REFLECTIONS ON THE PERSISTENCE OF RACIAL SEGREGATION IN HOUSING

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I. INTRODUCTION

My reflection on Professor Roberts' Sullivan Lecture poses two questions. First, how far have we come as a nation from the hyper-segregated housing patterns of the 1930s through 1960s that Professor Roberts described in her lecture? Regrettably, the answer appears to be not far at all. Further, we are today faced with a second form of hyper-segregation, one based on income rather than race.[1] Second, why have we made so little progress to date in addressing housing segregation? The simple answer here, of course, is that efforts to address the situation Professor Roberts describes have proved inadequate.[2] But why? While a comprehensive answer to that question is well beyond the scope of this writing, the author examines why one of the efforts has proven inadequate: the attempts to combat "exclusionary zoning."[3]

II. RESIDENTIAL SEGREGATION THEN AND NOW

Professor Roberts' article notes that, using one common measure of racial segregation, the "isolation index," which measures the extent to which blacks live in neighborhoods that are predominantly black, "[t]he spatial isolation of African-Americans in Chicago 'increased from only

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[1] *See, e.g.*, Sean F. Reardon & Kendra Bischoff, *Growth in the Residential Segregation of Families by Income, 1970–2009*, US2010 PROJECT (Nov. 2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report111111.pdf [https://perma.cc/T4RG-XW4F] (concluding that segregation of families by income has grown significantly in the last 40 years); Paul A. Jargowsky, *The Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, CENTURY FOUND. 1 (Aug. 9, 2015), https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2015/08/07182514/Jargowsky_ArchitectureofSegregation-11.pdf [https://perma.cc/XSX2-V7LG] (finding "a dramatic increase in the number of high-poverty neighborhoods" and showing that the "number of people living in high-poverty ghettos, barrios, and slums has nearly doubled since 2000, rising from 7.2 million to 13.8 million").

[2] *See* Reardon & Bischoff, *supra* note 1, at abstract.

[3] *See infra* Part IV.

10% in 1900 to 70% thirty years later.'"[4] The situation Professor Roberts describes has changed little over the ensuing decades. Based on data from the US2010 Project, the spatial isolation of African-Americans in Chicago had increased to 89.9% by 1980.[5] While the isolation index for African-Americans had declined to 79.9% by 2010,[6] that figure still represents a *relative* increase in isolation for African-Americans of over 14% when compared to the 1930 figure noted by Professor Roberts.[7]

Another commonly used measure of segregation in housing is the dissimilarity index.[8] As explained by the US2010 Project:

> The dissimilarity index measures whether one particular group is distributed across census tracts in the metropolitan area in the same way as another group. A high value indicates that the two groups tend to live in different tracts. D[issimilarity] ranges from 0 to 100. A value of 60 (or above) is considered very high. It means that 60% (or more) of the members of one group would need to move to a different tract in order for the two groups to be equally distributed. Values of 40 or 50 are usually considered a moderate level of segregation, and values of 30 or below are considered to be fairly low.[9]

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[4] Dorothy E. Roberts, *Crossing Two Color Lines: Interracial Marriage and Residential Segregation in Chicago*, 45 CAP. U. L. REV. 1, 10–11 (2017) (citing DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 24 (1993)). The isolation index is the percentage of same-group population in the census tract where the average member of a racial/ethnic group lives. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 23 (1993). It has a lower bound of zero (for a very small group that is quite dispersed) to 100 (meaning that group members are entirely isolated from other groups). *See id.* Thus, the index measures "the extent to which minority members are exposed only to one another . . . ." Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281, 288 (1988); Margery Austin Turner & Judson James, *Discrimination as an Object of Measurement*, 17 CITYSCAPE: J. POL'Y DEV. & RES. 3, 3 (2015) (describing how discrimination in housing is measured). Note, however, that this index is "affected by the size of the group—it is almost inevitably smaller for smaller groups, and it is likely to rise over time if the group becomes larger." *Residential Segregation*, DIVERSITY & DISPARITIES, https://s4.ad.brown.edu/projects/diversity/segregation2010/Default.aspx [https://perma.cc/SK8X-D9QB].

[5] *Chicago City*, DIVERSITY & DISPARITIES, https://s4.ad.brown.edu/projects/diversity/segregation2010/city.aspx?cityid=1714000 [https://perma.cc/LK46-3DSR].

[6] *Id.*

[7] *See* Roberts, *supra* note 4, at 10–11.

[8] *See Chicago City*, *supra* note 5.

[9] *Id.*

Data from Chicago for the dissimilarity index for African-Americans mirrors that for the isolation index; in 1980, the dissimilarity index for African-Americans ranged from 90.8% to 88.8%, depending on the racial group comparator[10] and the index declined to between 83.1% and 80.8% by 2010.[11] In comparison, the dissimilarity indices for the non-African-American racial groups—Asians, Hispanics, and Whites—were significantly lower, ranging from a high of 67.3% for Asian-Hispanics in 1980 to a low of 40.8% for Asian-Whites in 2010.[12]

The pattern of racial segregation seen in Chicago is not unique.[13] When researchers William H. Frey and Dowell Myers examined data from the 2000 Census,[14] they found that 143 of 318 Metropolitan Areas (44.97%) had Black-White dissimilarity indices of at least 60%, meaning that they fell into the "very high" category.[15] Further, only 80 of the 318 (25.16%) had Black-White dissimilarity indices of 50% or below, meaning that they had low to moderate dissimilarity.[16] Perhaps most notably, *none* of the 318 had a dissimilarity index in the "fairly low" category of 30% or below.[17]

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[10] The 1980 dissimilarity index was 90.8% between African-Americans and Asians, 90.6% between African-Americans and Whites, and 88.8% between African-Americans and Hispanics. *Id.*

[11] The 2010 dissimilarity index was 83.1% between African-Americans and Asians, 82.5% between African-Americans and Whites, and 80.8% between African-Americans and Hispanics. *Id.*

[12] The only dissimilarity index that showed significant improvement between 1980 and 2010 was White-Asian, declining from 51.4% to 40.8%, a relative decline of just over 20%. *Id.* The other indices barely changed during the same period: White-Hispanic went from 61.4% to 60.9% and Asian-Hispanic from 67.3% to 66.6%. *Id.*

[13] *See* Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167 (2003), https://www.jstor.org/stable/pdf/30036965.pdf [https://perma.cc/9DFV-PUL3] (providing a comprehensive review of the dynamics and consequences of racial residential segregation).

[14] Frey and Myers issued a report that accompanied the release of detailed racial segregation indices for the 318 U.S. metropolitan areas by CensusScope. William H. Frey & Dowell Myers, *Neighborhood Segregation in Single-Race and Multirace America: A Census 2000 Study of Cities and Metropolitan Areas* 1 (Fannie Mae Found., Working Paper, 2002), http://www.censusscope.org/FreyWPFinal.pdf [https://perma.cc/L6ML-8PPE]; *United States Segregation: Dissimilarity Indices*, CENSUSSCOPE (2000) [hereinafter CENSUSSCOPE], http://www.censusscope.org/us/print_rank_dissimilarity_white_black.html [https://perma.cc/86M7-V5BB].

[15] *See* CENSUSSCOPE, *supra* note 14.

[16] *See id.*

[17] *See id.* Note, however, that because a number of the smaller metropolitan areas have a small African-American population, CensusScope cautions: "When a group's population is small, its dissimilarity index may be high even if the group's members are evenly

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Compounding these long-standing patterns of racial segregation is the more recent growth in spatial segregation by income.[18] Sean Reardon and Kendra Bischoff report:

> As overall income inequality grew in the last four decades, high- and low-income families have become increasingly less likely to live near one another. Mixed income neighborhoods have grown rarer, while affluent and poor neighborhoods have grown much more common. In fact, the share of the population in large and moderate-sized metropolitan areas who live in the poorest and most affluent neighborhoods has more than doubled since 1970, while the share of families living in middle-income neighborhoods dropped from 65 percent to 44 percent. The residential isolation of the both poor and affluent families has grown over the last four decades, though affluent families have been generally more residentially isolated than poor families during this period. Income segregation among African Americans and Hispanics grew more rapidly than among non-Hispanic whites, especially since 2000. These trends are consequential because people are affected by the character of the local areas in which they live. The increasing concentration of income and wealth (and therefore of resources such as schools, parks, and public services) in a small number of neighborhoods results in greater disadvantages for the remaining neighbor hoods where low- and middle-income families live.[19]

Their finding that "[i]ncome segregation among African Americans and Hispanics grew more rapidly than among non-Hispanic whites, especially since 2000,"[20] is confirmed by Paul Jargowsky's research finding similar patterns.[21]

These findings would seem to suggest that were income inequality trends to reverse, and thus narrow the gap between White and Black

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distributed throughout the area. Thus, when a group's population is less than 1,000, exercise caution in interpreting its dissimilarity indices." *Id.*

[18] *See* Reardon & Bischoff, *supra* note 1, at abstract.

[19] *Id.*

[20] *Id.*

[21] Jargowsky, *supra* note 1, at 1. *See also* David Albouy & Mike Zabek, *Housing Inequality* 1 (Nat'l Bureau of Econ. Res., Working Paper No. 21916, 2016), http://davidalbouy.net/housinginequality.pdf [https://perma.cc/4A4Q-KCBD] (finding increasing "compression" of housing inequality in recent years).

incomes, that associated racial segregation might abate to some degree. But a recently published *New York Times* analysis of 2014 census data concludes that even if that were to occur, patterns of racial segregation in housing would largely be unaffected.[22] The *Times* reports:

> Affluent black families, freed from the restrictions of low income, often end up living in poor and segregated communities anyway. It is a national phenomenon challenging the popular assumption that segregation is more about class than about race, that when black families earn more money, some ideal of post-racial integration will inevitably be reached. In fact, a New York Times analysis of 2014 census figures shows that income alone cannot explain, nor would it likely end, the segregation that has defined American cities and suburbs for generations. The choices that black families make today are inevitably constrained by a legacy of racism that prevented their ancestors from buying quality housing and then passing down wealth that might have allowed today's generation to move into more stable communities. And even when black households try to cross color boundaries, they are not always met with open arms: Studies have shown that white people prefer to live in communities where there are fewer black people, regardless of their income. The result: Nationally, black and white families of similar incomes still live in separate worlds.[23]

This reflection could cite numerous additional sources documenting the persistence of racial segregation in housing up to the present.[24] Rather

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[22] John Eligon & Robert Gebeloff, *Affluent and Black, and Still Trapped by Segregation*, N.Y. TIMES (Aug. 20, 2016), http://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html?_r=0 [https://perma.cc/74NM-WSN7].

[23] *Id.*

[24] *See, e.g.*, *The Future of Fair Housing*, NAT'L COMMISSION FAIR HOUSING & EQUAL OPPORTUNITY 1 (Dec. 2008), http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf [https://perma.cc/UAS8-8JAJ] (noting the Commission's hearings "exposed the fact that despite strong legislation, past and ongoing discriminatory practices in the nation's housing and lending markets continue to produce [extreme] levels of residential segregation that result in significant disparities between minority and non-minority households . . . ."). *See also* Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 967 (2012) (arguing there has been a persistent failure to deliver real housing choice and opportunity to communities of color in housing markets across the United States); Mireya Navarro, *Segregation Is an Obstacle to New York's Housing Push*, N.Y. TIMES, Apr. 15, 2016, http://www.nytimes.com/images/2016/04/15/ (*continued*)

than belabor that point, however, this reflection now turns to the next question: why have we made so little progress to date in addressing housing segregation?

III. WHY HAS SEGREGATION PERSISTED?

There is little debate on the answer to that question: a combination of public and private policies over the decades have perpetuated our racial segregation in housing.[25] For example, a recent report from the National Commission on Fair Housing and Equal Opportunity[26] concludes:

> The continuing levels of racial and economic segregation in America's metropolitan areas result from a long history of public and private discriminatory actions. Segregation is rooted in historical practices but is maintained and sometimes worsened by continued discriminatory practices, including: present-day discrimination and steering in the private rental, sales, lending, and insurance markets; exclusionary zoning, land use, and school

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nytfrontpage/scan.pdf [https://perma.cc/6Q7X-K43D] (describing the persistence of residential racial segregation in New York).

[25] *See, e.g.*, FAIR HOUS. COMM'N, http://www.nationalfairhousing.org/Portals/33/National%20Commission/National%20Commission%20Outline.pdf [https://perma.cc/826X-GW44].

[26] In 2008, the 40th Anniversary of the Fair Housing Act, several civil rights groups agreed that the anniversary provided an excellent opportunity for the civil rights community to take stock of the status of fair housing in this country and look toward the future of fair housing practices. *Id.* Accordingly, the Leadership Conference on Civil Rights Education Fund (LCCREF), Lawyers' Committee for Civil Rights Under Law (LCCRUL) and the National Fair Housing Alliance (NFHA) created a Fair Housing Commission which conducted regional hearings across the country to "gather testimony, research, data and information on fair housing enforcement and the persistence of residential segregation forty years after the passage of the Fair Housing Act." *Id.* The hearings, chaired by former HUD Secretaries Jack Kemp and Henry Cisneros, explored a number of issues: (i) the persistence of discrimination and segregation; (ii) the impact of segregation on our communities and on education, and the benefits of integrated neighborhoods; (iii) federal fair housing enforcement mechanisms; (iv) enforcement by state and local governments and in the private sector, including individuals and neighborhood organizations and private, non-profit fair housing centers; (v) strategies to break down residential segregation and provide households isolated in segregated areas the opportunity to find integrative alternatives; and (vi) the shortage of affordable housing and strategies to increase the stock of affordable housing. *Id.* Hearings were held in Chicago on July 15; Houston on July 31; Los Angeles on September 9; Boston on September 22; and Atlanta on October 17. *The Future of Fair Housing*, NAT'L FAIR HOUSING ALLEGIANCE, http://www.nationalfairhousing.org/nationalcommission/tabid/2963/default.aspx [https://perma.cc/3KVY-LFY8]. Ultimately, the hearings concluded with the release of a report put out by the sponsoring organizations on December 9. *Id.*

> policies at the state and local governmental level; continuing government policies affecting the location of subsidized housing; the limited choices provided to those who receive federal housing assistance; income and wealth differences; and bank and insurance disinvestment in minority neighborhoods.[27]

That conclusion is supported by other sources. For example, a recent story in the *New York Times* discussed the findings of a report issued by the National Community Reinvestment Coalition,[28] which found that race was an important factor in deciding whether banks lend for mortgages in certain neighborhoods.[29]

> Specifically, the report indicated that banks made fewer loans to middle- and lower-income borrowers in minority neighborhoods than to borrowers with similar incomes in white neighborhoods. . . . Last year, the group did a similar analysis of lending in Baltimore, concluding that the racial

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[27] *The Future of Fair Housing*, *supra* note 24. *See also* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation,* 33 FORDHAM URB. L.J. 877, 877 (2006); Rachel L. Swarns, *Biased Lending Evolves, and Blacks Face Trouble Getting Mortgages*, N.Y. TIMES (Oct. 30, 2015), http://www.nytimes.com/2015/10/31/nyregion/hudson-city-bank-settlement.html [https://perma.cc/PSB9-2N65] (reporting that in 2014 Hudson City Savings Bank approved 1,886 mortgages in an area that included New Jersey and sections of New York and Connecticut. However, only twenty-five of those loans went to black borrowers, resulting in Hudson—while denying wrongdoing—agreeing to pay nearly $33 million to settle a lawsuit brought by the federal Consumer Financial Protection Bureau and Department of Justice).

[28] The website for the Coalition describes the organization as:

> The National Community Reinvestment Coalition (NCRC) was formed in 1990 by national, regional, and local organizations to develop and harness the collective energies of community reinvestment organizations from across the country so as to increase the flow of private capital into traditionally underserved communities. NCRC has grown to an association of more than 600 community-based organizations that promote access to basic banking services, including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families.

About Us, NAT'L COMMUNITY REINVESTMENT COALITION, http://www.ncrc.org/about-us [https://perma.cc/R5KM-3HK2].

[29] Peter Eavis, *Race Strongly Influences Mortgage Lending in St. Louis, Study Finds*, N.Y. TIMES (July 19, 2016), http://www.nytimes.com/2016/07/19/business/dealbook/race-strongly-influences-mortgage-lending-in-st-louis-study-finds.html [https://perma.cc/GAX7-BECV].

> composition of an area often drove where banks made mortgages.[30]

Another example can be seen in the persistence of "racial steering" as a significant factor in perpetuating racial segregation in housing.[31] The most recent national study of housing discrimination by the United States Department of Housing and Urban Development reported very high levels of discrimination and steering against Black, Latino, Asian, and Native American home seekers based on the experience of paired testers (investigators posing as renters or homebuyers) in major metropolitan housing markets.[32] In the same vein is a scholarly article reporting on the persistence of racial steering by real estate professionals.[33] Other scholars have examined how government housing polices perpetuate racial segregation.[34]

A comprehensive analysis of each of these factors is well beyond the scope of this writing. Rather, below this reflection more closely examines one of the efforts that has proved inadequate: the various attempts to combat exclusionary zoning.

IV. MIXED RESULTS IN THE FIGHT AGAINST EXCLUSIONARY ZONING

Scholars and practitioners have long recognized that many newer suburbs, particularly those in the highly urbanized Northeast, engage in so-called "exclusionary zoning" by using their land-use regulations to

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[30] *Id.*

[31] Rachel Blake, Commentary, *Illegal Steering in America: Who's at the Wheel?*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 95, 95 (2007) (reporting a 2006 study of twelve major metropolitan areas in the United States finding that steering occurred in at least 87% of the studied interactions).

[32] Margery Austin Turner et al., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. DEP'T HOUSING & URBAN DEV. xi (June 2013), http://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf [https://perma.cc/AF77-AZXJ].

> Although the most blatant forms of housing discrimination (refusing to meet with a minority homeseeker or provide information about any available units) have declined since the first national paired-testing study in 1977, the forms of discrimination that persist (providing information about fewer units) raise the costs of housing search for minorities and restrict their housing options.

Id.

[33] *See generally* Blake, *supra* note 31.

[34] *See, e.g.*, Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 662 (2011); Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 913 (2005).

frustrate the development of low- and moderate-income housing and encourage low-density, high-cost development.[35] The most common exclusionary zoning practices include: large minimum lot size requirements;[36] restrictions on multi-family housing;[37] prohibition of manufactured housing and mobile homes; [38] imposition of fees, exactions and costly amenities on new developments;[39] and limitations on annual growth.[40]

In the 1970s, affordable housing advocates and developers seeking to build such housing began challenging exclusionary zoning practices in the courts and, by 1975, their challenges appeared to have met with remarkable success.[41] In its landmark opinion in *Southern Burlington County, NAACP v. Township of Mount Laurel (Mount Laurel I)*, the New Jersey Supreme Court held that exclusionary zoning violated equal protection and substantive due process guarantees in the state constitution, and ruled that New Jersey municipalities had to meet their "fair share" of the "regional need" for low- and moderate-income housing.[42] That same year, the highest courts in two neighboring states, New York[43] and Pennsylvania,[44] also ruled that municipalities had to consider the effect of their zoning regulations on regional housing needs. These victories proved

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[35] *See, e.g.*, Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 475 (1971); Richard F. Babcock & Fred P. Bosselman, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S 1–3 (1973).

[36] *See, e.g.*, Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 309 (2002).

[37] *See, e.g.*, Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 10 (2001).

[38] *See* Schuck, *supra* note 36, at 309.

[39] *See* Span, *supra* note 37, at 10.

[40] *See, e.g.*, JOHN M. DEGROVE, THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES 1 (1992). *But see* Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1128 (1995) (arguing that state growth management programs can be used to combat local exclusionary zoning).

[41] *See* James C. Quinn, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches,* 4 FORDHAM URB. L.J. 147, 148–49 (1975).

[42] 336 A.2d 713, 734 (N.J. 1975).

[43] Berenson v. Town of New Castle, 341 N.E.2d 236, 241–43 (N.Y. 1975). In *Berenson*, the N.Y. Court of Appeals announced a two-part test for municipal zoning ordinances challenged as being exclusionary. *Id.* at 241–42. The ordinance should: (1) provide for a "balanced [and] cohesive community" and (2) take into consideration regional, as well as local, housing needs. *Id.* But the court qualified the latter requirement by holding that a municipality need not meet a "fair share" standard unless the regional need for low and moderate-income housing is not being met elsewhere. *Id.* at 242–43.

[44] Twp. of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466, 468 (Pa. 1975).

fleeting, however, as subsequent court decisions in all three states soon limited the impact of the "regional fair share" need requirement.[45]

While neither the New York nor the Pennsylvania courts after 1975 have imposed an effective "fair share" housing obligation on local governments, the situation is different in New Jersey.[46] There, by 1983, it had become clear that the exclusion of developed and rural areas from the requirement that they meet a "fair share" obligation,[47] combined with the "numberless" approach to "fair share" issues authorized by the Supreme Court's 1977 *Oakwood at Madison* ruling,[48] made *Mount Laurel I* a paper

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[45] *See* New Jersey: Oakwood at Madison Inc., v. Twp. of Madison, 371 A.2d 1192, 1200 (N.J. 1977) (holding that trial courts were not required to calculate "the precise fair share of the lower income housing needs of a specifically demarcated region."); Fobe Assocs. v. Mayor and Council of Demarest, 379 A.2d 31, 34 (N.J. 1977) and Pascack Ass'n Ltd. v. Mayor and Council of Wash. Twp., 379 A.2d 6, 13 (N.J. 1977) (each holding that "fair share" requirements need not be applied to "developed" municipalities); Glenview Dev. Co. v. Franklin Twp., 397 A.2d 384, 391 (N.J. Super. Ct. Law Div. 1978) (declining to apply "fair share" requirements to rural areas not undergoing development). New York: Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville, 414 N.E.2d 680, 683–84 (N.Y. 1980) (upholding a five-acre minimum lot requirement, ruling that the *Berenson* requirements were not violated unless there was proof of an exclusionary purpose or the ordinance ignored regional housing needs and had an exclusionary effect); Suffolk Hous. Servs. v. Town of Brookhaven, 511 N.E.2d 67, 67–70 (N.Y. 1987) (rejecting a claim that zoning restrictions and allegedly cumbersome procedures had prevented development of low-income housing in a suburban Long Island town. The ruling held that the plaintiffs had not stated a cause of action, in part, because they had not presented the town with a request to develop a particular parcel for low-income housing); Suffolk Interreligious Coal. on Hous. v. Town of Brookhaven, 575 N.Y.S.2d 548, 549–50 (N.Y. App. Div. 1991) (declining to review a decision rejecting the claims of a group challenging the *Brookhaven* ordinance who met the "particular parcel" requirement referred to in *Suffolk Hous. Servs.*); Asian Ams. for Equal. v. Koch, 527 N.E.2d 265, 273 (N.Y. 1988) (rejecting an exclusionary zoning challenge to the density bonus provisions in New York City's Chinatown Special District zoning regulations based on claim that the bonus, while intended to promote lower-income housing, was being used for much more expensive developments); *see generally* John R. Nolon, *A Comparative Analysis of New Jersey's* Mount Laurel *Cases with the* Berenson *Cases in New York*, 4 PACE ENVTL. L. REV. 3 (1986). Pennsylvania: Surrick v. Zoning Hearing Bd. of Upper Providence Twp., 382 A.2d 105, 109–10 (Pa. 1977) (reducing "fair share" concept to a non-binding "general precept"); BAC, Inc. v. Millcreek Twp., 633 A.2d 144, 147 (Pa. 1993) (holding that only restrictions on types of housing, not classes of people, were unlawful); Katrin C. Rowan, Comment, *Anti-Exclusionary Zoning in Pennsylvania: A Weapon for Developers, a Loss for Low-Income Pennsylvanians*, 80 TEMP. L. REV. 1271, 1272 (2007). *See generally* Clayton H. Collins, Comment, *Affordable Housing Options Under Pennsylvania's Three Legislative Regimes*, 28 J.L. & COM. 247 (2010).

[46] *See* Nolon, *supra* note 45, at 3–7.

[47] *See Fobe*, 379 A.2d at 34; *Pascack*, 379 A.2d at 13; *Glenview*, 397 A.2d at 391.

[48] *Oakwood*, 371 A.2d at 1200, 1216–23.

tiger.[49] In an effort to revitalize its *Mount Laurel* "doctrine," the New Jersey Supreme Court consolidated an appeal from Mount Laurel Township with five other "fair share" cases and issued a mammoth opinion that revolutionized land-use regulation in New Jersey.[50]

Mount Laurel II specified an array of substantive and procedural policies to ensure that its mandate for the creation of low and moderate-income housing would be fulfilled.[51] Most critically, the court imposed the requirement that a "fair share" burden be calculated for *all* communities designated as "growth areas" in a 1980 state development plan, ruled that three judges—each responsible for a different part of the state—be appointed to hear and expedite all *Mount Laurel* "fair share" litigation, and empowered these judges to authorize a "builder's remedy" to allow for the construction of low-income housing in communities that fail to meet their "fair share" obligation.[52] *Mount Laurel II* also challenged the New Jersey legislature to address the "fair share" issue.[53] In 1985, the legislature responded, enacting a Fair Housing Act[54] that replaced court supervision of municipal "fair share" obligations with an administrative agency, the Council on Affordable Housing.[55] The Act provided that a municipality

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[49] *See, e.g.*, Henry L. Kent-Smith, Note, *The Council on Affordable Housing and the* Mount Laurel *Doctrine: Will the Council Succeed?*, 18 RUTGERS L.J. 929, 933 (1987) (arguing that *Mount Laurel I* failed to produce low cost housing); Paula A. Franzese, Mount Laurel III: *The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 32 (1988) (arguing that little had changed in the eight years between *Mount Laurel I* and *Mount Laurel II*); Alan Mallach, *From* Mount Laurel *to Molehill*: *Blueprint for Delay*, 15 N.J. REP., Oct. 1985, at 21 (noting that eight years after *Mount Laurel I* no affordable housing had yet been built in Mount Laurel Township).

[50] S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 410 (N.J. 1983).

[51] *Id.* at 418–21.

[52] *Id.* at 420. *See also* Alan Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics and the Future of the* Berenson *Decision*, 4 PACE ENVTL. L. REV. 37, 119 (1986) (noting that over 100 lawsuits were filed by builders against New Jersey municipalities between 1983 and 1986).

[53] *S. Burlington*, 456 A.2d at 417.

[54] New Jersey Fair Housing Act of 1985, N.J. STAT. ANN. §§ 52:27D-301–329.9 (West 2008). *See also* Franzese, *supra* note 49, at 36–40 (discussing the Act).

[55] The Council on Affordable Housing (COAH) is an agency of the Government of New Jersey within the New Jersey Department of Community Affairs that is responsible for ensuring that all 566 New Jersey municipalities provided their fair share of low and moderate income housing. The COAH is made up of 12 members appointed by the Governor of New Jersey and approved by the New Jersey Senate. N.J. STAT. ANN. § 52:27D-305 (West 2008). COAH defines housing regions, estimated the needs for low/moderate income housing, allocates fair share numbers by municipality and reviews plans to fulfill these obligations. N.J. STAT. ANN. §§ 52:27D-302, -304 (West 2008). *See*

(*continued*)

that failed to participate in the Council's administrative process for substantive certification of a "fair share" plan would be subject to the full range of remedies previously available through *Mount Laurel* litigation.[56] One year later, the Supreme Court of New Jersey upheld the Act against a facial challenge, a decision commonly referred to as *Mount Laurel III*.[57]

The most controversial section of the Act was its provision for "Regional Contribution Agreements" (RCAs) that allowed suburban municipalities to compensate urban municipalities which agreed to accept up to 50% of the suburb's "fair share" housing obligation.[58] The "sending" municipality paid a negotiated fee for each unit transferred.[59] Critics claimed that RCAs violated the integrationist imperative of the *Mount Laurel* decisions by perpetuating a significant degree of racial and economic segregation while supporters of the concept argued that it has provided a desperately needed infusion of dollars for housing in the state's poorest cities, while still advancing integration in the suburbs.[60] RCAs were later abolished as part of a major legislative revision of the Fair Housing Act in 2008.[61]

By 2010, COAH's troubles were mounting. In 2007, the rules it had adopted to implement a new methodology for determining municipal fair

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also Alan Mallach, *The* Mount Laurel *Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS U. L. REV. 849, 850 (2011) (describing the COAH).

[56] *See generally* New Jersey Fair Housing Act of 1985, N.J. STAT. ANN. §§ 52:27D-301–329.9 (West 2008).

[57] Hills Dev. Co. v. Twp. of Bernards in the Cty. of Somerset (*Mount Laurel III*), 510 A.2d 621, 634 (N.J. 1986).

[58] New Jersey Fair Housing Act of 1985, N.J. STAT. ANN. § 52:27D-312 (West 2008).

[59] For example, Marlboro Township signed an agreement in June 2008 providing that the city of Trenton would build or rehabilitate 332 housing units (out of Marlboro's 1,600-unit obligation), with Marlboro paying $25,000 per unit for a total of $8.3 million, to Trenton for taking on the responsibility for these units. *Marlboro Will Pay Trenton to Take Affordable Housing*, GMNEWS ARCHIVE (June 18, 2008), http://www1.gmnews.com/2008/06/18/marlboro-will-pay-trenton-to-take-affordable-housing/ [https://perma.cc/8DY9-EGPM].

[60] *Compare* Rachel Fox, *The Selling Out of* Mount Laurel*: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535, 537, 565–72 (1988) (criticizing RCAs), *with* Alan Mallach, *supra* note 55, at 854 (arguing that "from a pragmatic standpoint, RCAs provided an important safety valve for suburban municipalities, mitigating at least some of their opposition to *Mount Laurel*, while offering a relatively easy way for urban municipalities to obtain funds for politically attractive housing activities").

[61] Act of July 17, 2008, 2008 N.J. Sess. Law Serv. Ch. 46 (codified as amended at N.J. STAT. ANN. § 52:27D-329.6 (West 2008)).

housing obligations[62] were overturned in a lawsuit brought by housing advocates[63] and the COAH's revised rules were again invalidated in 2010.[64] In January 2011, the New Jersey legislature passed legislation that would have abolished COAH, which Governor Chris Christie conditionally vetoed due to his disagreement with the fair housing obligations the legislation would have imposed on municipalities.[65] Rather than amend the legislation to satisfy Governor Christie's objections, the chief sponsor, Senator Raymond Lesniak, withdrew the bill on February 7, 2011, and the legislature took no further action.[66] Governor Christie subsequently abolished the COAH through a reorganization plan and transferred its functions to the New Jersey Department of Community Affairs. But that unilateral action was later invalidated on the ground that it exceeded the Governor's powers as regards to the COAH under the Fair Housing Act.[67]

In October 2014, COAH deadlocked on adopting new substantive rules establishing fair housing requirements for municipalities, thus failing to meet the state supreme court's deadline for adopting rules to replace those the court had previously struck down.[68] In March 2015, in a case that has become known as *Mount Laurel IV*, the court returned the responsibility for overseeing compliance with the Fair Housing Act to the courts, designating fifteen superior court judges to arbitrate claims brought under the Act.[69] These so-called "*Mount Laurel IV* cases" are just now proceeding through the courts and so it is premature to render any

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[62] *See, e.g.*, John M. Payne, *The Paradox of Progress: Three Decades of the* Mount Laurel *Doctrine*, 5 J. PLAN. HIST. 126, 131 (2006) (describing context for the change in methodology).

[63] *In re* Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous., 914 A.2d 348, 400–02 (N.J. Super. Ct. App. Div. 2007) (finding that the COAH methodology was incomprehensible).

[64] *In re* Adoption of N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Hous., 74 A.3d 893, 896 (N.J. 2013), *aff'g* 6 A.3d 445 (N.J. Super. Ct. App. Div. 2010).

[65] Press Release, Office of Governor Chris Christie, Governor Chris Christie Calls Current COAH Legislation Insufficient (Jan. 24, 2011), http://nj.gov/governor/news/news/552011/approved/20110124b.html [https://perma.cc/A9YS-XLCF]. *See* Stuart Meck, Commentary, *New Jersey's* Mount Laurel *Doctrine and Its Implementation: Under Attack, But Safe (for Now)*, 66 PLAN. & ENVTL. L., Jan. 2014, at 4, 7 (discussing Governor Christie's various objections).

[66] Meck, *supra* note 65, at 7.

[67] *In re* Plan for the Abolition of the Council of Affordable Hous., 70 A.3d 559, 580 (N.J. 2013), *aff'g* 38 A.3d 620 (N.J. Super. Ct. App. Div. 2012).

[68] In 2014, the court had granted COAH a final additional five months to adopt new rules. *See In re* Adoption of N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Hous., 106 A.3d 1173, 1173 (N.J. 2014).

[69] *In re* Adoption of N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Hous. (*Mount Laurel IV*), 110 A.3d 31, 42–43 (N.J. 2015).

judgments as to how these judges are faring in securing the goals of *Mount Laurel* and the Fair Housing Act.[70]

A comprehensive review of how the COAH operated or an independent evaluation of the results achieved by the Fair Housing Act is beyond the scope of this writing.[71] What can certainly be said, however, is that four decades after the courts in Pennsylvania, New Jersey, and New York signaled that they viewed "exclusionary zoning" by local governments as a concern justifying a judicial remedy, that concern remained vital only in New Jersey and, even there, observers disagreed on what *Mount Laurel* and the subsequent Fair Housing Act had accomplished. Some claimed that the *Mount Laurel* ruling and the Fair Housing Act did little to combat residential racial segregation[72] or that most of the beneficiaries have relatively higher socio-economic status,[73] while others argue that the results, while mixed, are largely positive.[74]

It's also notable that the *Mount Laurel* approach to addressing exclusionary zoning has not been particularly influential in other jurisdictions. For example, in *Britton v. Town of Chester*,[75] the New

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[70] *See, e.g.*, *In re* Declaratory Judgment Actions Filed by Various Municipalities, 141 A.3d 359, 380–81 (N.J. 2016) (reversing court order directing Special Regional Master to include as part of fair share calculation a separate component for municipalities' fair share obligation during period for which Council on Affordable Housing had failed to adopt rules governing determination of housing obligation).

[71] Orfield, *supra* note 27, at 909 (reviewed several studies of the effects of *Mount Laurel* and the Fair Housing Act and found "[t]hese analyses find that its policies have increased the amount of affordable housing. The housing has, however, disproportionately benefited Whites and moderate-income persons rather than low-income persons, large families, and people of color"); *MOUNT LAUREL II* AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING (Timothy N. Castano & Dale Sattin, eds., 2008); Alan Mallach, *supra* note 52, at 111, 115; David N. Kinsey, *The Growth Share Approach to* Mount Laurel *Housing Obligations: Origins, Highjacking, and Future*, 63 RUTGERS L. REV. 867, 867 (2011); John M. Payne, *Housing Rights and Remedies: A "Legislative" History of* Mount Laurel II, 14 SETON HALL L. REV. 889, 889 (1984).

[72] *See, e.g.*, Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1301–02 (1997) (finding little change in patterns of residential segregation).

[73] *See, e.g.*, Span, *supra* note 37, at 68 (finding that while a much larger number of affordable housing units have been realized via the New Jersey courts and the COAH, the residents tend to have higher socio-economic status, "but at a low point in their lifetime earning potential").

[74] *See, e.g.*, Mallach, *supra* note 52, at 114–15 (arguing that *Mount Laurel* and the Act created greater affordable housing options for the state's lower-income residents).

[75] 595 A.2d 492, 497–98 (N.H. 1991); Brian Blaesser et al., *Advocating Affordable Housing in New Hampshire: The* Amicus Curiae *Brief of the American Planning Association in* Wayne Britton v. Town of Chester, 40 WASH. U. J. URB. & CONTEMP. L. 3, 4 (*continued*)

Hampshire Supreme Court relied on an interpretation of the state's zoning statues to invalidate exclusionary practices, rather than an analysis based on the *Mount Laurel* doctrine or the state constitution.[76]

Several other New England states, such as Massachusetts[77] and Rhode Island,[78] use a type of "housing appeals board" that provides "for a direct appeal and override of local decisions that reject or restrict proposals for low- or moderate-income housing."[79] Connecticut, however, uses a court that can set aside local zoning decisions that receive federal or state assistance.[80] Illinois has also adopted this approach.[81] Some observers conclude that these approaches have resulted in the creation of significantly more affordable housing in exclusionary communities than

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(1991); John M. Payne, *From the Courts: Exclusionary Zoning and the "Chester Doctrine*,*"* 20 REAL EST. L.J. 366, 366–67 (1992).

[76] While the approach adopted in the *Chester* decision was unanticipated, the New Hampshire Supreme Court had previously considered several challenges to exclusionary land use regulations, dating back to its 1978 decision in Beck v. Town of Raymond, 394 A.2d 847 (N.H. 1978), in which it had voiced its distaste for exclusionary zoning. In *Beck*, the court warned municipalities that growth management must not be used as a pretext for excluding non-residents who were members of a disadvantaged social or economic groups. *Id.* at 850–51. Six years later, in Stoney-Brook Dev. Corp. v. Town of Fremont, 474 A.2d 561 (N.H. 1984), the court held that growth controls are properly used only when they regulate and control development, and are invalid when used to prevent development. *Id.* at 563. Finally, in Soares v. Town of Atkinson*,* 512 A.2d 436 (N.H. 1986), *appeal after remand*, 529 A.2d 867 (N.H. 1987), after a lower court relied on *Beck* and *Mount Laurel* to invalidate several exclusionary zoning practices, and the town both appealed and revised its ordinance, the New Hampshire Supreme Court remanded the case back to the lower court which then upheld the revised ordinance.

[77] MASS. GEN. LAWS ch. 40B §§ 20–23 (2016). *See also* Erika Barber, Note, *Affordable Housing in Massachusetts: How to Preserve the Promise of "40B" with Lessons from Rhode Island*, 46 NEW ENG. L. REV. 125, 128–29 (2011); Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 381–82 (2001).

[78] Rhode Island Low and Moderate Income Housing Act, 53 R.I. GEN. LAWS §§ 45-53-1–45-53-9 (West 2016). *See also* Barber, *supra* note 77, at 128–29.

[79] AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 4-152 (Stuart Meck ed., 2002).

[80] *See generally* Barber, *supra* note 77. *See also* Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 152–53 (2001).

[81] *See* Heidi L. Golz, *Breaking into Affluent Chicago Suburbs: An Analysis of the Illinois Affordable Housing Planning and Appeal Act*, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 181, 181 (2006).

would have been created without these laws,[82] while others are more critical.[83] Still other jurisdictions use techniques such as "inclusionary zoning"[84] or state mandates to adopt a local comprehensive plan that includes a detailed housing element in an effort to address housing affordability issues[85] and, thereby, seek to lessen racial segregation in housing.[86]

While one might think that racial discrimination through exclusionary zoning would easily be the basis for a federal court challenge based on the Equal Protection Clause of the federal Constitution, two Supreme Court decisions in the 1970s all but barred such claims.[87] First, in *Warth v. Seldin*, decided the same year as *Mount Laurel I* and the New York and Pennsylvania exclusionary zoning cases, the Court imposed stringent standing requirements on exclusionary zoning plaintiffs asserting claims based on the federal Constitution.[88] Two years later, in *Village of Arlington Heights v. Metropolitan Housing Development Corp*., the Court required that exclusionary zoning plaintiffs prove that municipal officials *intended* to engage in racial discrimination.[89]

Warth required that exclusionary zoning plaintiffs cite "specific concrete facts" to demonstrate both that they had been harmed by

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[82] *See, e.g.*, Barber, *supra* note 77; Krefetz, *supra* note 77; Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFF. 295, 296 (2006).

[83] *See, e.g.*, Jonathan Witten, *Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act*, 35 B.C. ENVTL. AFF. L. REV. 217, 252 (2008); Christopher Baker, Note, *Housing in Crisis—A Call to Reform Massachusetts's Affordable Housing Law*, 32 B.C. ENVTL. AFF. L. REV. 165, 205–06 (2005).

[84] *See* Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 212 (Anthony Downs ed., 2004); Nicholas Benson, Note, *A Tale of Two Cities: Examining the Successes of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado*, 13 J. GENDER, RACE & JUST. 753, 754 (2010).

[85] *See* CAL. GOV'T CODE §§ 65580–65589.8 (West 2000); William C. Baer, *California's Fair-Share Housing 1967–2004: The Planning Approach*, 7 J. PLAN. HIST. 48, 50 (2008).

[86] *But see* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1207 (1981) (arguing that inclusionary zoning requirements can actually be exclusionary devices under certain circumstances).

[87] Warth v. Seldin, 422 U.S. 490 (1975); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[88] 422 U.S. 490, 500 (1975). *See also* Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1, 27 (1980).

[89] 429 U.S. 252, 266 (1977). *See also* Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on* Arlington Heights, 55 TEX. L. REV. 1217, 1243 (1977); Robert G. Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. F. 961, 1034 (1977).

exclusionary practices and that they would benefit from court intervention.[90] To meet this standard, plaintiffs would have to point to the exclusion of a specific project as having caused them injury and prove that the court action they requested would remedy that injury.[91] Because this task has proved particularly difficult for fair housing organizations—who, unlike individual plaintiffs, have the skills and resources to bring lawsuits—the *Warth* decision discouraged exclusionary zoning litigation.[92]

Plaintiffs who could meet *Warth*'s standing requirements, such as prospective developers of low-income housing, faced a second hurdle in the federal courts.[93] While exclusionary zoning arguably violates the Equal Protection Clause, an attack on exclusionary practices will likely fail unless the plaintiff alleges racial discrimination and thereby subjects the ordinance to heightened judicial scrutiny. But in *Arlington Heights*, the Court ruled that a claim of racial discrimination requires proof that a municipality had the intent to discriminate based on race; proof that a zoning practice had a racially discriminatory *effect* was, by itself, not sufficient, but could be used as evidence to prove there was a discriminatory *intent*.[94]

Exclusionary zoning plaintiffs faced a less daunting task if they sued under the federal Fair Housing Act, because the Supreme Court had ruled in *Arlington Heights* that such claims required only proof of a racially discriminatory effect, not proof of intent.[95] When the Court remanded the *Arlington Heights* case to the United States Court of Appeals for the Seventh Circuit for consideration of the plaintiff's Fair Housing Act claim, the Seventh Circuit reintroduced the element of *intent* as one of four factors in judging whether there was a violation of the Act and required that any discriminatory effect be balanced against the justifications asserted by the municipality.[96] But another approach soon emerged that was far more favorable to advocates of affordable housing.

In *Huntington Branch, NAACP v. Town of Huntington*, the United States Court of Appeals for the Second Circuit, after a detailed

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[90] *Warth*, 422 U.S. at 508.

[91] *Id.* at 515.

[92] *See, e.g.*, Hope, Inc. v. Cty. of DuPage, Ill., 738 F.2d 797, 813–14 (7th Cir. 1984) (finding that the organization representing its members had no standing due to a lack of direct injury as exclusion from the project). *See generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION §§ 9.2–9.8 (Thomson Reuters 2015).

[93] *See Arlington Heights*, 429 U.S. at 265–66.

[94] *Id. See* BLAESSER & WEINSTEIN, *supra* note 92, at § 9.12.

[95] *Arlington Heights*, 429 U.S. at 265–66; 42 U.S.C. §§ 3601–3617 (2016).

[96] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977). *See also* BLAESSER & WEINSTEIN, *supra* note 92, at § 9.16 n.75.

examination of the intent issue, concluded that proof of a disproportionate impact on minorities was sufficient by itself.[97] In 2015, the Supreme Court affirmed the disparate impact approach to Fair Housing Act claims in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., but cautioned that disparate impact liability must be properly limited to give housing authorities and private developers leeway to state and explain the valid interest served by their policies, and that "[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"[98] In light of this "limiting" language, and the stringent reading of the statute by the four dissenting Justices,[99] some observers have sounded a cautionary note about what effect *Inclusive Communities* will have in addressing exclusionary zoning.[100]

V. CONCLUSION

As noted at the beginning of this writing, the passage of eight decades has had remarkably little effect on the patterns of racial segregation Professor Roberts described in her Sullivan Lecture. While the

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[97] 844 F.2d 926, 934–35 (2d Cir. 1988). *See also* BLAESSER & WEINSTEIN, *supra* note 92, at § 9.16; John M. Payne, *From the Courts: A Federal Remedy for Exclusionary Zoning*, 17 REAL EST. L.J. 261 (1989).

[98] 135 S. Ct. 2507, 2523–24 (2015) (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). Circuit courts have applied the *Inclusive Communities* decision. *See* Ave. 6E Invs., LLC v. City of Yuma, Ariz., 818 F.3d 493, 497 (9th Cir. 2016) (reversing district court dismissal of disparate treatment claims under FHA and the Equal Protection Clause on ground that the availability of similarly-priced and similarly-modeled housing in the same quadrant of the City as the zoned property prevented plaintiff-developers from showing a disparate impact); Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 611, 624 (2d Cir. 2016) (affirming district court's grant of summary judgment against Garden City on ground that City's decision to abandon R–M zoning in favor of R–T zoning was made with knowing acquiescence to race-based public input, showing discriminatory intent as well as disparate treatment under 42 U.S.C. § 3604(a) of the FHA).

[99] *Inclusive Communities*, 135 S. Ct. at 2533–34 (Alito, J., dissenting). Justice Alito's dissent, joined by Chief Justice Roberts and Justices Scalia and Thomas, argued that the language of the Fair Housing Act cannot be interpreted to support claims based on disparate impact. *Id.*

[100] *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, 115–22 (Sept. 18, 2015); *but see* Noah D. Zatz, *The Many Meanings of "Because Of": A Comment on* Inclusive Communities Project, 68 STAN. L. REV. ONLINE 68 (Nov. 12, 2015) (arguing that the dissenters are simply wrong and their interpretation of the statute will not stand in the way of more robust development of disparate impact claims). For a doctrinal analysis of what the *Inclusive Communities* decision portends for equal protection theory, *see* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115 (2016).

combination of public policies and private preferences that gave rise to segregated housing, and the segregation they created, have abated somewhat, the numerous sources referenced at the beginning of this writing document the persistence of racial segregation in housing up to the present.[101] Distressing as this is, still worse is the fact that efforts at both the federal and state levels have had relatively little success at changing these patterns.

The 41-year history of New Jersey's *Mount Laurel* doctrine illustrates the difficulty faced in addressing the problem. When little had been accomplished in the eight years following the Supreme Court of New Jersey's landmark ruling in *Mount Laurel I*, the Court's *Mount Laurel II* ruling, by allowing a "builder's remedy" and assigning exclusionary zoning challenges to a hand-picked group of judges, effectively forced the legislature to act.[102] The resulting Fair Housing Act, while controversial from its inception due to its allowing for Regional Contribution Agreements, established a workable administrative system for ensuring that local governments met their "fair share" affordable housing obligations.[103] Over time, however, the Council on Affordable Housing (COAH), unable to surmount technical problems and facing political and public opposition, proved incapable of meeting its obligations under the Fair Housing Act.[104] Finally, in 2015, thirty years after the legislature had replaced court supervision of municipal "fair share" obligations with the COAH, the Court found it had no choice but to return the responsibility for overseeing compliance with the Fair Housing Act to the judiciary.[105] And this is the history of the jurisdiction uniformly acknowledged as having done the most to address exclusionary housing policies.

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[101] *See supra* notes 5–24 and accompanying text.
[102] *See supra* notes 50–53 and accompanying text.
[103] *See supra* notes 53–57 and accompanying text.
[104] *See supra* notes 55, 62–70 and accompanying text.
[105] *See supra* note 69 and accompanying text.