most deceptive antiracial equality principles in society, scholarship, politics, and law is the persistent treatment of race as if there is no difference that need be noticed between the races, rather than seeing the difference that race makes.” *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1065 n.29 (1991); *see also* Payne, *supra* note 41, at 1706 (“[T]he theory that cries out for reincorporation into the *Mount Laurel* doctrine is that of race discrimination.”); Roisman, *supra* note 89, at 1391-95 (arguing that “racial and ethnic integration must be acknowledged as a goal and addressed directly”).

181. Anne B. Shlay & Charles E. King, *Beneficiaries of Federal Housing Programs: A Data Reconnaissance*, 6 HOUSING POL’Y DEBATE 481, 486 (1995).

182. *Id.* at 518.

183. In addition to Title VIII’s prohibition of discrimination on the bases of race, color, religion, sex, handicap, familial status, or national origin, *see* 42 U.S.C. § 3604(a), (f) (1994), Massachusetts prohibits discrimination on the bases of marital status, sexual orientation, ancestry, “children,” age, status as a veteran or member of the armed forces, or receipt of public assistance, rental assistance, or housing subsidies. *See* MASS. GEN. LAWS ch. 151B, § 4 (3B), (3C), (6), (7), (10), (11) (1998).

184. Krefetz et al., *supra* note 58, at 29. Professor Krefetz reported also that “efforts to obtain such data from a sample of local housing authorities were unsuccessful because few had, or were willing to make available, the information we sought on, for example, racial characteristics, previous place of residence, occupations and place of employment, etc.” *Id.* at 42-43 n.37.

185. *See* Krefetz, *supra* note 48 (manuscript at 12).

Similarly, New Jersey does not maintain adequate data about racial or other protected characteristics of the occupants of *Mount Laurel* housing,<sup>186</sup> and the studies of California programs refer to a goal of fostering racial integration but apparently provide no information with respect to race.<sup>187</sup> Such data must be collected and reported in order to measure progress toward racial integration.<sup>188</sup>

C. *The Low-Income Housing Tax Credit Program Must be Administered so as to Prevent Racial Discrimination and Promote Racial Integration*

The state now controls the principal federally-subsidized housing program—the Low Income Housing Tax Credit Program (“LIHTC”)<sup>189</sup>—and has created a state analog, the Massachusetts LIHTC.<sup>190</sup> The federal tax credits are distributed by the Massachusetts Housing Finance Agency (“MHFA”) pursuant to the state’s Qualified Allocation Plan (“QAP”).<sup>191</sup> Since tax credits are in great demand, with many more developers seeking them than can be satisfied,<sup>192</sup> MHFA is able to enforce whatever priorities it sets.

MHFA should play a major role in deciding where developments will be built. It should direct more tax credits to suburban jurisdictions that do not now have any or much subsidized housing, but it must require those developments to achieve racial as well as

---

186. See Payne, *Theory and Facts*, *supra* note 73, at 669, 674; Roisman, *supra* note 89, at 1424 (discussing necessity of data collection for *Mount Laurel* housing).

187. See Calavita & Grimes, *supra* note 31, at 152 (stating that a “major objective . . . is to foster greater economic and racial residential integration” and “ameliorate economic and racial imbalance”).

188. See Roisman, *supra* note 57, at 1038-39 (discussing necessity of data collection in the LIHTC program); *cf.* Housing and Community Development Act of 1987, 42 U.S.C. § 3608(a) (1994) (requiring collection and reporting of such data by federal agencies); *id.* § 3608(e)(6) (same).

189. See GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM SEC. 42 (March 1997) (LIHTC is “currently the largest federal program to fund the development and rehabilitation of housing for low-income households”); *see also* ABT ASSOCS. INC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT DATABASE: FINAL REPORT 1-2 (July 1, 1996) (“The LIHTC has become the principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households.”)

190. MASS. GEN. LAWS ANN. ch. 63, § 31H(b)(1) (West Supp. 2001).

191. 26 U.S.C. § 42 (m)(1)(A)(i); Mass. Hous. Fin. Agency, Low Income Housing Tax Credit: A Brief Guide for MHFA Applicants, at [http://www.mhfa.com/dev/da\\_lihtc.htm](http://www.mhfa.com/dev/da_lihtc.htm) (last visited June 21, 2000).

192. See LEVENTHAL, LIHTC, *supra* note 50, at 12 (discussing the “ferocious competition” for tax credits).

economic integration.<sup>193</sup> Decisions about sites should be made by the state, not by developers.<sup>194</sup>

The Massachusetts QAP does not now, but should, establish as a criterion for tax credit allocation that the siting of proposed developments promote racial non-discrimination and desegregation.<sup>195</sup> The obligation to impose this standard is implicit in the obligation “affirmatively to further” the policies of Title VIII.<sup>196</sup> This duty may be imposed on MHFA indirectly under Title VIII itself,<sup>197</sup> or under the LIHTC<sup>198</sup> or Community Development Block Grant (“CDBG”)<sup>199</sup> statutes. The meaning of the obligation is that an agency must use its “programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>200</sup> This mandate requires the agency to “consider [the] effect [of its actions] on the racial and socio-economic compo-

193. If tax credits go to suburbs but racial integration is not achieved, this would be another instance of whites benefiting at the expense of minorities and racial segregation’s being exacerbated instead of ameliorated.

Suburban communities that already have achieved some racial integration should be allies with the state in insisting that all communities be inclusionary. *See* DANIELSON, *supra* note 26, at 92 (“To the degree that these [hostile] attitudes toward subsidized housing limit the access of [B]lacks to suburban housing they can afford, pressure increases on communities where racial barriers have already been breached.”); HOUSING MOBILITY: PROMISE OR ILLUSION?, *supra* note 82, at 10; MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 11 (1997) (suggesting alliances between central cities and inner-ring suburbs). Such an enforcement program may have a prophylactic result because one thing that has encouraged suburbs to ease zoning barriers has been “[f]ear of losing local autonomy.” DANIELSON, *supra* note 26, at 111; *see also* DANIELSON & DOIG, *supra* note 158, at 69-71, 74-75 (discussing constraints on suburbs and differences among suburbs).

194. *See* DANIELSON, *supra* note 26, at 190 (criticizing decisions that “mistakenly assume an identity of interest between developers and those who are excluded from access to good housing”); *id.* at 104 (revealing the distortion by developers in the section 235 and 236 programs).

195. MHFA should impose this criterion in its other programs as well.

196. 42 U.S.C. § 3608(e)(5) (requiring that the Secretary of HUD “administer . . . housing and urban development [programs] in a manner affirmatively to further the policies of” Title VIII).

197. *See* Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973) (holding that the obligation imposed by Title VIII on HUD extends also to the Public Housing Authority).

198. *See* Roisman, *supra* note 57, at 1041-47 (arguing that since the Department of the Treasury has the same “affirmatively further” obligation under 42 U.S.C. § 3608(d), the Treasury can impose the duty on state housing finance agencies).

199. Both the state and any unit of local government receiving CDBG funds must certify that they will “affirmatively further fair housing.” Housing and Community Development Act of 1974, 42 U.S.C. § 5306(d)(5)(B); *see also* § 5304(a)(1); 24 C.F.R. §§ 91.325(a)(1), 570.487(b) (2000).

200. NAACP, Boston Chapter v. Sec’y of HUD, 817 F.2d 149, 155 (1st Cir. 1987).



sition of the surrounding area” and to “assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply.”<sup>201</sup> To satisfy this obligation, MHFA should identify non-discrimination and desegregation as priority goals to be served by development.<sup>202</sup> The QAP should limit approval of at least some LIHTC projects to sites that will promote desegregation.<sup>203</sup>

MHFA also should promote non-discrimination and racial desegregation in the LIHTC developments that already exist. These developments are required to have affirmative fair housing marketing plans. The QAP now requires that each developer “establish affirmative action goals of the percent of minority participation in each project [and] . . . establish effective marketing plans to reach the identified minority groups.”<sup>204</sup> MHFA should monitor and enforce these requirements.<sup>205</sup> MHFA also should require that LIHTC developments be open to the lowest-income occupants, by enforcing the prohibitions against discrimination based on source and amount of income, specifically including minimum income and other requirements that have the effect of discriminating against Section 8<sup>206</sup> recipients.<sup>207</sup> MHFA should encourage tax credit de-

---

201. *Id.* at 156 (citation omitted).

202. *See* Roisman, *supra* note 57, at 1042-43.

203. I say only some of the sites should be selected on this basis so that some LIHTC units will be available for people who choose or are constrained to live in cities. *See* Calmore, *supra* note 51, at 12 (discussing the deleterious impact on minority communities of HUD’s deconcentration regulations); Roisman, *supra* note 57, at 1043.

204. Commonwealth of Mass., Department of Housing and Community Development: Low Income Housing Tax Credit Program, 2001 Qualified Allocation Plan, at <http://www.state.ma.us/dhcd/2001LowIncomeHousingTaxCreditProgramQualifiedAllocationProgram.htm> (last visited Mar. 26, 2001) (on file with author). For tax credit developments located in any predominantly white neighborhood in the city of Boston, “the Affirmative Fair Marketing Plan shall have the percentage goals for occupancy of the low income units which reflect the racial composition of the city of Boston as determined in the most recent U.S. Census.” At the time, these goals were: 59% white; 12.8% Black; 10.8% Hispanic; .3% Native American; 5.2% Asian/Pacific Island; and 1.0% other. *Id.*

205. The Departments of the Treasury, Justice, and HUD have issued a Memorandum of Understanding acknowledging state agencies’ obligations regarding fair housing compliance. *See* Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (Aug. 11, 2000), at [www.hud.gov/pnessrel/proo-222.html](http://www.hud.gov/pnessrel/proo-222.html) (last visited Aug. 31, 2000) (on file with author).

206. 42 U.S.C.A. § 1437f (2000).

207. Since 1993, Federal law has explicitly prohibited such discrimination in LIHTC developments. *See* 26 U.S.C. § 42(g)(1)(B) (1994). Massachusetts prohibits such discrimination generally, as do other jurisdictions. MASS. GEN. LAWS ch. 151B,

velopments to seek residents with Section 8 certificates or vouchers.<sup>208</sup>

#### D. *MHFA Should Promote Racial Integration In Its Other Housing Programs*

MHFA has 500 developments—and 57,691 units—in its portfolio.<sup>209</sup> Available data suggest that these developments are not doing all they could to serve very low-income households, which in turn suggests inadequate attention to racial integration.<sup>210</sup> Thus, in a study of 283 developments whose occupancy is unrestricted,<sup>211</sup> the reporting developments indicated a vast disparity in the extent to which they served families whose income is from Aid to Families with Dependent Children (“AFDC”) or its replacement, Temporary Assistance to Needy Families (“TANF”).<sup>212</sup> The reporting de-

---

§ 4(10) (1998); see *Comm’n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 241 (Conn. 1999); *Attorney General v. Brown*, 511 N.E.2d 1103, 1110 (Mass. 1987); *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104, 1113 (N.J. 1999); see also *Recommendations of Section 8 Task Force to Texas Dept. of Housing and Community Affairs* (July 18, 2000) (on file with author) (recommending a statement of policy and a rule). Many of these recommendations have been adopted. See *Letter from Fred Fuchs, Esq., to Erin Boggs, Esq.*, (Sept. 25, 2000) (on file with author).

208. See Roisman, *supra* note 89, at 1414-15 (recommending affirmative coordination of the Section 8 and LIHTC programs).

209. MASS. HOUS. FIN. AGENCY, *IMPACT OF WELFARE REFORM ON DEVELOPMENTS FINANCED BY THE MASSACHUSETTS HOUSING FINANCE AGENCY* 5, 12 (1999) [hereinafter *IMPACT OF WELFARE REFORM*]. For 41 developments (4321 units), the agency has oversight responsibility only. The 459 developments (53,370 units) on which the agency owns permanent debt “were financed under a variety of state and federal subsidy programs, including” the section 236 interest credit program and its state counterpart, section 13A; the Section 8 program; the State Housing Assistance for Rental Housing Production (SHARP) program; the 80/20 mixed income development program; the Options for Independence Program (group homes for people with mental illness or mental retardation); and the Elder CHOICE program (assisted living for frail elders). *Id.* at 11-12.

210. There is a history of such disparity. From the 1960s, MHFA was required by law to provide one-quarter of its units to low-income households. Between 1968 and 1972, the Massachusetts agency financed the construction of 20,000 units, 6,000 of which were located in the suburbs. About one-third of these apartments were rented to low-income households. Most of these suburban units, however, were occupied by lower-income families who lived in the immediate area of the project site. Consequently, . . . MHFA has had little impact in dispersing low-income residents from central cities to the suburbs.

DANIELSON, *supra* note 26, at 285 (citation omitted).

211. These are developments on which the agency owns debt, excluding those for which MHFA has oversight responsibility only, or occupancy is restricted to elderly persons or group homes for people with mental illness. *IMPACT OF WELFARE REFORM*, *supra* note 209, at 4.

212. *Id.* at 4-5, 11-12. The report emphasizes that “despite the high response rate

velopments indicated that in the western part of the state and the city of Boston, 27% and 24% (respectively) of the units were occupied by Transitional Aid to Families with Dependent Children ("TAFDC") families, while that percentage fell to 17% in the central region, 10% in the southeast and Cape Cod, and 8% in metropolitan Boston and the north. Also, 52 of the 252 responding properties indicated that they were in areas with high concentrations of poverty.<sup>213</sup> This suggests that there is considerable room for increasing the proportion of TAFDC or TANF families living in MHFA-financed developments in all regions except the city of Boston and the west.<sup>214</sup> Furthermore, it is likely that the economic disparity also reflects racial disparity, with relatively few people of color in these developments in all regions save the city of Boston and the west.

The TAFDC families also are inequitably distributed within the programs. There is only one TAFDC family unit in the 80/20 Program (0.42% of total units); in the Section 8 developments, 50.83% of the Section 8 project-based units house TAFDC families, while only 12.28% of the Section 8 new construction units do so.<sup>215</sup> This disparity is likely to reflect racial separation as well as separation on the basis of source of income.

#### E. *Subsidized Housing Programs Should Focus on Lowest Income and Minority Participants*

Both the Massachusetts and New Jersey programs demonstrate that when predominantly white suburban communities are required simply to accept subsidized housing, they will admit subsidized housing that predominantly serves white people. Existing Affirmative Fair Housing Marketing Plans ("AFHMP") have been shown to be ineffective.<sup>216</sup> The AFHMP requirements must be enhanced

---

and relatively proportional distribution of survey responses, the study data is not the result of a rigorous scientific investigation . . . [and] . . . should not be generalized to the entire survey universe, nor to the entire MHFA portfolio." *Id.* at 5. See *supra* note 67 for a discussion of TANF.

213. IMPACT OF WELFARE REFORM, *supra* note 209, at 28.

214. *Id.* at 31 (noting that the "study reveals that in comparison to the public housing portfolio, relatively few tenants in MHFA-financed properties are currently receiving welfare benefits").

215. *Id.* app. A.7 (noting that 38.24% of the Section 8 moderate rehab units are occupied by TAFDC families).

216. See Krefetz, *supra* note 48 (manuscript at 41-42); Laura Lazarus, Affirmative Fair Housing Marketing Regulations: HUD's Failed Attempt to Implement a Good Idea 47 (1993) (unpublished seminar paper, Georgetown University Law Center) (on file with author) (reviewing HUD and independent studies that "confirm that the regu-

and enforced. Further steps must be taken if the subsidized housing is to include any significant number of minorities.

The Montgomery County experience suggests that policies that require economic integration can achieve some measure of racial integration as well. It is important to consider why Montgomery County has succeeded in achieving some racial integration while Massachusetts and New Jersey have failed to do so.

One of the reasons for Montgomery County's relative success is the requirement that 40% of the MPDU units be offered to the local public housing authority. Since people of color comprise a significant percentage of the households on the waiting list for PHA subsidies,<sup>217</sup> directing "affordable" units to very low-income people who are on a waiting list for public housing subsidies can be an effective way to reach minorities.<sup>218</sup> Economic remedies are an imperfect proxy for racial problems, but a focus on very poor people will yield more minorities than will a focus on "moderate"- or even "low"- income people. The Montgomery County Code defines "low income" as the level established for "very-low income families" by HUD.<sup>219</sup>

Montgomery County also achieves racial integration in its MPDU sales units. More than half of these units are sold to minorities, despite the existence of a preference for local residents and workers. Part of the explanation for this is in the means by which MPDU purchasers are identified—by a lottery.<sup>220</sup> Information

---

lations have had minimal impact on opening up housing opportunities"). For suggestions about improvements, see John M. Goering, *Introduction*, in HOUSING DESEGREGATION AND FEDERAL POLICY 202 (John M. Goering ed., 1986); HUD OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, AN ASSESSMENT OF THE AFFIRMATIVE MARKETING REVIEW PROCESS ON THE RENTAL REHABILITATION PROGRAM (1985); HUD OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, AN ASSESSMENT OF THE MULTIFAMILY AFFIRMATIVE FAIR HOUSING MARKETING PROGRAM (1990); OFFICE OF MANAGEMENT AND BUDGET, EVALUATION OF THE EFFECTIVENESS OF THE AFFIRMATIVE FAIR HOUSING MARKETING PLAN (1982); LEONARD S. RUBINOWITZ ET AL., AFFIRMATIVE MARKETING OF FEDERALLY ASSISTED HOUSING: IMPLEMENTATION IN THE CHICAGO METROPOLITAN AREA (1974); see also Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1450-62 (1998) (discussing affirmative marketing)).

217. E-mail from Bernard K. Tetreault, *supra* note 105.

218. See Roisman, *supra* note 89, at 1416 (encouraging such linkage for *Mount Laurel* housing).

219. MONTGOMERY COUNTY, MD. CODE § 25A-3(o) (2000). Thus, "low income" would be at or below 50% of area median income. See *supra* note 67 and accompanying text for a discussion of affordable housing for low-income families.

220. See *id.* § 25A-8(a)(3) (requiring a lottery or other method "that will assure eligible persons an equitable opportunity to buy or rent a MPDU"); § 25A-8(a)(4) (requiring that the County Executive establish buyer and renter selection system); *cf.*

about the lottery is distributed widely throughout the County.<sup>221</sup> The long-time former director of HOC explains the program's success by reference to long-term support from fair housing groups, education of the industry, demonstrated commitment to enforcement of non-discrimination laws, internal networking within minority communities, and commitment by the program administrators.<sup>222</sup> Careful study of the means used to achieve these results would enable Massachusetts and other jurisdictions to redesign their programs so as to achieve racial as well as economic integration.

F. *Litigation and Other Advocacy Should Be Directing to Achieving Racial Integration*

Congress, state legislatures, and local governing bodies all are extremely sensitive to the concerns of their dominant constituents, which makes contradiction of the suburban bias very difficult for these elected officials.<sup>223</sup> Federal, state, and local appointed officials may have somewhat more leeway, but they are accountable to the elected officials who, in turn, are accountable to the electorate.<sup>224</sup> The institution most isolated from electoral pressures—the institution most capable of protecting what are perceived as minority interests and taking a longer and larger view of the general public interest—is the judiciary, both federal and state.<sup>225</sup>

The courts are not without their own substantial limitations. Even judges who are appointed for life are subject to political and other constraints.<sup>226</sup> Doctrinal changes have made it much more difficult for unpopular claimants to reach or prevail on the mer-

---

United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 434 (E.D.N.Y. 1995) (discussing the distribution of HUD-subsidized houses to "pre-selected persons").

221. Personal Telephone Communication from Eric Larsen, MPDU Coordinator for Montgomery County Housing Opportunities Commission, to Florence Wagman Roisman (n.d.).

222. E-mail from Bernard K. Tetreault, *supra* note 105.

223. See DANIELSON, *supra* note 26, at 311-22.

224. See Stonefield, *supra* note 47 (manuscript at 7) (discussing the political obstacles to affordable housing statutes).

225. See HAAR, *supra* note 41, at 175-85 (discussing judicial intervention). *But cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 67-71 (discussing the ineffectiveness of the judiciary to create social change without simultaneous efforts by the executive and legislative branches); Alexander Polikoff, Gautreaux and Institutional Litigation, 64 CHI.-KENT L. REV. 451, 461, 476-78 (1988) (considering the extent of the role of the judiciary in remedying housing segregation).

226. See DANIELSON, *supra* note 26, at 160-61 (discussing judicial restrictions). In addition to the political constraints discussed there, judges are subject to considerable

its.<sup>227</sup> Nonetheless, litigation (and the preliminary advocacy that leads up to it) is an essential element of a strategy to open up the suburbs to racial integration. In addition to judges' relative freedom from majoritarian constraints, the judicial process has the benefit of focusing more on concrete realities rather than myths than do the other institutions.<sup>228</sup>

Some of the limitations attributed to courts are less potent now than in the past. Thus, for example, Danielson noted that "[w]hen subsidized housing is an essential component of court-ordered remedies in the suburbs, the problems inherent in judicial activism are multiplied," in part because of the need for "presidential budgetary requests, congressional appropriations, administrative allocations, and other steps in the funding process."<sup>229</sup> Since the publication of *Politics of Exclusion*<sup>230</sup> in 1976, however, courts have managed to direct the provision of federal housing subsidies for remedial purposes.<sup>231</sup> Moreover, since the largest current subsidized housing program, the LIHTC program, is controlled by state agencies, courts have an easier job of reaching those resources. Danielson's pessimism about litigation may be attributable to relative impatience: some of what he described as "futile" has turned out to be fruitful in the decades since he wrote.<sup>232</sup>

The importance of litigation is evident in every study of measures that advance integration. The New Jersey initiatives, of course, began with litigation; were it not for *Mount Laurel II*, the New Jersey Fair Housing Act never would have been enacted.<sup>233</sup> The Massachusetts statute would have been a dead letter were it not for litigation: the powerful decisions of the Supreme Judicial

---

peer pressure: they are immersed in a cocoon of values that is hard to resist, and they do not like being criticized by their colleagues or reversed by higher courts.

227. See, e.g., GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993).

228. See DANIELSON, *supra* note 26, at 159-60 (discussing judicial independence).

229. *Id.* at 195.

230. *Id.*

231. See *Sanders v. United States Dep't of Hous. & Urban Dev.*, 872 F. Supp. 216, 225-46 (W.D. Pa. 1994) (consent decree); *Walker v. United States Dep't of Hous. & Urban Dev.*, 3:85-CV-1210-R, N.D. Tex., settlement stipulation and order (Mar. 8, 2000); Roisman, *supra* note 20, at 194-96 (listing other desegregation cases against HUD).

232. See e.g., DANIELSON, *supra* note 26, at 195 (referring to "the futile efforts" of the courts in the *Gautreaux* case). Important relief has been provided through *Gautreaux* since then. See RUBINOWITZ ET AL., *supra* note 20, at 767-69.

233. See *supra* note 37 and accompanying text for a discussion of the *Mount Laurel* litigation.

Court in *Board of Appeals (Hanover) v. Housing Appeals Committee*<sup>234</sup> and *Mahoney v. Board of Appeals (Winchester)*<sup>235</sup> were essential to persuade many local jurisdictions that they would be wise to accommodate those who sought to construct subsidized housing.<sup>236</sup>

There are a variety of promising litigation strategies. There should be more systemic litigation against local governments challenging racial exclusion and segregation, building on cases like *Gautreaux*,<sup>237</sup> *Walker*,<sup>238</sup> *Yonkers*,<sup>239</sup> and *United States v. City of Parma*.<sup>240</sup> There also should be litigation to require collection and reporting of racial data in housing programs; litigation to require racial integration as a goal in LIHTC and other housing programs; and litigation against states for discriminatory actions.<sup>241</sup> Other

---

234. 294 N.E.2d 393 (Mass. 1973).

235. 316 N.E.2d 606 (Mass. 1974).

236. See Krefetz, *supra* note 48 (manuscript at 22-25) (suggesting local communities act to avoid litigation); see also Calavita & Grimes, *supra* note 31, at 162-63 (noting that lawsuits led to 3% of inclusionary programs and that Carlsbad, California recognized the possibility of litigation); *id.* at 163-64 (Chula Vista, California, same); *id.* at 165 (same, more generally).

237. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

238. *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000); *Walker v. United States Dep't of Hous. & Urban Dev.*, 734 F. Supp. 1231 (N.D. Tex. 1989).

239. *United States v. City of Yonkers*, 96 F.3d 600, 608 (2d Cir. 1996) (holding New York State liable for housing segregation); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1185-94 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *United States v. Yonkers Bd. of Educ.*, 30 F. Supp. 2d 650 (S.D.N.Y. 1998) (same).

240. 494 F. Supp. 1049 (N.D. Ohio, 1980). See generally W. Dennis Keating, *The Parma Housing Racial Discrimination Remedy Revisited*, 45 CLEV. ST. L. REV. 235 (1997). Note also that suburban localities can be challenged successfully for discriminating against people of color who already live in the suburb. This was the genesis of *Mount Laurel*. See Yale Rabin, *Expulsive Zoning: The Inequitable Legacy in Euclid*, in *ZONING AND THE AMERICAN DREAMS: PROMISES STILL TO KEEP* 101 (Charles M. Haar & Jerold S. Kayden eds., 1989); Jon C. Dubin, *From Junkyards to Gentrification: Exploring a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993); Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 GEO. J. ON FIGHTING POVERTY 75 (1996).

241. See *City of Yonkers*, 96 F.3d at 608, 621-22 (discussing claims against New York State); *Yonkers Bd. of Educ.*, 837 F.2d at 1185-94 (same). *But cf.* *Bd. of Trustees of Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001) (limiting liability of state under Americans with Disabilities Act). There also is room for litigation against states for forcing communities to rely on property taxes to fund schools, thus encouraging land use discrimination against families with children, especially those of low income. There may also be a Title VIII claim to bring against the state. Obviously, these claims could be coordinated with other school finance litigation.

Challenges to other state policies also may be productive. States that allow homeowner deductions that mirror the federal deductions undoubtedly thus accord a substantial tax advantage to whites over minorities. The disparate impact of this tax advantage is vulnerable to effective challenge. See *United States v. County of Nassau*,

useful lawsuits would enforce Affirmative Fair Housing Marketing Plans for developments in predominantly white suburban communities; implement the prohibition against discrimination on the basis of Section 8 status in LIHTC developments<sup>242</sup> and more generally; challenge local residency preferences in any housing programs in predominantly white suburban jurisdictions;<sup>243</sup> use environmental standards to require more low-income housing;<sup>244</sup> and attack the failure of state and local recipients of Community Development Block Grant (“CDBG”) funds “affirmatively to further” fair housing.<sup>245</sup>

We also need new advocacy institutions. Many of those that were most prominent in the earlier struggle to open the suburbs no longer exist.<sup>246</sup> The Suburban Action Institute,<sup>247</sup> the National

---

79 F. Supp. 2d 190, 197 (E.D.N.Y. 2000) (dismissing federal complaint under Tax Injunction Act); *Coleman v. Seldin*, 687 N.Y.S.2d (1999) (challenging racially discriminatory property tax system); see also John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1601-15 (1993) (proposing tax reform).

242. See *supra* note 207 and accompanying text for a discussion of this prohibition. Other improvements to the Section 8 program could further the use of Section 8 in suburban jurisdictions; e.g., (1) increasing fair market rent levels to allow use of Section 8 in higher cost areas, see *Downs, supra* note 91, at 161; *Roisman, supra* note 20, at 174; James Janega, *South Suburbs Out to Alter Section 8; Higher Rent Subsidies Sought so Poor can Afford Other Areas*, CHI. TRIB., Dec. 16, 1999, at 2C; (2) providing mobility counseling, see *TURNER & WILLIAMS, supra* note 125 at 107-08; (3) regionalizing the authority of central-city PHAs, thereby transforming local Section 8 programs into regional programs, see *Downs, supra* note 91, at 161; see also *TURNER & WILLIAMS, supra* note 125, at 61-90 (describing the Regional Opportunity Counseling Initiative); and (4) increasing search time for Section 8 certificate and voucher holders, see *Roisman, supra* note 20, at 174; see also SUSAN J. POPKIN & MARY K. CUNNINGHAM, CHAC SECTION 8 PROGRAM: BARRIERS TO SUCCESSFUL LEASING UP (1999) (recommending improvements to the Section 8 program); MARGERY AUSTIN TURNER ET AL., SECTION 8 MOBILITY AND NEIGHBORHOOD HEALTH (2000) (same).

243. See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 46 (1st Cir. 2000); *In re Township of Warren*, 622 A.2d 1257, 1266-68, 1277 (N.J. 1993).

244. See *Calavita & Grimes, supra* note 31, at 155 (describing such challenges); *Calavita et al., supra* note 31, at 114 (discussing a lawsuit that required housing to accompany new industrial and commercial development in order to reduce environmental degradation. To the extent that the workers would be minorities, this could produce racial as well as economic diversity.); see also *DANIELSON, supra* note 26, at 142-45, 202 (describing similar efforts).

245. See 42 U.S.C. § 5306(d)(5)(B) (1994) (requiring certification for CDBG program that State will “affirmatively further fair housing”); 24 C.F.R. § 91.325(a) (2000) (same); *id.* § 570.487(b) (same).

246. See *DANIELSON, supra* note 26, at 212 (describing “steadily rising pressures on the federal government growing out of the mounting concern of civil rights groups with suburban exclusion”).

247. See *id.* at 118-23 (describing the work of Suburban Action Institute).



Committee Against Discrimination in Housing,<sup>248</sup> and the New Jersey Office of the Public Advocate<sup>249</sup> have all been terminated.<sup>250</sup> The federally-funded Legal Services programs that were central to *Mount Laurel* and the New Hampshire litigation have been subjected to rigorous restrictions (which prohibit, inter alia, class action litigation).<sup>251</sup> The loss of the advocacy organizations has been keenly felt. Additional support for new and existing advocacy organizations that will focus on residential racial desegregation is

---

248. See *id.* at 114-116 (noting that the National Committee Against Discrimination in Housing ("NCDH") "in the 1970s placed more and more emphasis on increasing the supply of lower-cost housing in the suburbs and removing zoning and other local barriers which reinforce segregated residential patterns"); see also Willy E. Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate*, 27 HOW. L.J. 227, 255 (1984) (stating that the NCDH "has been devoting its full efforts and resources to the cause of equal housing opportunity for more than three decades") (citations omitted).

249. See G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 235 (1988) ("The Public Advocate was the driving force behind the exclusionary zoning and public trust litigation."); John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 729 (1998) (describing the work of the Public Advocate). The Office was created on May 13, 1974. Department of the Public Advocate Act of 1974, N.J. STAT. ANN. §§ 52:27-E-1-41 (West 1986) (repealed 1994).

250. See Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. SCH. L. REV. 1093, 1153 (1998) (noting that the New Jersey Department of the Public Advocate "was eliminated entirely in January 1994, when the Republicans won control of both the statehouse and the legislature"); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1103 (1989) ("NCDH was primarily funded by foundations, and when funds ran out efforts at fund raising proved fruitless."); Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L.J. 1, 45 n.129 (1998) (explaining that the Office of Public Advocate was dismantled in 1994 by Governor Whitman "as a cost-saving measure").

251. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 §§ 504(a), 507, 110 Stat. 1321, 1321-53-57 (1996); *Velazquez v. Legal Servs. Corp.*, 2001 S.Ct. (2001) (denying a petition for writ of certiorari to review other restrictions upheld at 164 F.3d 757 (2d Cir. 1999)); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating one of the restrictions); Gordon Bonnyman, *Adapting Without Accepting: The Need for a Long-Term Strategy for "Full Service" Representation of the Poor*, 17 YALE L. & POL'Y REV. 435, 435 (1998) (describing the impact of the restrictions); Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2188-92 (1999) (same); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 260-62 (same); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 481 n.48 (1999) (same); David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337, 337-38 (1998) (same).

essential.<sup>252</sup>

### CONCLUSION

I fear that my observations about the Massachusetts Comprehensive Permit statute seem negative, focusing upon what has not been accomplished. But I join my colleagues in saluting the Massachusetts advocates, legislature, courts, Housing Appeals Committee, and others for having been the first in the country to implement this important initiative.<sup>253</sup> If I offer only one cheer<sup>254</sup> for Massachusetts, it is a rousing one.

The Massachusetts Comprehensive Permit statute was a courageous step in a crucial direction. Thirty years of experience with it illuminates the necessity of assessing precisely what impact it has had on racial residential patterns and of supplementing the statute with measures that will directly promote the racial desegregation of communities in Massachusetts and elsewhere.

Success in this endeavor will not be easy, but is essential.

---

252. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 44-70, 198-99 (1988) (demonstrating that a "deep and vibrant" "support structure" for legal advocacy is essential to the acknowledgment of legal rights).

253. See Krefetz, *supra* note 48; Stonefield, *supra* note 47.

254. See Stonefield, *supra* note 47.