DISPARATE IMPACT AND THE LIMITS OF LOCAL DISCRETION AFTER *INCLUSIVE COMMUNITIES*

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INTRODUCTION

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"),[1] the Supreme Court, in a 5-4 ruling authored by Justice Anthony Kennedy, issued a landmark decision finding disparate impact claims cognizable under the Fair Housing Act ("FHA")[2]—perhaps the most significant FHA case decided since Congress enacted the law in 1968.[3] The disparate impact standard allows a plaintiff to challenge housing practices with discriminatory effects or that perpetuate segregation, regardless of whether discriminatory intent is shown.[4] Defendants have an opportunity to justify any discriminatory effects demonstrated by plaintiffs; plaintiffs can then establish liability on any justified effects if they can prove that the defendant's interests can be served by another practice that has a less discriminatory effect.[5] Although the cases prompting the Court's recent interest in disparate impact theory arose in the context of government discretion in setting housing policy, disparate impact claims under

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[1] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc. (*Inclusive Communities*), 135 S. Ct. 2507 (2015).

[2] 42 U.S.C. §§ 3601–3619, 3631 (2012).

[3] The Court had granted certiorari on this question twice before, in two recent cases presenting less typical sets of facts, but petitioners dismissed both cases prior to argument. *See* Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013); Magner v. Gallagher, 565 U.S. 1013 (2011), *cert dismissed*, 565 U.S. 1187, 1187 (2012). Every federal circuit court of appeals to consider the question—eleven—found disparate impact claims cognizable under the FHA. ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUSING ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 6–7 (2009), http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf. The U.S. Department of Housing and Urban Development, consistent with previous guidance and enforcement actions, issued a regulation finding disparate impact claims cognizable. 24 C.F.R. § 100.500 (2016). It was against this backdrop, unanimity among federal circuit courts and an authoritative agency regulation, that the Court decided to grant certiorari in a third case, *Inclusive Communities*, in 2014. *Inclusive Communities*, 135 S. Ct. 46 (2014) (granting certiorari).

[4] 24 C.F.R. § 100.500 (2016).

[5] *Id.*

the FHA are available to a range of protected groups in varied housing market settings.[6]

In upholding the disparate impact theory of liability under the FHA, the Court simultaneously made sweeping pronouncements in favor of residential integration and issued safeguards protecting the legitimate exercise of local policy discretion, particularly in the siting of affordable housing.[7] The Court's safeguards address three interrelated concerns implicating how disparate impact theory might curb the legitimate exercise of local policy discretion and lead to unintended consequences. The Court disapproved challenges to: (1) racial imbalances alone that fail to identify policies causing the imbalances; (2) challenges based on second guessing valid local priorities; and (3) "abusive" challenges to legitimate housing improvement and neighborhood revitalization efforts.[8] These safeguards preserving local discretion might be read as condoning policy choices that maintain the status quo of segregation in government housing programs; yet, such a reading is logically incoherent in that it would contradict the Court's overarching integration pronouncement. This Article demonstrates how the Court's competing pronouncements must be reconciled: with respect to each safeguard, local policy discretion is not absolute, but must yield to the integration aims of the FHA.

The vehicle for establishing the appropriate boundary lines for the exercise of policy discretion lies in the Court's persistent focus on housing barriers. In *Inclusive Communities*, the Court upheld disparate impact liability as a targeted "barrier removal" mechanism rather than a blunt instrument "displac[ing] valid governmental and private priorities;" the Court cited its decision in *Griggs v. Duke Power Co.*[9] three times for the proposition that FHA disparate impact theory mandates the removal of "artificial, arbitrary, and unnecessary barriers."[10] As I have explored in earlier work, this is the vision that the lower courts have largely implemented for forty years.[11] In a review of four decades of appellate decisions addressing FHA disparate impact challenges, I found that the predominant claim on appeal and the pre-

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6 *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 364–65 (2013).

7 *Inclusive Communities*, 135 S. Ct. 2507, 2521–23 (2015).

8 *Id.* at 2522–24.

9 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

10 *Inclusive Communities*, 135 S. Ct. at 2522, 2524 (quoting *Griggs*, 401 U.S. at 431).

11 Seicshnaydre, *supra* note 6, at 402. Other commentators have observed that the Supreme Court did not particularly limit or expand the disparate impact standard, but recognized and clarified it. *See, e.g.*, Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 107, 110–11 (2015), http://columbialawreview.org/content/fair-housing-litigation-after-inclusive-communities-whats-new-and-whats-not/ ("In many ways, . . . *ICP* will not greatly alter FHA-based litigation. . . .").

dominant claim on which plaintiffs obtained positive outcomes was the housing barrier claim.[12] Justice Kennedy cited this work in acknowledging that "the heartland of disparate-impact suits target[s] artificial barriers to housing."[13] The only principled reading of Justice Kennedy's opinion is that the exercise of local policy discretion to overcome housing barriers and "mov[e] the Nation toward a more integrated society" is legitimate and entitled to deference.[14] Local policy discretion that operates to maintain housing barriers and perpetuate the status quo of racial isolation, even under the auspices of "community revitalization," is not legitimate and is subject to challenge. Thus, this Article harmonizes the Court's competing pronouncements using history, precedent, and the *Inclusive Communities* opinion itself.

A fair housing litigation case study provides an illustration. In the mid-1990s, the Greater New Orleans Fair Housing Action Center ("GNOFHAC")[15] filed a housing discrimination complaint against the 140-unit Riviera Oaks apartment complex in New Orleans, Louisiana. The complaint alleged the apartment segregated black tenants in apartments on one side of the complex and provided different services and facilities on the "black side" and "white side" of the complex.[16] Ten black tenants also joined the litigation. A testing investigation by GNOFHAC revealed that the segregation at the complex did not occur by accident or because black residents preferred to live in a segregated configuration—black and white prospects were each steered to different sides of the apartment complex based on race.[17] One side of the apartment complex consisted solely of black tenants (except for a white woman with bi-racial children and a white woman who lived with a black man).[18]

In addition, GNOFHAC's investigation revealed that there was no separate-but-equal pretense at the complex. The U.S. Department of Housing and Urban Development ("HUD") later reported that GNOFHAC's investigation found "[t]enants on the 'white side' could control heating and air-conditioning in their apartments, but [tenants] on the 'black side' . . . could only [have temperatures] . . . adjusted by management."[19] One plaintiff reported that management told her to "get a fan" on a summer day when she requested that air conditioning be turned on in her unit. Furthermore, each side of the complex had a swimming pool only available to residents living on that

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12 Seicshnaydre, *supra* note 6, at 402.

13 *Inclusive Communities*, 135 S. Ct. at 2522 (citing Seicshnaydre, *supra* note 6, at 360–63).

14 *Id.* at 2526.

15 At the time suit was filed, the Author was Executive Director of GNOFHAC.

16 *Walton v. Riviera Oaks*, petition on file with the author.

17 *See* U.S. Dep't of Hous. & Urban Dev., *Cuomo Announces Record $2.1 Billion Lending Discrimination Settlement and Commemorates 30th Anniversary of Fair Housing Act*, HUD ARCHIVES: NEWS RELEASES (Apr. 3, 1998), http://archives.hud.gov/news/1998/pr98-146.html.

18 *Id.*

19 *Id.*

side.[20] As a result, managers effectively barred the overwhelming majority of black tenants from using the pool frequented by whites—even when the pool on the "black side" of the complex closed due to neglect during the spring and summer of 1995 and 1996.[21]

The case resulted in a settlement of $325,000.[22] Owners of the apartments fired the on-site manager and sold the apartments.[23] In considering an effective policy response to the segregation at the complex, the appropriate first step would not be to build more apartment units on the "black side" amidst its unequal facilities. Nor should apartments on the "black side" of the complex be renovated before ensuring equalization of the separate and unequal facilities. Rather, in order to remedy segregation at the Riviera Oaks complex, the first response would be to dismantle the structures and policies confining black residents and applicants to the "black side." Second, the remedy would equalize the conditions on the "black side" before any more units were built or any new housing investments were made (or any more children moved in).[24] It might be the case that the facilities on the "white side" were structurally superior and better maintained because of years of investment on the "white side" and years of neglect and disinvestment on the "black side." However, no matter how difficult it might be to equalize the "black side," a strategy of more housing investments on the "black side," with no equalization of services and facilities and no dismantling of practices confining blacks to the "black side," would only reinforce and perpetuate racial isolation and discrimination at the complex.[25]

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20 *Id.*

21 *Id.*

22 *Id.*

23 U.S. Dep't of Hous. & Urban Dev., *Cuomo Announces Record $2.1 Billion Lending Discrimination Settlement and Commemorates 30th Anniversary of Fair Housing Act*, HUD ARCHIVES: NEWS RELEASES (Apr. 3, 1998), http://archives.hud.gov/news/1998/pr98-146.html ("Shawn Walton, a black woman who initiated the discrimination complaint, said: 'This isn't the way things are supposed to be, slavery is over. This is 1998. We're free, we're not living in a cage. Everybody has equal opportunity.'").

24 Integration is an effective stimulus for equalization. In an East Texas housing desegregation case, for example, a federal judge ordered that white tenants be assigned to previously all-black projects and vice-versa. Before whites were moved into previously all-black projects, "HUD made a special grant to the local housing authority to . . . [pave the] streets around the previous all-black projects" before complying with the order to desegregate. *See* Brief of Housing Scholars as Amici Curiae Supporting Respondent at 15, *Inclusive Communities*, 135 S. Ct. 2507 (2015) (No. 13-1371) (citing Elizabeth K. Julian & Michael M. Daniel, *Separate and Unequal – The Root and Branch of Public Housing Segregation*, 23 CLEARINGHOUSE REV. 666, 673–74 (1989)). For a discussion of equalization as a remedy to compensate victims of discrimination living in segregated neighborhoods "'chronically underserved by municipalities and housing authorities,'" see Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 464 (1996) (quoting Memorandum from Richard Gervase of the National Housing Law Project to Fair Housing Advocates 17 (Aug. 16, 1991) (manuscript on file with author)).

25 *See* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1232 (2011) ("Highlighting the ongoing role of the state in shaping

Part I of the Article summarizes the procedural history of *Inclusive Communities* and Justice Kennedy's majority opinion. This Part details the broad pronouncements in favor of integration and the concerns about disparate impact theory impeding local policy discretion. Part II.A. addresses the first concern implicating local policy discretion, which relates to the theory that local governments will be compelled to adopt quotas to fend off disparate impact challenges based solely on racial disparities in housing programs. In responding to that concern, the Court describes a safeguard pre-dating its *Inclusive Communities* opinion, which requires "robust causality"[26] between the challenged practice and the racial disparity so that defendants will not be liable for disparities they did not create.[27] A "robust causality requirement" can be harmonized with the "continuing struggle against racial isolation."[28] Disparate impact claims need not implicate concerns about quotas when they target neutral policies perpetuating segregated housing patterns rather than bare statistical disparities.

Part II.B. addresses the concern that disparate impact theory will expose governmental and private entities to a "double bind of liability,"[29] resulting in litigation no matter which housing priority is selected or where affordable housing is located—whether in cities or suburbs—because plaintiffs may allege harm either way. The Court discusses the safeguard that defendants are entitled "to state and explain the valid interest served by their policies,"[30] suggesting that disparate impact claims may not be used to second guess legitimate policy choices. The need for governmental entities to set priorities and exercise discretion in implementing housing policy can be harmonized with "moving the Nation toward a more integrated society."[31] Importantly, Justice Kennedy's opinion does not privilege local government policy discretion over fair housing objectives. It merely provides local governments running room to administer their programs within fair housing bounds. Thus, local governments do not have discretion to decide *whether* to overcome segregation, only *how* to do so. This concept aligns with Justice Kennedy's use

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housing choice and constructing residential segregation reveals that the racial boundaries that one may think of as natural are in fact created by state policy, and allows questioning of the seemingly private 'choices' that emerge from those boundaries.").

26 *Inclusive Communities*, 135 S. Ct. 2507, 2523 (2015).

27 On remand, the district court dismissed ICP's disparate impact claim for failure to prove a prima facie case. *Inclusive Communities*, 135 S. Ct. at 2513; *see also* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1, (N.D. Tex. Aug. 26, 2016) [hereinafter *ICP Remand Opinion*]. The court found that ICP did not identify a specific policy or practice that caused a disparity in the location of low-income housing. *Id.* at *6–7.

28 *Inclusive Communities*, 135 S. Ct. at 2523, 2525.

29 *Id.* at 2523.

30 *Id.* at 2522.

31 *Id.* at 2526.

of the term "valid" in reference to the governmental priorities requiring deference.[32] The Court assumes as a general matter that revitalization of inner city neighborhoods will constitute a valid interest and a legitimate exercise of local policy discretion. Yet, a priority that effectively doubles down on racial isolation and segregation does not promote fair housing choice; neutral policies confining new low-income housing investments to devastated neighborhoods with little promise of integrating cannot be deemed valid under any construction of the Fair Housing Act text, purpose, regulations, and *Inclusive Communities* opinion.

Part II.C. addresses the Court's warning against "abusive disparate-impact claims"[33] that might chill a developer or city from pursuing legitimate strategies related to revitalizing inner city neighborhoods. Comprehensive and concerted neighborhood revitalization strategies can be harmonized with the "continuing struggle against racial isolation."[34] Nevertheless, a revitalization label will not immunize a policy from challenge if it operates to perpetuate racial isolation. For example, a review of history and precedent reveals that policies restricting affordable housing to neighborhoods where minority residents already live has served to "contain" and isolate them, not provide opportunity.[35] Policies operating to locate low-income housing solely in distressed neighborhoods function as barriers to integration; the remedy for segregation is not more segregation. Indeed, neither low-income housing development nor rehabilitation alone has proven effective in revitalizing devastated neighborhoods, perhaps because of their focus on one of the symptoms of segregation rather than on segregation as the root cause of blight and unequal conditions. On the other hand, comprehensive neighborhood investment strategies can be consistent with the FHA if they expand opportunity for those living in segregated, unequal conditions and counteract disinvestment and blight as barriers to more integrated living patterns.[36]

I. THE SUPREME COURT RECOGNIZES DISPARATE IMPACT CLAIMS IN *INCLUSIVE COMMUNITIES*

The Court's holding in *Inclusive Communities* is simple; its factual underpinnings and procedural history are complex. Inclusive Communities Pro-

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32 *Id.* at 2522, 2524.

33 *Id.* at 2524.

34 *Inclusive Communities*, 135 S. Ct. at 2525.

35 *See infra* notes 246–262, and accompanying text.

36 Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 571 (2008) ("[D]uring the past forty years the divided fair housing and community development movements have not succeeded in either dismantling the vestiges of segregation in communities of color or in creating an open and inclusive society. These movements have just causes that are best advanced together." (footnote omitted)).

ject ("ICP") is a Texas-based nonprofit corporation that "works for the creation and maintenance of thriving racially and economically inclusive communities, expansion of fair and affordable housing opportunities for low income families, and redress for policies and practices that perpetuate the harmful effects of discrimination and segregation."[37] In 2008, ICP challenged the Texas Department of Housing and Community Affairs' ("TDHCA") practice of disproportionately allocating housing tax credits[38] to majority black areas, alleging the practice perpetuated racial segregation in violation of the FHA.[39]

In 2010, the U.S. District Court for the Northern District of Texas granted partial summary judgment to ICP on its prima facie showing of disparate impact.[40] After a bench trial, the court found in favor of ICP on its disparate impact claim under the FHA.[41] TDHCA asserted that its legitimate governmental interest consisted of "awarding tax credits in an objective, transparent, predictable, and race-neutral manner."[42] The court assumed that TDHCA's proffered interests were "bona fide and legitimate."[43] The court, however, found TDHCA failed to meet its burden of showing that "no alternative course of action could be adopted that would enable TDHCA's interest to be served with less discriminatory impact."[44] The court denied ICP's claim that the TDHCA had acted with discriminatory intent.[45]

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37 INCLUSIVE COMMUNITIES PROJECT, http://www.inclusivecommunities.net (last visited June 9, 2017).

38 The Low Income Housing Tax Credit program ("LIHTC") originated in 1986 and is currently the largest affordable rental housing production program in the United States. Elizabeth K. Julian, *Community Revitalization, Civil Rights, and the Low Income Housing Tax Credit Program*, 38 CAROLINA PLANNING 25, 25 (2013). States administer the LIHTC through a Qualified Allocation Plan setting out the terms for each year's allocation. *Id.* at 26. The most coveted subsidies (9% credits) are awarded through competition and generate millions of dollars annually in tax credits and other returns for investors, banks, syndicators and for-profit and non-profit housing developers. *Id.*

39 *Inclusive Communities*, 135 S. Ct. 2507, 2514 (2015).

40 Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 499–500 (N.D. Tex. 2010). The court relied on ICP's evidence that between 1999 and 2008, TDHCA had approved nearly 50% of applications for family units in neighborhoods that were less than 10% Caucasian, while approving only 37% of family units in neighborhoods that were 90% or more Caucasian. The court found that this disproportionate allocation practice concentrated tax credit units in minority neighborhoods and perpetuated racial segregation, where 92% of tax credit units in the city of Dallas were concentrated in minority neighborhoods. *Id.* at 500.

41 Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 313–14 (N.D. Tex. 2012).

42 *Id.* at 323.

43 *Id.* at 326.

44 *Id.* at 331.

45 *Id.* at 321.

The court's "remedial order contained no explicit racial targets or quotas."[46] It required Texas to propose changes in its selection criteria to eliminate the segregative impact, including awarding points for units in neighborhoods with good schools and disqualifying sites near hazardous conditions.[47]

TDHCA appealed the district court finding of disparate impact. While the appeal was pending, HUD issued a rule resolving inconsistencies in the appellate courts concerning the proof analysis, but otherwise stated it was "not proposing new law in this area."[48] Contrary to the district court, HUD assigned to plaintiffs the burden of proving that a defendant's interests "could be served by another practice that has a less discriminatory effect."[49] The Fifth Circuit held that disparate impact claims are cognizable under the FHA, but reversed and remanded for the district court to apply the HUD regulation.[50] In a concurring opinion, Judge Jones stated that the district court on remand should re-examine whether ICP had met its prima facie burden of showing that a practice of TDHCA caused the segregation demonstrated by the statistical evidence.[51] Following the Fifth Circuit's ruling, TDHCA petitioned for certiorari, which the Court granted in 2014.[52] The Court heard oral argument on January 21, 2015 and issued its decision on June 25, 2015.[53]

The Supreme Court's ruling recognizing disparate impact claims under the FHA is anchored in the history of residential racial segregation and the passage of the FHA to address longstanding segregation and discrimination in housing.[54] Citing *Buchanan v. Warley*,[55] Justice Anthony Kennedy, writing for the majority, acknowledged that "*[d]e jure* residential segregation by race was declared unconstitutional almost a century ago . . . but its vestiges remain today."[56] The Court acknowledged the historical role of governmental and private actors "to encourage and maintain the separation of the races."[57] Pos-

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46 *Inclusive Communities*, 135 S. Ct. 2507, 2514 (2015).

47 *See id.*

48 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,462 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

49 24 C.F.R. § 100.500(c)(3) (2016).

50 Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 280–83 (5th Cir. 2014).

51 *Id.* at 283–84 (Jones, J., concurring).

52 *Inclusive Communities*, 135 S. Ct. 46 (2014) (granting certiorari).

53 *Inclusive Communities*, 135 S. Ct. 2507, 2507 (2015).

54 Florence Wagman Roisman, *The Power of the Supreme Court's Decision in the Fair Housing Act Case,* TDHCA v. ICP, 24 POVERTY & RACE (Poverty & Race Res. Action Council, D.C.), Jul./Aug. 2015, at 17, http://www.prrac.org/newsletters/julaug2015.pdf ("The opinion does three important things with respect to residential racial segregation: it identifies integration as a purpose of the Fair Housing Act (FHA); it indicts federal, state, and local governments for causing and exacerbating residential racial segregation; and it affirms the obligation to advance integration.").

55 Buchanan v. Warley, 245 U.S. 60 (1917).

56 *Inclusive Communities*, 135 S. Ct. at 2515 (citing *Buchanan*, 245 U.S. at 81).

57 *Id.*

sibly in recognition of the recent social unrest in Ferguson, Missouri and Baltimore, Maryland, the Court bookended its opinion with references to the Kerner Commission, established by President Lyndon Johnson in response to the urban riots of the mid-1960s.[58] The Court cited the Kerner Commission's finding that segregation and unequal housing and economic conditions in the inner cities were "significant, underlying causes of the social unrest" and also cited the Commission's "recommended enactment of 'a comprehensive and enforceable open-occupancy law . . .' [t]o reverse '[t]his deepening racial division.'"[59] The assassination of Dr. Martin Luther King, Jr. created new urgency to pass such a law;[60] Congress passed the Fair Housing Act in 1968.[61]

In addition to the broad congressional purpose in passing the FHA, the Court rested its holding on the FHA's "results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, [and] Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals."[62] The Court also cited briefs filed by states and cities in support of disparate impact liability, noting their reliance on the standard and that its existence "for the last several decades 'has not given rise to . . . dire consequences.'"[63]

In its *Inclusive Communities* decision, the Court relied heavily on two employment precedents: *Griggs v. Duke Power Co.*,[64] a unanimous 1971 decision finding liability for discriminatory effects under Title VII, and *Smith v. City of Jackson*,[65] in which a plurality of the Court extended disparate impact liability to Age Discrimination in Employment Act ("ADEA") cases.[66]

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58 *Id.* at 2516, 2525.

59 *Id.* at 2516 (citing KERNER COMM'N REPORT, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 91, 263 (1968)).

60 *Id.*

61 42 U.S.C. §§ 3601–3619, 3631 (2012).

62 *Inclusive Communities*, 135 S. Ct. at 2525. The Court considered "of crucial importance" the fact that Congress amended the FHA in 1988 with awareness that nine Courts of Appeals had read the FHA to permit disparate impact claims: "with that understanding, it made a considered judgment to retain the relevant statutory text." *Id.* at 2519. The Court cited Justice Antonin Scalia for the proposition: "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Id.* at 2520 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012)). The Court also found persuasive the inclusion of three exemptions incorporated into the 1988 amendments "that assume the existence of disparate-impact claims." *Id.* at 2520. The Court discussed the exemptions in detail and noted they would be superfluous if Congress had not presupposed disparate impact liability in 1968. *Id.* at 2521 ("In short, the 1988 amendments signal that Congress ratified disparate-impact liability.").

63 *Id.* at 2525 (quoting Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 196 (2012)).

64 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

65 Smith v. City of Jackson, 544 U.S. 228 (2005).

66 *See Inclusive Communities*, 135 S. Ct. at 2516–19.

These decisions "instruct[] that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[67] Turning to the FHA text, the Court found that a prohibition in 42 U.S.C. § 3604(a) on actions that "otherwise make unavailable or deny"[68] a dwelling on the basis of a prohibited characteristic "refers to the consequences of an action rather than the actor's intent."[69] With respect to the other provision relied upon by ICP, the prohibition in 42 U.S.C. § 3605(a) against discrimination in real-estate related transactions, the Court stated that it has construed similar language ("discriminate") to include disparate impact liability.[70] The Court rejected the argument that the Title VII verbiage "otherwise adversely affect" must be present in the FHA for a disparate impact standard to be cognizable.[71] The Court also rejected the notion that the FHA's use of the phrase "because of race" forecloses disparate impact liability, pointing to identical language in Title VII and the ADEA.[72]

The Court then proceeded to discuss the purpose of the FHA, its approval of cases residing at "the heartland" of disparate impact liability, limits on liability, and safeguards to protect against what the Court describes as "abusive" claims.[73] The Court emphasized that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose."[74] It regarded suits targeting "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" as resting at the "heartland of disparate-impact liability."[75] The Court cited exclusionary zoning cases from the 1970s, 1980s, and the 2000s to illustrate its point.[76] The Court then emphasized the way in which the FHA can help property owners and developers "vindicate the FHA's objectives" and "protect their property rights by stopping municipalities from

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67 *Id.* at 2518.

68 42 U.S.C. § 3604(a) (2012).

69 *Inclusive Communities*, 135 S. Ct. at 2518.

70 *Id.* at 2518–19.

71 *Id.* at 2519.

72 *Id. See also* Lee Anne Fennell, *Because and Effect: Another Take on* Inclusive Communities, 68 STAN. L. REV. ONLINE 85, 91 (2016) ("Requiring those regulable parties to refrain from acts and omissions that are the functional equivalent of decisions motivated by race—ones that make opportunities unavailable because of race—helps to chip away at the causal connection between status and opportunity."); Noah D. Zatz, *The Many Meanings of "Because Of": A Comment on* Inclusive Communities Project, 68 STAN. L. REV. ONLINE 68, 72 (2015) ("The phrase 'because of' refers directly to causal concepts, not mental ones.").

73 *See Inclusive Communities*, 135 S. Ct. at 2521–24.

74 *Id.* at 2521.

75 *Id.* at 2521–22.

76 *Id.* at 2522.

enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."[77]

After noting the way heartland cases further private property rights while also vindicating the FHA, the Court recognized the way in which disparate impact liability can uncover discriminatory intent, permitting plaintiffs to "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment" and thereby "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[78]

The Court then discussed the limits on disparate impact liability, noting that such liability "has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA."[79] This language suggests that the Court was not creating new limits, but was shining a spotlight on limits in existing law. Citing *Wards Cove Packing Co. v. Atonio*,[80] the Court stated that a statistical disparity alone is not sufficient, and that a "robust causality requirement" helps ensure a prima facie case does not arise from racial imbalances defendants did not create.[81] The Court considered the causality requirement as a check on the possibility that defendants might adopt quotas to avoid racial imbalances, because those imbalances would not be sufficient by themselves to create liability.[82] The Court also referenced the principle in existing law that a single act or decision does not give rise to disparate impact liability, noting that "a one-time decision may not be a policy at all."[83] Lower courts "must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important."[84]

Analogizing to Title VII cases, and referring to HUD's rulemaking, the Court recognized that defendants have "leeway to state and explain the valid interest served by their policies."[85] The Court did not quote the HUD regulation in setting out the defendant's burden, but stated that defendants must "be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest."[86] The Court described the defendant's burden as "analogous to the business necessity standard under Title VII."[87] Two interpretations of this language are possible. Industry groups might argue that the Court is substituting a more lenient burden for defendants than that set forth in the HUD

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77 *Id.*
78 *Id.*
79 *Inclusive Communities*, 135 S. Ct. at 2522.
80 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
81 *Inclusive Communities*, 135 S. Ct. at 2523 (quoting *Wards Cove Packing Co.*, 490 U.S. at 653).
82 *Id.* at 2523.
83 *Id.*
84 *Id.*
85 *Id.* at 2522.
86 *Id.* at 2523.
87 *Inclusive Communities*, 135 S. Ct. at 2522.

regulation. This interpretation seems unlikely given that the Court's use of the term "valid" serves as a placeholder for a standard rather than a substitution of an alternative standard. The other interpretation is that, given Justice Alito's complaint in oral argument that HUD's recent issuance of the rule amounted to "the use of *Chevron*[88] to manipulate the decisions of [the] Court,"[89] Justice Kennedy decided to root FHA disparate impact liability solely in the statutory text and purpose. Moreover, the Court did not grant certiorari on the question of what standard courts should apply in analyzing disparate impact claims, only whether such claims were cognizable.[90]

Another "safeguard" the Court provided is the caution against using the disparate impact standard to second guess funding decisions and the setting of priorities, particularly regarding the "revitaliz[ation of] dilapidated housing in our Nation's cities."[91] The Court noted that "[t]he FHA does not decree a particular vision of urban development."[92] This caution must be read not only in light of the *Inclusive Communities* case, but also in light of the two cases that preceded it. *Gallagher v. Magner*,[93] which the Court specifically references, involved a challenge to an aggressive code enforcement scheme that allegedly reduced affordable housing for minorities.[94] *Township of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*,[95] the second case, involved a challenge to a revitalization plan in a specific neighborhood that was alleged to effect displacement of most of the town's minority population.[96] I have written elsewhere that cases challenging "housing improvement" plans for their displacing effects have not fared well under the FHA's four-decade history.[97] In any event, the Court distinguished between "displac[ing] valid governmental and private priorities, rather than solely 'remov[ing] . . . artificial, arbitrary, and unnecessary barriers.'"[98] This distinction provides the frame for analyzing future FHA disparate impact claims.

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88 Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

89 Transcript of Oral Argument at 45, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371).

90 *See Inclusive Communities*, 135 S. Ct. at 2513; *see also ICP Remand Opinion,* No. 3:08-CV-0546-D, 2016 WL 4494322, at *3, *4 (N.D. Tex. Aug. 26, 2016) (noting its conclusion that ICP's disparate impact claim must be decided "under the burden-shifting regimen adopted by HUD and the Fifth Circuit" and that the Supreme Court affirmed "without altering the burden-shifting approach").

91 *Inclusive Communities*, 135 S. Ct. at 2522–23.

92 *Id.* at 2523.

93 Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).

94 *Id.* at 830.

95 *See* Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569, 569 (2012), *cert dismissed*, 134 S. Ct. 636, 636 (2013).

96 Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377–81 (3rd Cir. 2011).

97 *See* Seicshnaydre, *supra* note 6, at 362–63.

98 *Inclusive Communities*, 135 S. Ct. 2507, 2524 (2015) (quoting Griggs v. Duke Power Co., 402 U.S. 424, 431 (1971)).

Justice Kennedy noted that the "automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers."[99] However, Justice Kennedy departed from his colleagues who would like to prohibit any consideration of race at all in addressing the vestiges of racial segregation.[100] Citing his own concurrence in a school desegregation case,[101] and the Court's decision in *Ricci v. DeStefano*,[102] Justice Kennedy stated "it is also true that race may be considered in certain circumstances and in a proper fashion."[103] For example, housing authorities "may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[104] Justice Kennedy did caution that "[r]emedial orders that impose racial targets or quotas might raise more difficult constitutional questions."[105] However, because remedies for racial isolation in housing usually involve the race-neutral removal of barriers to housing mobility, as in *Inclusive Communities*, and because of the limits on disparate impact liability, Justice Kennedy appeared satisfied that the FHA disparate impact doctrine could live in harmony with the Equal Protection Clause.

Given the Court's acknowledgment of the "Nation's continuing struggle against racial isolation,"[106] and the FHA's "continuing role in moving the Nation toward a more integrated society,"[107] it appeared that a challenge against racial isolation in the Texas tax credit program fell squarely within the FHA's purpose. However, on remand, the district court dismissed ICP's disparate impact claim based on a failure to prove a prima facie case; the court found that ICP failed to identify a specific practice that caused the disparity in the location of low-income housing.[108]

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99 *Id.* at 2525.

100 *See id.*

101 *Id.* (citing Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in judgment)).

102 Ricci v. DeStefano, 557 U.S. 557, 585 (2009).

103 *Inclusive Communities*, 135 S. Ct. at 2525.

104 *Id.*; *see also* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law after* Inclusive Communities, 101 CORNELL L. REV. 1115, 1130 (2016) (arguing that *Inclusive Communities* reflects Kennedy's view that "the government may seek to achieve integration but may not pursue the integration objective using racial classifications" (quoting Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 854 (2011))).

105 *Inclusive Communities*, 135 S. Ct. at 2524.

106 *Id.* at 2525.

107 *Id.* at 2525–26.

108 *See ICP Remand Opinion*, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1, 6 (N.D. Tex. Aug. 26, 2016). Despite the dismissal of ICP's disparate impact claim, TDHCA has continued to incorporate provisions in its plan for awarding tax credits that further fair housing. For example, in the State's 2017 Qualified Allocation Plan, tax credit development sites are awarded extra points if they are located in opportunity areas, e.g., near grocery stores, near recreational and transportation services, in census tracts with less than 20% poverty, and in areas with a low rate of crime. *See* Tex. Dep't of Hous. & Cmty.

II. RECONCILING LOCAL DISCRETION AND INTEGRATION AFTER *INCLUSIVE COMMUNITIES*

In applying *Inclusive Communities* to government actors, courts must determine whether a FHA disparate impact challenge focuses on the removal of barriers to integration or the displacement of valid governmental priorities consistent with integration. A leading commentator helps frame this analysis by noting that Justice Kennedy relied on three guiding principles traditionally applied by courts interpreting the FHA. Specifically, the commentator notes, courts should "(1) broadly interpret the FHA; (2) be mindful of the congressional goal of residential integration in applying the FHA; [and] (3) generally rely on Title VII precedents in FHA cases."[109] The only principled reading of Justice Kennedy's decision extolling integration while issuing cautions, therefore, is that local policy discretion exercised with the effect of expanding housing choice and integration is entitled to deference. Local policy discretion exercised with the effect of restricting housing choice and building on segregation and racial isolation is invalid and subject to challenge.

A. *Robust Causality and the Perpetuation of Segregation Theory*

One of the Court's safeguards addresses the concern that disparate impact liability will impair local discretion by forcing government defendants to adopt racial quotas in housing programs. The Court responds by pointing to the requirement in existing law that disparate impact challenges be aimed at policies or practices causing racial disparities, rather than at the disparities themselves. This safeguard, described as a "robust causality requirement," can be reconciled with the Court's broad pronouncement in favor of integration because disparate impact claims targeting segregation have traditionally been, and can continue to be, aimed at practices perpetuating segregation rather than mere statistical disparities.[110]

The Court warns against disparate impact challenges to housing programs based strictly on racial imbalances. The Court discusses how disparate

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Affairs, *Multifamily Housing Rental Programs, 2017 Qualified Allocation Plan*, https://www.tdhca.state.tx.us/multifamily/nofas-rules.htm (last visited June 10, 2017). Tax credit development is also encouraged in school attendance zones meeting minimum standards for three consecutive years. *Id; see also Inclusive Communities*, 135 S. Ct. at 2525 ("[L]ocal housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools.").

109 Schwemm, *supra* note 11, at 120 n.87. Justice Kennedy did not explicitly defer to the HUD disparate impact regulation, the fourth guiding principle traditionally employed by courts interpreting the FHA. *See id.*

110 *Inclusive Communities*, 135 S. Ct. at 2523.

impact liability based solely on statistical disparities "'would almost inexorably lead . . . to . . . 'numerical quotas,'"[111] presumably because governmental entities would assume perfect racial balance was necessary to avoid liability. To avoid the "serious constitutional questions"[112] raised by quotas, and to "protect[] defendants from being held liable for racial disparities they did not create,"[113] the Court points to the requirement in existing law[114] that a plaintiff at the prima facie stage must identify a neutral policy of the defendant *causing* a statistical disparity.[115] The Court further reasoned that "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact."[116] This "robust causality requirement" expands the focus to include the practices causing the disparities, not merely the disparities alone.[117] In the context of a perpetuation of segregation claim, the focus expands to include the practices or policies causing (perpetuating) the segregation.[118]

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111 *Id.* at 2523 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2(k) (2012))).

112 *Id.*

113 *Id.* (citing *Wards Cove Packing*, 490 U.S. at 653).

114 The Court cited its 1989 Title VII decision in *Wards Cove Packing Co. v. Atonio* to emphasize a limit on disparate impact theory that pre-dated its opinion. *See id.* at 2523 (citing *Wards Cove*, 490 U.S. 642, 653 (1989), *superseded by statute*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2(k))). For a discussion of how Congress attempted to overrule, in part, the *Wards Cove* causality requirement, see Bagenstos, *supra* note 104, at 1122. *See also id.* at 1139 ("[B]y referring to a 'policy or policies causing th[e] disparity,' perhaps the Court's holding leaves space for plaintiffs to challenge a connected series of practices without separating them out for analysis." (quoting *Inclusive Communities*, 135 S. Ct. at 2523)).

115 *Inclusive Communities*, 135 S. Ct. at 2523.

116 *Id.*

117 *Id.* The Court also expressed concern about disparate impact challenges to isolated decisions rather than policies. *See id.* ("[A] plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all."); *see also* City of Joliet v. New West, L.P., 825 F.3d 827, 830 (7th Cir. 2016) ("[T]he condemnation of Evergreen Terrace is a specific decision, not part of a policy to close minority housing in Joliet."); *but see* Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) (expressing confidence that zoning decision affecting one piece of property constituted "general policy" because of months of hearings and meetings, asserted community-wide impacts on traffic and school overcrowding, and purported necessity to change local law).

118 *See, e.g.*, *Mhany Mgmt.*, 819 F.3d at 619–20 (noting lower court finding that a particular zoning restriction on development of multi-family housing perpetuated segregation because it decreased availability of housing to minorities in mostly white municipality).

Despite the suggestion that Justice Kennedy in dicta heightened the pleading standard in FHA disparate impact cases,[119] before *Inclusive Communities* courts required plaintiffs to plead causation as a necessary element of a disparate impact claim under the FHA.[120] Indeed, federal pleading standards pre-dating *Inclusive Communities* required pleading of facts with enough specificity "to raise a right to relief above the speculative level"[121] and to "state a claim to relief that is plausible on its face."[122] Courts have

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119 *See* Ellis v. City of Minneapolis, No. 14-CV-3045, 2016 WL 1222227, at *6, *7 (D. Minn. Mar. 28, 2016), *aff'd*, 860 F.3d 1106 (8th Cir. 2017) (describing as "new" the "'robust causality requirement' for pleading disparate impact claims under the FHA," and concluding the plaintiffs' allegations "do not plausibly connect any policies to the alleged disparity"); *cf.* Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 411 n.29 (Mass. 2016) ("Our understanding is that the Court's call for 'adequate safeguards,' including a 'robust causality requirement,' . . . indicates a higher burden for disparate impact plaintiffs under the FHA than under Title VII." (citation omitted)). *But see* Anfeldt v. United Parcel Service, Inc., No. 15-C-10401, 2016 WL 1056670, at *2 (N.D. Ill. Mar. 17, 2016) (citing *Inclusive Communities* as in accord with earlier Seventh Circuit Title VII precedent requiring plaintiffs at the pleading stage to "show a causal link between the challenged . . . [practice] and a statistically significant . . . imbalance."); Elizabeth L. McKeen, et al., *Robust Causality and Cautionary Standards: Why the* Inclusive Communities *Decision, Despite Upholding Disparate Impact Liability, Establishes New Protections for Defendants*, 132 BANKING L.J. 553, 557 (2015) (describing *Inclusive Communities* as offering defendants "new protections" while also recognizing the Court's discussion of disparate impact theory as having "always been properly limited"); Rigel C. Oliveri, *Disparate Impact and Integration: With* TDHCA v. Inclusive Communities *the Supreme Court Retains an Uneasy Status Quo*, 24 J. AFFORDABLE HOUS. & COMMUNITY. DEV. L. 267, 276 (2015) (explaining that *Inclusive Communities*' holding "is not particularly remarkable in the sense that it merely leaves existing law and precedent undisturbed.").

120 *See* Cty. of Cook v. Bank of America, Corp., 181 F. Supp. 3d 513, 523 (N.D. Ill. 2015) (finding the pleading sufficient because it "identifies specific practices that allegedly caused minority borrowers to receive a disproportionate share of high cost home loans"); Dekalb Cty. v. HSBC North America Holdings, Inc., No. 1:12-CV-03640-SCJ, 2013 WL 7874104, at *13, *16 (N.D. Ga. Sept. 25, 2013) (requiring allegations "demonstrating a causal connection between the specific challenged practice or policy and the alleged disparate impact" and finding that complaint "gives rise to a fair inference of causation"); Guerra v. GMAC LLC, No. 2:08-cv-01297-LDD, 2009 WL 449153, at *4 (E.D. Pa. Feb. 20, 2009) (finding plaintiff met pleading requirement by alleging "facts raising a sufficient inference of causation"); Steele v. GE Money Bank, No. 08-C-1880, 2009 WL 393860, at *5 (N.D. Ill. Feb. 17, 2009) (finding the complaint adequately alleged causation because it "plausibly points the finger at the defendants' alleged practices and thus provides sufficient detail to give the defendants fair notice of the nature of the plaintiffs' argument about causation and the ground upon which it rests"); Hoffman v. Option One Mortgage Corp., 589 F. Supp. 2d 1009, 1011–12 (N.D. Ill. 2008) (requiring that "[p]laintiffs must identify a specific practice or policy responsible for the disparate impact" and finding plaintiffs to have sufficiently alleged causation to survive a motion to dismiss); Miller v. Countrywide Bank, 571 F. Supp. 2d 251, 255, 259 (D. Mass. 2008) (finding that "Plaintiffs' complaint gives rise to a fair inference of causation"); Ramirez v. Greenpoint Mortgage Funding, Inc., 633 F. Supp. 2d 922, 927–28 (N.D. Cal. 2008) (plaintiffs sufficiently stated a claim by alleging a specific policy that had a disproportionately adverse effect on minority borrowers).

121 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

122 *Id.* at 570; *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (rejecting as insufficient the conclusory pleading of elements); Subramaniam v. Beal, No. 3:12-cv-01681-MO, 2013 WL 5462339, at *9 (D. Or. Sept. 27, 2013) (citing *Twombly* before the *Inclusive Communities* ruling and finding that a

dismissed FHA disparate impact claims at the pleading stage since *Inclusive Communities* and its "robust causality" caution, but it is doubtful that some of these pleadings would have otherwise survived prior to the decision, given the *Twombley/Iqbal* federal pleading standards and the fundamental nature of the deficiencies in the dismissed complaints.[123]

Of greater import is the decision by the district court on remand to dismiss ICP's disparate impact claim for failure to prove a prima facie case and satisfy the Supreme Court's robust causality requirement.[124] The court explained that it did not have the benefit of the Supreme Court's opinion and discussion of robust causality when granting partial summary judgment to ICP on the issue; however, the court also noted that the defendant did not challenge ICP's prima facie case, suggesting the reason the court did not earlier place emphasis on ICP's prima facie burden.[125]

In dismissing the claim, the district court found that ICP failed to identify a specific practice that caused the disparity in the location of low-income housing.[126] The court found that ICP instead challenged the cumulative effects of the defendant's own decision-making process over a multi-year period, which amounted to a challenge aimed at statistical results rather than a policy; put another way, ICP challenged the application of discretion, rather than the use of discretion itself.[127] By contrast, litigants have succeeded in

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complaint did not causally link defendant's challenged business practice to any ultimate lending decisions).

123 *See, e.g.,* Boykin v. Fenty, 650 F. App'x 42, 44 (D.C. Cir. 2016) (per curiam) ("The complaint failed to allege facts suggesting that the closure affected a greater proportion of disabled individuals than non-disabled."); *Burbank*, 48 N.E.3d at 412–13 (dismissing disparate impact claim because it "does not set forth any harm," was "speculative and indefinite," "offer[ed] no facts," and failed to show "that the defendant's decision not to renew their [subsidized housing contract] has resulted in a disproportionately negative impact on members of protected classes"); *Ellis*, 2016 WL 1222227, at *6–7 (dismissing disparate impact claim as conclusory and failing to plausibly connect policies to alleged disparity; plaintiffs failed to allege facts that "plausibly suggest that—as a result [of defendants' policies]— Plaintiffs have lost a rental license or otherwise been unable to rent a unit, or that any protected-class tenant has been displaced"); *cf.* Crossroads Residents Organized for Stable & Secure ResiDencieS v. MSP Crossroads Apartments LLC, No. 16-233 ADM/KMM, 2016 WL 3661146, at *8 (D. Minn. July 5, 2016) ("Plaintiffs' causation argument is straightforward: Defendants' policies are the reason they are unable to remain at the complex.").

124 *ICP Remand Opinion*, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1, *6–7 (N.D. Tex. Aug. 26, 2016).

125 *Id.* at *3. The court acknowledged that it was applying a materially different and more onerous prima facie burden on remand, but it did not state that the Supreme Court heightened the prima facie burden. *Id. at *1*. To the contrary, the court stated it was applying the burden-shifting regimen earlier adopted by HUD and the Fifth Circuit. *Id.* at *4.

126 *Id.* at *6.

127 *Id.* at *6–7. The Supreme Court has recognized in other contexts that a policy of delegated discretion can be subject to challenge under disparate impact theory. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355 (2011) (recognizing that an employer's "undisciplined system of subjective decision-making" can be subject to disparate impact liability); Watson v. Fort Worth Bank & Trust, 487

bringing disparate impact claims challenging policies of delegated discretion by defendants to other decision makers.[128] The court deemed ICP's request as asking for an order requiring the defendant to make decisions in a specific way, which more closely approximated a disparate treatment claim than a disparate impact claim.[129] Thus, the court found that ICP had not "identified any barriers to housing that the court [could] remove."[130] The court also found that even had ICP succeeded in identifying a specific practice, it failed to prove that the practice caused the disparity in the location of low-income housing.[131]

Notwithstanding the district court's ruling on remand, the "robust causality" safeguard must align with the Court's broad pronouncements in favor of integration.[132] In the context of affordable housing policy, disparate impact challenges frequently use the "perpetuation of segregation" theory. These claims have been, and can continue to be, analyzed as challenges to practices causing segregation, rather than naked challenges to segregation itself. Perpetuation of segregation claims seek removal of the practice perpetuating segregation and need not seek or implicate concerns about racial quotas.

For example, perpetuation of segregation claims originated in the early barrier cases, such as *United States v. City of Black Jack*[133] and *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[134] the latter of which found two kinds of discriminatory effects arising from facially neutral housing decisions. The first occurs when a neutral decision has a greater adverse impact on one racial group than on another.[135] The second is the effect that the "decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it . . . [is] invidious under the [FHA] independently of the extent to which it produces a disparate effect on

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U.S. 977, 991 (1988) ("[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.").

128 *See* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L REV. 375, 405 (2010) (discussing lawsuits against various lenders for allowing discriminatory pricing).

129 *ICP Remand Opinion*, 2016 WL 4494322, at *7.

130 *Id.*

131 *Id.* at *8.

132 *See* Bagenstos, *supra* note 104, at 1133 ("Nothing in the Court's analysis suggests that . . . disparate impact law is driven by a desire to respond only to the defendant's own past intentional discrimination. Rather, the goal is to combat 'racial isolation' and 'segregated housing patterns'—results that exist in the world, independent of whose actions caused them in the first place." (footnote omitted)); c*f.* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 400–01 (2007) ("[T]he questions posed by the *Griggs* disparate impact regime prove inadequate in dealing with policies and practices that cause disparate racial impacts not simply because they are arbitrary . . . but due to the interaction of these practices with structural and embedded racial inequalities." (footnote omitted)).

133 United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974).

134 Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

135 *Id.* at 1290.

different racial groups."[136] These early cases treated the perpetuation of segregation claim as distinct from the adverse impact claim, focusing on "the effect of the municipal action . . . to foreclose the possibility of ending racial segregation in housing."[137]

The Second Circuit, in *Huntington Branch, NAACP v. Town of Huntington*,[138] later recognized the perpetuation of segregation claim as a distinct theory that addressed "harm to the community generally" and "advance[d] the principal purpose of Title VIII to promote, 'open, integrated residential housing patterns.'"[139] *Huntington* involved a zoning regulation that restricted (or contained) private multi-family housing projects to a largely minority, narrow "urban renewal area" and correspondingly resulted in the refusal to allow construction of a subsidized housing complex outside this area in a virtually all white neighborhood.[140] To further illustrate the stark segregation in *Huntington*, only 3.35% of the town's population was black, but 70% of these residents were concentrated in two neighborhoods, or six census tracts.[141] Outside of these neighborhoods, the town's population was overwhelmingly white. The court found that the refusal to permit privately built multi-family housing outside of an area where minorities were concentrated "significantly perpetuated" and "reinforced racial segregation in housing" and "impede[d] integration."[142] Thus, the perpetuation of segregation claim recognized in *Huntington* challenged a policy and practice causing segregation.

In promulgating its final rule implementing a discriminatory effects standard in 2013, HUD recognized both types of effects by defining effect as a practice that "actually or predictably results in a disparate impact on a group of persons *or* creates, increases, reinforces, or perpetuates segregated housing patterns" because of a protected status.[143] HUD in its preamble supports the

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136 *Id.* at 1290 (citing Trafficante v. Metro. Life Insur. Co., 409 U.S. 205, 209–10 (1972)).

137 *Id.* at 1291 (citing *City of Black Jack*, 508 F.2d at 1183; Kennedy Park Homes Assoc. v. City of Lackawanna, 436 F.2d 108, 110-11 (2d Cir. 1970)) (noting that in these cases, low-cost housing was effectively precluded throughout the rigidly segregated area and the site proposed for housing was in an overwhelmingly white community).

138 Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).

139 *Id.* at 937 (quoting Otero v. New York Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973)); *see also* Graoch Assoc. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366, 378 (6th Cir. 2007).

140 *Huntington Branch*, 844 F.2d at 928.

141 *Id.* at 929.

142 *Id.* at 937–38. Litigants have successfully challenged similar efforts to contain minority populations to narrow geographic areas using an intent theory. *See, e.g.*, United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184 (2d Cir. 1987) (affirming trial court judgment for plaintiff on allegations that city defendants intentionally engaged in a pattern of selecting sites for subsidized housing that perpetuated and aggravated residential racial segregation).

143 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500(a) (2016)) (emphasis added).

inclusion of a perpetuation of segregation claim by emphasizing that "elimination of segregation is central to why the Fair Housing Act was enacted;" the FHA "was structured to address discriminatory housing practices that affect 'the whole community' as well as particular segments of the community."[144] HUD cites illustrative cases in which litigants have used the perpetuation of segregation theory to challenge practices limiting affordable housing development in nearly all white communities.[145]

The Supreme Court did not explicitly defer to HUD's regulation, but acknowledged the continuing vitality of the perpetuation of segregation theory under the FHA.[146] The Court cited *Huntington* and *Black Jack*, two cases relying on the perpetuation of segregation theory,[147] as among those "resid[ing] at the heartland of disparate-impact liability."[148] Moreover, the Court employed language incorporating both theories: "the FHA aims to ensure that [governmental] priorities can be achieved without arbitrarily creating discriminatory effects *or perpetuating segregation*."[149] Courts have applied the perpetuation of segregation theory since *Inclusive Communities*.[150] As long as a perpetuation of segregation claim challenges a policy or practice

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144 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469 (citations omitted); *see also* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION, at § 10:7 n.12 (discussing legislative history associated with both 1968 and 1988 Acts as supporting perpetuation of segregation claims).

145 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469 nn.102–103 (citing *Huntington*, 844 F.2d at 937; Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–86 (8th Cir. 1975); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 567–68 (N.D. Tex. 2000); Summerchase Ltd. v. City of Gonzales, 970 F. Supp. 522, 527–28 (M.D. La. 1997)); *see also* Schwemm, *supra* note 144, at § 10:7 nn.1, 15 (citing cases).

146 *Cf.* Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court *implicitly* adopted HUD's [burden shifting] approach" (emphasis added) (citing *Inclusive Communities*, 135 S. Ct. 2507, 2518 (2015))); *ICP Remand Opinion*, No. 3:08-CV-0546-D, 2016 WL 4494322, at *4 (N.D. Tex. Aug. 26, 2016) (applying HUD's burden-shifting regimen).

147 Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17–18 (1989) (per curiam); *Black Jack*, 508 F.2d at 1186.

148 *Inclusive Communities*, 135 S. Ct. at 2521–22 (citing *Huntington*, 488 U.S. at 16–18; *Black Jack*, 508 F.2d at 1182–88). The third "heartland" case the Court cites, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009), relies on proof of adverse effects on African Americans.

149 *Inclusive Communities*, 135 S. Ct. at 2522 (emphasis added).

150 See Boykin v. Fenty, 650 F. App'x 42, 44–45 (2016) (D.C. Cir. 2016) (per curiam) (upholding grant of summary judgment dismissing disparate impact claim but recognizing both disparate and segregative effects theories); Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 513 (9th Cir. 2016) (upholding dismissal of perpetuation of segregation claim but recognizing theory); Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 619–20 (2d Cir. 2016) (citing *Huntington* and noting the district court's finding that the challenged zoning restriction on development of multi-family housing perpetuated segregation; the court recognized exclusionary zoning cases as "heartland cases").

causing segregation, rather than a bare statistical disparity, it would be consistent with a robust causality requirement and help move the nation toward the integrated society envisioned by *Inclusive Communities*.[151]

B. *Legitimate Exercise of Local Discretion Means Moving the Nation toward a More Integrated Society*

Another of the Court's safeguards arises from the concern that disparate impact challenges might operate to second guess valid policy choices, exposing defendants to suit regardless of which policy they adopt. In particular, the Court expressed the view that the FHA does not impose a "double bind of liability" against public and private actors, subjecting them to disparate impact suit no matter where they decide to locate affordable housing programs, i.e., whether "to rejuvenate a city core or to promote new low-income housing in suburban communities."[152] Justice Kennedy was likely responding to a concern raised in oral argument by Chief Justice Roberts suggesting that "it's very difficult to decide what impact is—is good and bad."[153] If a state entity has an opportunity either to promote integration by subsidizing low-income housing in an affluent area or to build new housing to revitalize a low-income area, he asked, which should it choose to be compliant with the FHA?[154] Could either or both strategies result in disparate impact liability?[155] The possibility that communities could assert a prima facie case of disparate impact no matter where an affordable housing development was located "seem[ed] very odd" to Justice Kennedy.[156] He took pains to reassure that "[t]he FHA does not decree a particular vision of urban development,"[157] which would "force housing authorities to reorder their priorities,"[158] or allow litigants to "second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing."[159] And yet, well-established case law undermines

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151 An example of such a policy would be one consisting of neutral criteria that have the effect of confining new low-income housing investments to distressed neighborhoods with little promise of integrating.

152 *Inclusive Communities*, 135 S. Ct. at 2523.

153 Transcript of Oral Argument, *supra* note 89, at 39 (Roberts, C.J.); *see also id.* at 42 (Roberts, C.J.) ("Which is the bad thing to do, not promote better housing in the low-income area or not promote housing integration?").

154 *Id.* at 39 (Roberts, C.J.).

155 *Id.* at 50–51 (Roberts, C.J.).

156 *Id.* at 44–45 (Kennedy, J.).

157 *Inclusive Communities*, 135 S. Ct. at 2523.

158 *Id.* at 2522.

159 *Id.*; *see also id.* at 2523 ("From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa.").

the notion that litigants frequently use the FHA to force governmental entities to locate affordable housing in segregated neighborhoods, or that those claims might succeed. Moreover, in the context of the FHA, local discretion in setting housing policy must conform to the Court's broad pronouncements in favor of integration.

1. The Double Bind: Not Such a Bind

An examination of four decades of case law interpreting the Fair Housing Act's disparate impact standard demonstrates that the hypothetical posed by the Chief Justice is more rhetorical than practical: the answer lies in reorienting towards the principal FHA aim of expanded choice and integration.[160] Various types of litigants in theory may bring a disparate impact claim under the FHA, but in order to succeed in showing a "disproportionately *adverse* effect on minorities,"[161] litigants must demonstrate a policy or practice that isolates them or restricts housing choice.[162] There is no double bind because denial of segregated housing is not an adverse impact under the FHA.

For example, tenants living in a segregated neighborhood do not have a federally protected civil right to more segregated housing in their area. The FHA does not protect the right to housing subsidies per se, but the right to equal housing.[163] Even if tenants tried to bring a claim of adverse impact based on a decision to locate low-income housing investments away from segregated neighborhoods, where the vast majority of low-income housing already exists,[164] they would have great difficulty showing *a civil rights injury* resulting from the government's decision to subsidize the rare alternative

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160 *See* U.S. DEP'T OF HOUS. & URB. DEV., EVIDENCE MATTERS: EXPANDING OPPORTUNITY THROUGH FAIR HOUSING CHOICE (Spring/Summer 2014), https://www.huduser.gov/portal/periodicals/em/spring14/highlight1.html [hereinafter HUD EXPANDING HOUSING CHOICE] (explaining that limited housing choice "reinforces segregation").

161 *Inclusive Communities*, 135 S. Ct. at 2513 (emphasis added) (citing Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

162 *See, e.g.*, HUD EXPANDING HOUSING CHOICE, *supra* note 160 (explaining that disparate impact liability attaches to "practices or policies [that restrict] housing choice and opportunity").

163 *See* U.S. DEP'T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING RULE GUIDEBOOK 11 (December 31, 2015), https://www.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf [hereinafter HUD GUIDEBOOK] ("Providing affordable housing for low- and moderate-income families is not, in and of itself, sufficient to affirmatively further fair housing.").

164 *See* NAT'L COMM'N ON FAIR HOUSING & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 38 (2008), http://www.nationalfairhousing.org/Portals/33/reports/Future_of_Fair_Housing.PDF ("Today, for a number of reasons, federal programs are still focusing low-income housing resources in higher poverty, segregated areas.").

of integrated low-income housing choices.[165] To the contrary, there is a growing body of empirical evidence demonstrating the harms associated with remaining in segregated neighborhoods.[166] The FHA is designed to expand housing choices, not limit them.[167] In addition, the hypothetical assumes that minority tenants would not benefit from housing opportunities created outside of segregated areas. In reality, minority communities are not using FHA disparate impact theory to demand revitalization of segregated communities, but rather to challenge revitalization plans because they frequently displace minority residents.[168] Despite this, those displacement claims are rarely successful; my examination of four decades of appellate case law demonstrates that displaced tenants have won only three of 14 appeals.[169]

Developers are the more likely plaintiffs to challenge a governmental agency's decision to build affordable housing outside of segregated communities.[170] However, developer plaintiffs similarly do not have a federally protected, fair housing right to build or improve low-income housing in segregated neighborhoods with heavy concentrations of such housing. For example, the U.S. Court of Appeals for the Fifth Circuit has rejected just this sort of claim, reasoning that most of the low-income housing in a Texas county was located precisely where the developer proposed to build more of it.[171] Crucially, the Fifth Circuit compared the developer's claim to the heartland disparate impact cases challenging the exclusion of all low-income housing and found, "if anything, racial minorities are already concentrated in [the locality] and . . . additional low-income developments would *further* this trend."[172]

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165 *See* City of Joliet v. New West, 825 F.3d 827, 830 (7th Cir. 2016) ("[G]iven the district court's findings about the dilapidated and crime-ridden nature of Evergreen Terrace, it is inappropriate to treat a move to new housing as injurious.").

166 *See, e.g.*, HUD EXPANDING HOUSING CHOICE, *supra* note 160 (explaining that segregated neighborhoods are commonly associated with "negative health, employment, and crime outcomes"); Katherine Theall et al., *Association Between Neighborhood Violence and Biological Stress in Children*, 171 JAMA PEDIATRICS 54, 57–59 (2016) (finding that neighborhood stressors such as violence and density of liquor or convenience stores are associated with signs of biological stress in children).

167 *See* HUD EXPANDING HOUSING CHOICE, *supra* note 160 ("Renewed [fair housing policy] efforts at both local and federal levels, . . . take a . . . proactive approach to promoting fair housing choice.").

168 Seicshnaydre, *supra* note 6, at 374–91; *see also* James J. Kelly, Jr., *Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing*, 46 U. MEMPHIS L. REV. 1009, 1035 (2016) ("After decades of enduring urban renewal and revitalization efforts, inner-city residents of color have come to believe that if the neighborhood they live in is being improved by money from outside the community, then the intention is to improve it for someone other than them.").

169 Seicshnaydre, *supra* note 6, at 399–401.

170 *But see* Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999) (involving homeowners' equal protection challenge to remedial order requiring public housing units to be built in predominantly white areas adjacent to where they lived).

171 Artisan/Am. Corp. v. City of Alvin, 588 F.3d 291, 298 (5th Cir. 2009).

172 *Id.* at 299 n.20.

HUD has listed as an example of disparate impact "the siting of public housing developments in segregated areas."[173] By contrast, pursuing integration by locating low-income housing in higher-income, resource-rich areas is not a largescale phenomenon, much less one that is subject to challenge by a civil rights law passed to promote integration.[174] Of course, depending on the type and level of housing subsidy, land costs, density restrictions, and unit size,[175] as well as marketing efforts and tenant assignment strategies involved, low-income minority residents might participate at a sub-optimal level in a "fair share" approach to the siting of low-income housing.[176] Nevertheless, the possibility that high opportunity places will find ways to limit or exclude minorities from accessing any low-income housing built there cannot serve as justification for perpetuating segregation in siting decisions. Even more to the point, the possibility of exclusionary practices in high-opportunity, white areas does not support a disparate impact challenge against the entity seeking to locate new affordable housing in those areas; rather, the exclusionary practices themselves would be the proper targets of disparate impact theory. In theory, litigants may file all types of cases in the affordable housing realm, but only practices "limit[ing] the ability of low- and moderate-income minorities to leave segregated areas" are those creating an adverse impact

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173 HUD EXPANDING HOUSING CHOICE, *supra* note 160.

174 Justice Alito cited the argument of the respondent intervener, Frazier Revitalization Inc. ("FRI"), that giving housing tax credits to wealthy neighborhoods violates a "moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities." *Inclusive Communities*, 135 S. Ct. 2507, 2548 (2015) (Alito, J., dissenting). Respectfully, FRI's is not a fair housing disparate impact argument directed at the removal of housing barriers. This argument assumes no mobility or housing choice for low-income households, i.e., that low-income families cannot benefit from housing developed outside of substandard neighborhoods; that the only permissible strategy for remedying segregation is more segregation; and that improvement of housing, without more, can revitalize neighborhood conditions. *See infra* Section II.C.2.

175 *See* U.S. DEP'T OF HOUSING & URB. DEV., HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY 104 (2015), https://www.huduser.gov/hud50th/HUDat50Book.pdf (acknowledging tension between "serving as many households as possible and supporting [potentially fewer units of more expensive] housing in high-opportunity neighborhoods.").

176 Commentators have observed that many white communities forced to accept some measure of affordable housing have found ways to benefit current residents, such that the effort fails to help reduce segregation. *See, e.g.*, John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1707 (1998) (reviewing CHARLES HARR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996)) (discussing a report on the Mount Laurel initiatives implementing a New Jersey constitutional mandate for municipalities to provide a fair share of low and moderate income housing and finding that "[t]he 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." (footnote omitted)); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW. ENG. L. REV. 65, 82 (2001) (noting that "suburbs that were required to accept subsidized housing did so in ways that made it likely that the subsidies would go to whites"). *But see* Roisman, *supra*, at 84–85 (discussing an innovative approach in Montgomery County, Maryland that achieves integration by ensuring that 5% of its affordable housing opportunities are offered to public housing authority waiting list applicants).

within the ambit of the FHA.[177] The creation of low-income housing opportunities outside of low-income, segregated neighborhoods helps further the purposes of the FHA by removing barriers to integration.

2. Local Discretion in Service of Integration

In posing another safeguard, Justice Kennedy describes that one of the ways disparate impact liability is properly limited under the FHA, as under Title VII, "is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies" and maintain these policies if they can prove them necessary to achieve this valid interest.[178] Justice Kennedy clearly sees "revitalizing dilapidated housing in our Nation's cities" as a valid interest that should not be displaced "because some other priority might seem preferable."[179]

Without deciding the merits of the underlying controversy, the Court observed that a case challenging the siting of affordable housing disproportionately in African-American neighborhoods might involve the second-guessing of local priorities rather than the elimination of barriers.[180] The Court suggests that this theory of liability is a novel one, in the sense that it is not a typical use of the theory when compared with the earliest FHA disparate impact claims.[181] Although the particular use of the disparate impact theory to challenge the perpetuation of segregation through a state's tax credit program may be novel in one sense,[182] the tension it illustrates between state and local prerogatives and civil rights objectives is perennial.[183]

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177 HUD EXPANDING HOUSING CHOICE, *supra* note 160.

178 *Inclusive Communities*, 135 S. Ct. at 2522–23 (stating that "disparate-impact liability has always been properly limited in key respects.").

179 *Id*. at 2523.

180 *Id*. at 2522.

181 *Id.* (citing Seicshnaydre, *supra* note 6, at 360–63).

182 Civil rights groups and commentators have long argued that the LIHTC program is subject to fair housing obligations. *See* Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1790 (2005) ("The special importance and history of civil rights law require that the [affirmatively furthering] fair housing duty be considered before all others and that the regulations be applied broadly to cover the LIHTC program."); Roisman, *supra* note 54, at 18 (explaining that state housing finance agencies administering the LIHTC program under the jurisdiction of the Department of the Treasury, as well as HUD, "are obligated to eschew actions that discriminate against minorities and actions that perpetuate segregation"); *see also* Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 (1998) ("[T]he LIHTC program operates without effective regard to civil rights laws.").

183 *See* Xavier de Souza Briggs, *Introduction*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 1, 8 (Xavier de Souza Briggs ed., 2005) ("Since tools for regulating land development at the local level were developed in the United States a century ago, diversity of race and class has been contained, ensuring that disadvantage is concentrated in particular places."

The fact remains that Justice Kennedy embeds his concern about second-guessing state and local implementation of housing and community development programs within the Court's overarching pronouncement against racial isolation and the importance of "moving the Nation toward a more integrated society."[184] The Court's call to integration can be harmonized with its professed interest in deferring to the legitimate exercise of local policy discretion. In attempting to apply this hierarchy of concern to future cases, the following principles emerge.[185]

Overcoming racial isolation and segregation lies at the heart of federal fair housing mandates. Any exercise of state and local policy discretion, including revitalization strategies, must serve this end. Courts must not defer to a local priority if it "arbitrarily creat[es] discriminatory effects or perpetuat[es] segregation."[186] This means that for local and state governments, remaining agnostic[187] about racial segregation is as perilous as actively pursuing it, because of the way "neutral" housing policies and practices can perpetuate longstanding segregation regardless of intent.[188]

History teaches that unbridled local policy discretion, with federal backing, helped establish and maintain the very racial residential segregation Justice Kennedy so pointedly described in the *Inclusive Communities* opinion. For example, the federal government allowed local governments to implement the public housing program in a manner that replaced integrated housing patterns with segregated ones as they built public housing explicitly for blacks and whites in neighborhoods where their race predominated.[189] Local

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(footnote omitted)); Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 171 (2011) ("Federal-level decisions about how to structure state and local discretion in the design of federal programs . . . have tremendous implications for racial inequality.").

184 *Inclusive Communities*, 135 S. Ct. at 2525–26.

185 *See* Oliveri, *supra* note 119, at 286 (noting that in *Inclusive Communities* the Court "affirm[ed] the significance of integration as a goal but then question[ed] whether disparate impact theory can succeed in a number of the cases that might be brought to vindicate this goal").

186 *Inclusive Communities*, 135 S. Ct. at 2522.

187 Barbara Samuels is the first person to my knowledge to use this term to describe local government neutrality on the merits of residential segregation. Barbara Samuels, Am. Bar Assoc., Webinar Speaker at the Forum on Affordable Housing and Community Development Law: Disparate Impact (Sept. 30, 2015).

188 *See* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000) ("Localism, or the ideological commitment to local governance, has helped to produce fragmented metropolitan regions stratified by race and income."); David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1170–71 (2008) (discussing "legal localism's succession as the instrument of post-war de facto segregation"); *see also* Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 851 (2016) (describing "institutional discrimination" as not requiring even implicit bias, but arising from situation where "the architecture for choice . . . does not permit any decision but the discriminatory one").

189 Ingrid Gould Ellen & Jessica Yager, *Race, Poverty, and Federal Rental Housing Policy, in* HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY 103, 109 (2015) (describing how local control built into the public housing program allowed suburban jurisdictions to opt out of the program and cities to build

governments "developed [neutral] zoning rules to control black population movement"[190] soon after racial zoning was declared unconstitutional in 1917,[191] and "worked closely with private agencies to encourage whites to leave [cities] and move to suburbs to escape proximity to African Americans" in the middle part of the twentieth century.[192] The limited housing options for blacks led to overcrowding and slum conditions in inner cities, further exacerbated by municipal policy denying adequate public services such as sanitation, garbage removal, paving, and street lighting.[193] More recently, "a wide array of land use regulations have been associated with higher housing prices and, by extension, with exclusion of African American and Hispanic residents. . . ."[194] At the same time, local control of low-income housing siting decisions and administration "has facilitated housing segregation" because it has operated to maintain the status quo of residentially segregated housing patterns.[195]

It would be a gross misreading of *Inclusive Communities* to suppose that local government discretion in setting a housing and community development agenda is unlimited and unreviewable.[196] The erroneousness of this supposition is illustrated by every disparate impact case to be decided against a

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overwhelmingly "in central city neighborhoods occupied by poor, typically minority, residents, deepening poverty concentration and racial segregation"); Brief for Housing Scholars, *supra* note 24, at 15 (describing federal court findings that "the government created or perpetuated ghettos by discriminatory decisions to locate public housing for African-Americans only in ghetto communities, or by assignment policies placing black tenants in all black projects and white tenants in all white projects"); 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, 393 (2000) (stating that a federal agency "tried unsuccessfully to prevent local authorities from using the new federal resources to reinforce existing "ghettos."); Richard Rothstein, *The Making of Ferguson*, 24 AFFORDABLE HOUS. & COMM. DEV. LAW 165, 176–79 (2015).

190 Rothstein, *supra* note 189, at 179; *see also id.* at 173–76.

191 Buchanan v. Warley, 245 U.S. 60, 82 (1917).

192 Rothstein, *supra* note 189, at 187.

193 Brief for Housing Scholars, *supra* note 24, at 35–36.

194 Rolf Pendall et al., *Connecting Smart Growth, Housing Affordability, and Racial Equity*, *in* GEOGRAPHY OF OPPORTUNITY, *supra* note 183, at 219, 220.

195 Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL'Y 209, 212, 216 (1994) (discussing the availability of a municipal veto over federal public housing, a voluntary low-income housing system that channels new housing funds in a pattern that reinforces segregation, delegation of admissions decisions to local housing authorities, and barriers such as residency preferences for using federal rental vouchers to cross jurisdictional lines); *see also* Paul Boudreaux, E Pluribus Unum Urbs*: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL'Y & L. 471, 479 (1998) (discussing the "multiplicity of sovereignties" and noting "[b]ecause federally supported housing projects traditionally have been implemented through local housing authorities designed to house only residents of their particular jurisdiction, such projects have not fostered racial or social integration across local borders, except when forced by litigation to implement a cross-jurisdictional remedy." (footnote omitted)).

196 *See* Avenue 6E Invs. v. City of Yuma, 818 F.3d 493, 510 (9th Cir. 2016) ("[T]he wisdom of disparate-impact liability under the FHA is that it addresses local government's (as well as other government's) historical racism and the continuing persistence of housing segregation not by interjecting racial

local government over the past four decades—a jurisprudential record before the Court in *Inclusive Communities* and cited in the opinion.[197] Local governments may violate the FHA disparate impact theory when they erect race-neutral barriers to housing mobility and choice through zoning and other powers.[198] "The discretion of local zoning officials . . . must be curbed where the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods."[199]

Though Justice Kennedy plainly states that courts may not "reorder the[] priorities" of local governments, he also emphasizes that the FHA stands to ensure that any local priorities are achieved "without arbitrarily creating discriminatory effects or perpetuating segregation."[200] Courts may not give their imprimatur to local government action that maintains housing barriers and locks in the status quo of racial isolation.[201]

Justice Kennedy's opinion does not privilege local government policy discretion over fair housing objectives. It merely gives local governments room to maneuver in tackling the integration objective. Thus, the discretion

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quotas as the end goal of municipal zoning decisions, but rather by ensuring that municipalities making such decisions will base them on legitimate objectives rather than on discriminatory reasons, conscious or otherwise."); *cf.* Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 819 (3d Cir. 1970) (interpreting HUD's affirmative duty to further fair housing and finding: "The defendants assert that HUD has broad discretion to choose between alternative methods of achieving the national housing objectives set forth in the several applicable statutes. They argue that this broad discretion permitted HUD in this case to make an unreviewable choice between alternative types of housing. We agree that broad discretion may be exercised. But that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing, and in favor of fair housing." (citations omitted)).

197 *See Inclusive Communites*, 135 S. Ct. 2507, 2522 (2015) (citing with approval "heartland" cases, all challenging local government exclusionary zoning practices); Seicshnaydre, *supra* note 6, at 364–72.

198 *See* Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) (citing the Supreme Court's admonishment in *Inclusive Communities* that suits targeting exclusionary zoning laws and restrictions "reside at the heartland of disparate-impact liability").

199 United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) (internal quotations and citations omitted); *see also* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1011 (7th Cir. 1980) ("Such [court-ordered, site-specific relief in exclusionary zoning cases] ordinarily runs counter to local zoning or other local legislation, but given the national open housing policy established by Congress, acting under the Civil War Amendments, the state or local legislation must yield to the paramount national policy."); Swati Prakash, Comment, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CAL. L. REV. 1437, 1491 (2013) ("[U]nquestioning deference to local government actors and decision-making favors the continued concentration of privilege in the hands of the historically powerful. But federal statutes such as the Fair Housing Act, and the judiciary's role in safeguarding its civil rights guarantees, should serve as an egalitarian check on this dynamic.").

200 *Inclusive Communities*, 135 S. Ct. at 2522.

201 *See* Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 38 (2016) ("[L]aw must expect local governments to resist and take advantage of any opportunity to use their discretion and avoid real compliance. The only approach that might succeed is for state (or metropolitan) governments to restrain local government's desire and power to [engage in exclusionary zoning practices]." (footnote omitted)).

does not center on *whether* local governments may work to overcome segregation, but *how*.[202] This concept aligns with Justice Kennedy's use of the term "valid" in reference to the governmental priorities requiring deference.[203] HUD defines a valid interest as "substantial, legitimate, [and] nondiscriminatory."[204] Policies that effectively double down on racial isolation and segregation cannot be legitimate and nondiscriminatory. Neutral criteria that have the effect of confining new low-income housing investments to distressed neighborhoods with little promise of integrating are not valid under any construction of the Fair Housing Act text, purpose, regulations, and *Inclusive Communities* opinion.

C. *Revitalization as Remedy for Segregation*

A particular concern driving the Court's discussion of safeguards is its warning against "abusive disparate impact claims" that might chill a developer or city from pursuing legitimate strategies related to revitalizing inner city neighborhoods.[205] "If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system."[206] Moreover, a governmental entity can "ensur[e] compliance with health and safety codes."[207] Yet, the Court's opinion does not immunize all neighborhood revitalization activity. Nominal revitalization efforts that focus narrowly on low-income housing rehabilitation or development rather than on comprehensive neighborhood investment strategies frequently operate as "containment" programs that perpetuate the status quo of racial isolation.[208] A city's revitalization activities can be consistent with the FHA if they expand housing choices outside of devastated

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202 *See* Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, *in* GEOGRAPHY OF OPPORTUNITY, *supra* note 183, at 310, 327 ("[S]ince local land use policy has long been linked to race and class exclusion, the new generation of efforts to rethink the management of local development will have to pursue inclusionary growth quite intentionally if inclusion is a goal.").

203 *Inclusive Communities*, 135 S. Ct. at 2522–23.

204 24 C.F.R. § 100.500(b)(1)(i) (2016).

205 *Inclusive Communities*, 135 S. Ct. at 2524; *see also id.* at 2523 ("It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable.").

206 *Id.* at 2524.

207 *Id.*

208 *See infra* notes 246–262 and accompanying text.

neighborhoods and address segregation as the root cause of blight and unequal conditions.[209] Otherwise, they maintain and build on a segregated foundation.

1. The Ghost of *Magner*

Justice Kennedy's concern about abusive disparate impact claims is responsive to the consternation apparent in Justice Alito's principal dissenting opinion[210] and the specter of FHA disparate impact liability for revitalization activities presented by the two prior cases before the Court, *Magner v. Gallagher*[211] and *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc*.[212] I have previously referred to the prior two cases as housing improvement cases, which challenge regulations or plans designed to improve housing and neighborhood conditions, but which result in disproportionate displacement of minorities from their homes.[213] In *Magner*, owners of rental property challenged the City of St. Paul, Minnesota's aggressive housing code enforcement scheme as disproportionately making housing unavailable to their minority tenants in need of affordable housing.[214] The Eighth Circuit reversed summary judgment granted to the City on the basis that plaintiffs satisfied their prima facie burden and created a fact issue on whether an alternative to the aggressive tactics of code enforcement existed that would accomplish the city's legitimate objectives while reducing any discriminatory impact.[215] The City withdrew its appeal shortly before oral argument.[216] In *Mount Holly*, the Third Circuit reversed summary judgment on a disparate impact challenge to a redevelopment plan.[217] The appellate court permitted the plaintiffs' prima facie showing of a proportional disparity and found the plaintiffs created a fact issue on whether the redevelopment of the township's

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209 *See* Julian, *supra* note 36, at 560 ("While a plethora of public and private programs and associated resources have 'targeted' struggling low-income communities for 'revitalization,' the conditions in underserved minority neighborhoods were rarely [addressed] *as legacies of segregation*." (emphasis added) (footnote omitted)).

210 *Inclusive Communities*, 135 S. Ct. at 2532 (Alito, J., dissenting) (lamenting that "even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents [through aggressive enforcement of the housing code] could not ward off a disparate-impact lawsuit" leading to "unfortunate consequences for local government, private enterprise, and those living in poverty").

211 *See* Magner v. Gallagher, 565 U.S. 1013 (2011), *cert dismissed*, 565 U.S. 1187, 1187 (2012) (dismissing certiorari as a result of the parties' settlement).

212 Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013), *cert dismissed*, 134 S. Ct. 636 (dismissing certiorari as a result of the parties' settlement).

213 Seicshnaydre, *supra* note 6, at 359–61.

214 Gallagher v. Magner, 619 F.3d 823, 828–30 (8th Cir. 2010).

215 *Id.* at 837–38.

216 *See Magner*,132 S. Ct. at 1306 (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

217 *Mount Holly*, 658 F.3d at 377.

only predominantly minority neighborhood could be accomplished without displacing its residents and making the neighborhood unaffordable to them.[218] This case also resolved before argument.[219] *Magner* and *Mount Holly* are aberrational in the sense that they mask an otherwise overwhelmingly unsuccessful track record for plaintiffs using the FHA disparate impact theory to challenge housing improvement activities.[220]

The Court granted certiorari in these cases perhaps because of the implication that disparate impact theory might "render [a locality] powerless to rehabilitate its blighted neighborhoods."[221] The parties in *Magner* and *Mount Holly* did not even dispute that the government defendants had a legitimate interest in maintaining minimum housing and neighborhood standards and alleviating blight.[222] Therefore, the litigation centered on whether plaintiffs could make a prima facie showing of disparate impact and, importantly, on whether the governmental defendants could achieve their legitimate revitalization objectives without disproportionately harming protected groups.

The Justices seemed to view *Inclusive Communities* as similar to *Magner* and *Mount Holly* to the extent that they equate a challenge to the concentration of tax credit housing in minority neighborhoods with a challenge to the revitalization of those neighborhoods.[223] However, *Inclusive Communities* differs from the previous two cases in several respects. First, the plaintiffs in *Magner* and *Mount Holly* challenged revitalization and blight elimination activities based on their disproportionate displacement of minorities. *Inclusive Communities* challenged the location pattern of tax credit housing based on the perpetuation of segregation.[224] The first challenge is to the loss of affordable units; the second is to the segregation of affordable units. The first challenge seeks to preserve housing units for minority residents where they already exist; the second seeks to expand housing units for minority residents

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218 *Id.* at 379, 382–83.

219 Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

220 Seicshnaydre, *supra* note 6, at 390–91, 399–403.

221 *Mount Holly*, 658 F.3d at 385.

222 *Id.*; Gallagher v. Magner, 619 F.3d 823, 837 (8th Cir. 2010).

223 *See Inclusive Communities*, 135 S. Ct. at 2548–49 (Alito, J., dissenting); Oliveri, *supra* note 119, at 280 ("Justice Kennedy clearly viewed *Inclusive Communities* as a housing improvement case, describing the use of disparate impact theory as 'novel'.").

224 *See* Roisman, *supra* note 54, at 18 ("Studies of the LIHTC program elsewhere have shown the same pattern as that of which ICP complains in this lawsuit: a disproportionate allocation of tax credits for family units to minority-concentrated, high-poverty, under-resourced neighborhoods with substandard schools, environmental hazards, inadequate employment opportunities, unsafe and unhealthy conditions." (citing The Editorial Board, *Affordable Housing, Racial Isolation*, N.Y. TIMES, (June 29, 2015), https://www.nytimes.com/2015/06/29/opinion/affordable-housing-racial-isolation.html?_r=0)).

where they do not already exist. Rather than treating revitalization justifications as beyond review, courts must ensure that they are not operating to "double down" on racial isolation.[225]

HUD's obligation to affirmatively further fair housing ("AFFH") may be instructive on this point. The Fair Housing Act imposes an affirmative duty on HUD not merely to ensure its funding recipients are refraining from discrimination, but also to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA]."[226] HUD's affirmative duty requires "the federal government and its grantees, including local housing authorities, to use their power and leverage to support an integrated housing market."[227] HUD, in July 2015, issued a comprehensive regulation interpreting and defining its affirmative duty as "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics."[228] In order to overcome patterns of segregation, HUD and its grantees must "assess the elements and factors that cause, increase, contribute to, maintain, or perpetuate segregation."[229] HUD and its grantees, therefore, "must take racial and socioeconomic data into consideration in siting housing."[230]

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225 *Id*. at 19 ("Merely uttering the word 'revitalization' will not satisfy the LIHTC statute's [approving] reference to housing that contributes to 'a concerted community revitalization plan.'").

226 42 U.S.C. § 3608(e)(5) (2012).

227 Orfield, *supra* note 182, at 1768 (footnote omitted); *see also* NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 154–55 (1st Cir. 1987) (noting FHA legislative history, which "reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases"); Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 457 (D. Md. 2005) ("[A]ction must be taken [by HUD] to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation[.]" (citing Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973))).

228 Dep't of Hous. & Urban Dev., Affirmatively Furthering Fair Housing, 24 C.F.R. § 5.152 (2016). HUD elaborates that the affirmative duty means "taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws." *Id.*

229 *Id.* at § 5.154(a). For a discussion of an affirmatively furthering style regime that would apply to governmental actors outside the housing arena, see Johnson, *supra* note 132, at 380 (considering "a regime that seeks to prompt institutions to address and remedy racial inequality in much broader ways than the traditional impact standard by requiring institutions to gather and distribute information about racial disparities and to take affirmative steps to remedy those disparities").

230 Orfield, *supra* note 182, at 1770. *See also Inclusive Communities*, 135 S. Ct. 2507, 2525 (2015) ("[M]ere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.").

HUD indicates in its AFFH regulation that it supports "a balanced approach" to meeting its affirmative duty.[231] This balanced approach would include strategies that improve conditions in high poverty neighborhoods and preserve existing affordable housing stock, as well as remove barriers preventing access to high opportunity neighborhoods.[232] Yet, HUD concedes that "balance" cannot be code for a revitalization-only strategy:

> [I]n areas with a history of segregation, if a program participant has the ability to create opportunities outside of the segregated, low-income areas but declines to do so in favor of [revitalization] strategies, there could be a legitimate claim that HUD and its program participants were acting to preclude a choice of neighborhoods to historically segregated groups, as well as failing to affirmatively further fair housing as required by the Fair Housing Act.[233]

ICP argued that the Texas tax credit program had opportunities to fund projects in white areas, but it disproportionately denied those applications and disproportionately approved applications for projects in minority neighborhoods.[234] Nationally, rather than pursuing anything resembling a balanced approach, federal housing programs have largely followed the path of least resistance in siting low-income housing in low-income neighborhoods often under the label of revitalization, without making a truly comparable effort towards integration.[235]

Worse, "[e]xperience has shown that the [so called] revitalization approach on its own has been unsuccessful in remedying the segregation that Justice Kennedy so eloquently denounced."[236] As one researcher notes, "neighborhood revitalization efforts often are ineffective; they do not have enough concentration of resources, interventions in areas other than housing, or diversity of housing types . . . to turn a low-income neighborhood into a

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231 Dep't of Hous. & Urban Dev., Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,279 (July 16, 2015).

232 *See id.*

233 *Id*.

234 *Inclusive Communities*, 135 S. Ct. at 2514.

235 *See* Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 669–74 (2011); *see also* Myron Orfield, et al., *High Costs and Segregation in Subsidized Housing Policy*, 25 HOUS. POL'Y DEBATE 574, 574 (2015) ("Present-day regional subsidized housing construction [in the Twin Cities] has largely been centered on building and rebuilding housing in the region's poorest neighborhoods. While this practice has been rationalized as a form of economic development, the evidence to date suggests that these policies have intensified racial segregation and the concentration of poverty."). *But see* Alex Schwartz, *The Low-Income Housing Tax Credit, Community Development, and Fair Housing: A Response to Orfield et al.*, 26 HOUS. POL'Y DEBATE 276 (2016) (responding to Orfield on several grounds, in particular arguing that LIHTC is an important tool for preserving affordable housing in inner cities and is often accompanied by other community development activities).

236 Richard Rothstein, *The Supreme Court's Challenge to Housing Segregation*, AM. PROSPECT (July 5, 2015), http://prospect.org/article/supreme-courts-challenge-housing-segregation.

high-opportunity neighborhood."[237] According to another literature review commissioned by HUD, "the balance of evidence shows" low-income housing in poor, segregated neighborhoods, by itself, "does not have a revitalizing effect"[238] and "even the most concerted community development efforts cannot turn around devastated neighborhoods."[239]

The AFFH requirement of a balanced approach to siting affordable housing, the historic failure to execute this balanced approach, and the evidence showing low-income housing subsidies are frequently ineffective at revitalizing deeply distressed neighborhoods all underscore the crucial role the FHA must play in assessing the impact of "revitalization" activities on the removal of housing barriers.[240]

In the end, *Inclusive Communities* certainly does not immunize the tax credit program from challenge under the FHA. Nor does the Court's holding immunize local government policies that have the effect of isolating low-income housing in segregated neighborhoods. If "it seems difficult to say *as a general matter* that a decision to build low-income housing in a blighted

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237 JILL KHADDURI, POVERTY & RACE RES. ACTION COUNCIL, CREATING BALANCE IN THE LOCATIONS OF LIHTC DEVELOPMENTS: THE ROLE OF QUALIFIED ALLOCATION PLANS 2 (2013) (footnote omitted), http://www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf. Similarly, isolated renovations of tax credit projects have not generally revitalized neighborhoods. *See id.* ("[T]he author has found no research showing that distressed neighborhoods with LIHTC investments improve as measured by other quality measures such as well-performing schools, responsive public services, or safety."); *see also* Orfield, *supra* note 182, at 1799 ("Studies show that poor segregated areas virtually never receive comparable services to middle-class areas." (footnote omitted)); *cf.* Orfield, et al., *supra* note 235, at 605 (recommending greater investments in economic and social conditions in the poorest neighborhoods to address "cutthroat competition by central cities for the only significant funding sources left—those for subsidized housing—despite the fact that any economic development benefits of such spending (if they even exist) are short-lived and come with clear long-term costs in the form of greater concentrations of poverty.").

238 Orfield, *supra* note 182, at 1756 (citing JILL KHADDURI, ET AL., ABT ASSOC., INC., TARGETING HOUSING PRODUCTION SUBSIDIES: LITERATURE REVIEW 68–73 (2003)); *see also* KHADDURI, ET AL., *supra*, at 69 ("[P]roduction subsidies have not succeeded in improving the quality of *severely distressed* neighborhoods."). *But see* Ellen & Yager, *supra* note 189, at 110 (citing a study of subsidized units in New York City [homeownership units in improving neighborhoods] and stating that "at least in some circumstances, creating subsidized housing in blighted areas can help to revitalize neighborhoods and attract private investment" (citation omitted)).

239 KHADDURI ET AL., *supra* note 238, at 71; *see also* Julian, *supra* note 38, at 27–28 (analyzing indicators of distress and opportunity used by the U.S. Treasury and HUD and suggesting that the highest level of distress (4) and lowest level of opportunity (0) persisted nationally for the 41% of tax credit units located in high distress neighborhoods and 79% located in low opportunity neighborhoods prior to 2001).

240 *See* Kirk McClure & Bonnie Johnson, *Housing Programs Fail to Deliver on Neighborhood Quality, Reexamined*, 25 HOUS. POL'Y DEBATE 463, 468 (2015) ("The LIHTC program has become the primary program that adds to the supply of rental housing for low- and moderate-income households."); *see* Orfield, *supra* note 182, at 1795–96 (arguing for the "supremacy of the FHA" such that the preference for LIHTC units that contribute to a concerted community revitalization plan should apply only in "neighborhoods that are not racially segregated or in danger of resegregation"); *see also id.* at 1798 ("Aiming tax credits at the places to which people with the most residential choices are attracted is a good strategy for integration, as it cuts off their avoidance.").

inner-city neighborhood instead of a suburb is discriminatory, or vice versa,"[241] that is because more information is needed to make that determination.[242]

Furthermore, the district court's dismissal on remand did not declare policies affecting location of low-income housing as off limits under FHA disparate impact theory. The district court simply found that ICP's proof was lacking on the existence of a policy and causation and that the claim more closely resembled a disparate treatment challenge to the way the state exercised its own discretion rather than a disparate impact challenge to a policy of delegated discretion.[243] This means that a neutral policy or practice perpetuating segregation in the location of low-income housing units is subject to challenge under FHA disparate impact theory, subject to HUD's burden-shifting proof standards.[244] In other words, when a policy concentrates low-income housing in high poverty neighborhoods that are unequal in their provision of education, employment, and health and safety standards, and this policy perpetuates segregation, it must be justified, not only on the basis of eliminating blight, but also as a means of eliminating segregation.[245]

2. Revitalization or Containment?

In describing the history of private and governmental practices that helped "encourage and maintain the separation of the races,"[246] the Court

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241 *Inclusive Communities*, 135 S. Ct. 2507, 2523 (2015) (emphasis added).

242 HUD GUIDEBOOK, *supra* note 163, at 11 ("[I]f affordable housing is predominantly occupied by low-income racial or ethnic minorities and it is concentrated in or adjacent to geographic areas occupied by racial or ethnic minorities, program participants will need to develop strategies to overcome segregation, including the siting of affordable housing in areas of opportunity and mobility strategies that provide access to areas of opportunity.").

243 *ICP Remand Opinion*, 2016 WL 4494322, No. 3:08-CV-0546-D, at *7 (N.D. Tex. Aug. 26, 2016) (characterizing ICP's attempt to promote decisions "increase[ing] opportunities for desegregated low-income housing" as resembling a disparate treatment claim). It is not conceivable that a governmental entity could have any other aim; certainly a policy of increasing opportunities for *segregated* low-income housing would be illegitimate. The court's main point is that a disparate impact claim is focused on removing a policy causing discriminatory effects, and it found ICP failed to identify such a policy.

244 The district court's race-neutral remedy in the ICP case has resulted in more tax-credit units in high opportunity neighborhoods and more integrated housing options, suggesting that the old criteria for awarding tax credits contributed to segregation. *Ten Years and Counting Housing Mobility, Engagement and Advocacy: A Journey Towards Fair housing in the Dallas Area*, INCLUSIVE COMMUNITIES PROJECT, http://www.inclusivecommunities.net/documents/ICP_10_years_and_counting.pdf (last visited June 12, 2017).

245 *See* Julian, *supra* note 38, at 26. Julian discusses a preference in the tax credit program for projects that would "contribute to a concerted community revitalization plan." *Id.* If a defendant justifies a location decision based on this preference, Julian argues that "there must be an objective basis" for this justification. *Id.*

246 *Inclusive Communities*, 135 S. Ct. at 2515 (acknowledging racially restrictive covenants preventing sales of housing to minorities, steering by real-estate agents of buyers to racially homogeneous areas,

cited a brief filed by historians, social scientists, demographers, and housing scholars who study housing segregation and its effects in the United States.[247] The Housing Scholars Brief outlines in methodical detail the history of federal, state, and local governmental policies that helped concentrate public housing in low-income minority neighborhoods.[248] This concentration of affordable housing cannot masquerade as a revitalization strategy; it was a "containment" strategy. The distinction is important because residential segregation was built on this containment strategy; if the purpose of the FHA was to address segregation, it cannot be agnostic on "containment" programs, even those purporting to revitalize minority communities.

Historian Arnold Hirsch describes the postwar urban revitalization period, "a time when precedents were set and patterns established," as "a policy of simultaneous clearance and containment."[249] Less dense communities of black families living in relatively integrated settings were "cleared" for redevelopment, and a dual housing market emerged. The pattern continued into the 1950s, as "[f]amily public housing increasingly became a minority relocation program locked in the urban core, while government subsidies brought homeownership and suburban mobility within the reach of the white middle class."[250] The phenomenon of federally funded and locally implemented urban clearance and containment was iconic in industrial cities of the Northeast and Midwest, but "southern municipal authorities [also] understood the potential of the [federal housing] law for imposing a greater degree of segregation than had previously been possible."[251] Hirsch caps off his searing description of the local "clearance and containment" strategy as follows: "A prime defense against the application of federal authority on behalf of civil rights was thus the extension of federal resources and power in the realm of housing policy."[252]

Cases involving restrictions of subsidized housing to certain narrow geographic areas further demonstrate how "containment" strategies have persisted and perpetuated racial segregation.[253] In *United States v. Yonkers Board of Education*,[254] the Second Circuit upheld the district court's finding that the City's decision to locate nearly 97% of the city's subsidized housing

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and discriminatory lending practices preventing minority families from purchasing homes in affluent neighborhoods).

247 *Id.* at 2515 (citing Brief of Housing Scholars, *supra* note 24, at 22–23).

248 Brief of Housing Scholars, *supra* note 24, at 9–16.

249 Hirsch, *supra* note 189, at 431–32.

250 *Id.* at 431. One million of the 1.3 million public housing units ultimately built were constructed before 1970 and any serious enforcement of Civil Rights Era legislation. *Id.*

251 *Id.* at 432.

252 *Id.*

253 *See* Julian, *supra* note 36, at 567 (discussing the HOPE VI Program of the late 1990s and early 2000s aimed at the revitalization of public housing, but often resulting in displacement of residents or containment in segregated conditions).

254 United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987).

in the southwest quadrant of the City, where over 80% of the city's minority residents lived, was a contributing cause of the "extreme condition of residential segregation" in Yonkers.[255] The court found that "over a period of more than three decades, the City approved no housing for minorities in any area that was not in or close to an already heavily minority area."[256] Given this backdrop of intentional segregation, it would be disingenuous for the City of Yonkers to claim that it needed to continue locating subsidized housing in Southwest Yonkers to "revitalize" the area it had helped harm through segregation.

A closer look at *Huntington* reveals the town in fact attempted to assert a "restoration of the neighborhood" defense of its policy restricting low-income housing needed by minorities to an area that was already largely minority.[257] The court rejected this justification, stating "if the Town wishes to encourage growth in the urban renewal area, it should do so directly through [tax] incentives which would have a less discriminatory impact on the Town."[258]

Another case, *Jackson v. Okaloosa County, Florida*,[259] presents similar facts. The Eleventh Circuit reversed dismissal of a complaint in which plaintiffs alleged that all of the public housing units in the county were built in one predominantly African-American neighborhood.[260] The plaintiffs sued the housing authority and county for excluding public housing from areas outside the segregated neighborhood through enactment and incorporation of a policy prohibiting development without approval of a majority of the county board of commissioners.[261]

The governmental defendants in *Huntington*, *Yonkers*, and *Jackson* avoided housing integration through a "containment" strategy that ensured the siting of subsidized housing only in areas where minority residents already lived. Revitalization is not a valid justification for integration avoidance strategies. Even if there is no proof of intent to segregate, as was available in *Yonkers*, a disparate impact theory of liability can hold governmental defendants to account for neutral practices that reinforce segregation; these practices can include those explicitly directed at containing subsidized housing in minority neighborhoods or those restrictive land use practices serving as barriers to integration.[262]

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255 *Id.* at 1186, 1219.

256 *Id.* at 1220. The court also noted additional evidence that as minority residents became increasingly concentrated in Southwest Yonkers, "the white population . . . declined steeply." *Id.*

257 Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988).

258 *Id.*

259 Jackson v. Okaloosa Cty., 21 F.3d 1531 (11th Cir. 1994).

260 *Id.* at 1534–35.

261 *Id.* at 1535–36.

262 *See supra* Part II.B.2; *see also* Anthony Downs, *Reducing Regulatory Barriers to Affordable Housing Erected by Local Governments*, *in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 255, 257–58 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) (discussing land use restrictions that raise

When the history of segregation is in sharp focus, it is difficult to entertain the circular argument for more racial containment as a remedy for racial containment, i.e. low-income housing must continue to be concentrated in areas where minorities have been contained in order to remedy the harm of minority containment. This is true regardless of the form of subsidy employed, whether traditional public housing, housing choice vouchers, or tax credit housing.[263] The FHA was not passed to promote "separate but equal" as a second-best solution in housing policy. Its purpose was to "mov[e] the Nation toward a more integrated society."[264] The need for revitalization of neighborhoods harmed by segregation is beyond doubt.[265] But if concentration of low-income housing in places where minority residents already live has been shown to cause segregation, the continued pursuit of these policies (without more) can be expected to yield the same results, whether we call it "containment" or "revitalization."

The Kerner Commission advocated for equalization, or enrichment, as an interim strategy with integration being the ultimate goal.[266] Martin Luther King, Jr., even before the Fair Housing Act was passed, insisted that "[t]he new and rehabilitated housing in ghetto areas should be temporary . . . Units should be built with a plan to tear them down at the end of that period as housing integration is advanced."[267]

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housing costs and reduce affordability, such as large lot zoning, minimum housing size, cumbersome permitting procedures, and limits on accessory units and single-room occupancy buildings); Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 993 (2012) ("The lack of housing opportunities outside the ghetto for all income levels presents one of the greatest obstacles to eliminating the ghetto, but one to which federal and local governments have directed inadequate attention and resources." (footnote omitted)).

263 *See* McClure & Johnson, *supra* note 240, at 488 (explaining that the LIHTC program is less racially segregated than the public housing program, but is "locating households into tracts with low minority concentrations less well than the market" and over time is locating "larger shares in neighborhoods with high minority concentrations"); *id.* at 493 (explaining that same pattern holds with respect to entry into low-poverty areas; the LIHTC program is making entry into low poverty neighborhoods, especially in the suburbs, but not in proportion to the market); Kirk McClure, *Are Low-Income Housing Tax Credit Developments Locating Where There Is a Shortage of Affordable Units?*, 20 HOUS. POL'Y DEBATE 153, 169 (2010) (arguing that "the [low-income housing tax credit program] is not directing units where few or no affordable housing options exist," but rather, is concentrating the units where they are least needed).

264 *Inclusive Communities*, 135 S. Ct. 2507, 2526 (2015).

265 *See* Orfield, *supra* note 182, at 1802 ("The gap left by tax credit funds leaving segregated areas could be filled by investment in areas other than housing. These neighborhoods need capital, but they do not need to further concentrate poverty or deepen segregation.").

266 Oliveri, *supra* note 119, at 280–81 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1, 10, 222–25 (1968)); *see also* Rothstein, *supra* note 236(discussing debates about wisdom of investing in segregated communities without comparable efforts to achieve integration).

267 MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY 213 (1968). Rules and standards governing the selection of sites for public housing as revised since the civil rights era have been criticized by civil rights advocates as weak and "increasingly difficult to enforce" given HUD's granting of frequent waivers and exceptions for projects in segregated areas. Philip Tegeler et al., *Oppor-*

The Riviera Oaks case study described in the Introduction to this Article, while not a perfect analogy, can help frame future interpretations of *Inclusive Communities* and its application to the siting of low-income housing.[268] Continued low-income housing investments on the "black side," decade after decade, without equalization of neighborhood conditions or dismantling of barriers to integration cannot pass for revitalization, is the functional equivalent of a "containment" strategy, and is doomed to perpetuate segregation.

CONCLUSION

The Court in *Inclusive Communities* held that disparate impact claims are cognizable under the Fair Housing Act; it does not authorize more segregation in government housing programs. Although Justice Kennedy instructed against using disparate impact theory to second guess policy judgments of housing agencies, his opinion must be read to require that local policy choices be exercised in furtherance of the FHA's integration command. Restricting the location of affordable housing to areas where minority residents already reside has served as a powerful tool, not to revitalize, but to "contain" minority communities and perpetuate segregation. Courts recognized this type of "housing barrier" in many of the earliest cases to arise under the FHA. Given that *Inclusive Communities* is bookended by the strongest pronouncements against racial residential segregation made by the Court in a generation, the only principled reading of the opinion is that Justice Kennedy *assumes* any policy approach selected would remedy racial isolation and unequal housing opportunities, not exacerbate them.

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tunity and Location in Federally Subsidized Housing Programs: A New Look at HUD's Site & Neighborhood Standards as Applied to the Low Income Housing Tax Credit, POVERTY & RACE RES. ACTION COUNCIL 2–3 (Oct. 2011). These standards "highlight the competing objectives of revitalizing urban communities through new housing investments and promoting poverty and racial de-concentration." Ellen & Yager, *supra* note 189, at 110.

268 *See supra* text accompanying notes 15–25.