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Overcoming Land Use Localism: How HUD's New Fair Housing Regulation Can Push States to Eradicate Exclusionary Zoning

Thomas Silverstein¹

Since 2009, the U.S. Department of Housing & Urban Development (HUD) and various housing and community development stakeholders have grappled with the question of what it means to affirmatively further fair housing (AFFH). In some respects, HUD's publication of a final AFFH rule on July 16, 2015 was the culmination of that process,² but the rule did not resolve all outstanding questions. In particular, the one point that has been reiterated by a range of groups with often competing interests is that no one is entirely clear how the framework that HUD has developed will work for states.³ To a certain extent, this gap in understanding is illustrated by the fact that the department still has not published a template for the required Assessment of Fair Housing (AFH) for states.⁴

This purported conundrum should not be hard to solve. The solution is to simply refocus the conversation on two closely related questions. First, what is the identity of the entity that is subject to the duty to AFFH? Second, what is the scope of that entity's capacity, both in terms of planning and implementation? Agonizing over how states fit into HUD's regulatory framework is grounded in a misappraisal of the answers to these two questions.

The answer to the first question is clear-cut: the entity is the state government as a whole and not the individual lead agency that develops the state's Consolidated Plan and AFH. Each state government includes not only its state housing and community development department and its state housing finance agency, it also includes more far flung executive agencies, the legislative branch, and even the judiciary. If the most effective way to overcome a fair housing issue involves state legislative action, then the state legislature actually has an obligation to pass a bill and the governor has an obligation to sign it into law.⁵

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1. Associate Counsel, Fair Housing & Community Development Project, Lawyers' Committee for Civil Rights Under Law.
 2. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,271, 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 90, 91, *et al.*).
 3. *Id.* at 42,278.
 4. *Id.* at 44,290.
 5. *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 712 F.3d 761, 769-770 (2d Cir. 2013) ("There is, of course, a difference between

Once it is clear that the state as a whole, not an individual lead agency, is on the hook,⁶ the scope of the state's capability starts to look quite vast. In light of the United States' federal system of government, states are arguably the most powerful political entities that exist in this country; their power has only grown in recent years in light of Supreme Court decisions limiting the federal government's powers.⁷ Subject to a relatively limited set of Constitutional constraints, states can impose taxes, create new spending programs, exercise the power of eminent domain, regulate participants in the housing market like real estate agents and insurance companies, and regulate land use.⁸ The fact that states have diffused these powers across their component parts and delegated these powers to local governments is immaterial to the substance of their legal obligations as HUD grantees.

The twin phenomena of diffusion and delegation, however, are relevant to the question of how to implement policies that would bring a state into meaningful compliance with the duty to AFFH. For example, although amending a provision of a state's constitution may accomplish AFFH goals, the perceived difficulty of doing so might undermine meaningful voluntary compliance from the start. State officials are most likely to take positive steps that are attainable. Creating unrealistic expectations could incentivize evasive tactics.

Out of this context, there emerges a need for policy solutions that embody three essential characteristics. First, reforms must provide effective tools for fostering residential racial integration by reducing the

an obligation as a condition of grant funding to adopt specific legislation and the availability of injunctive relief against individual officials who act in a manner inconsistent with those obligations. The availability of such relief is a subject of conjecture at this point although the Second Circuit's affirmation of the district court's decision that the Westchester County Executive's veto of legislation banning discrimination in housing on the basis of lawful source of income violated a provision of a consent decree between HUD and the County requiring the latter to promote such legislation suggests that the duty to AFFH – as embodied in that consent decree – reaches the affairs of legislators and chief executives in a meaningful way.”).

6. See *infra* notes 11-14 and accompanying text.

7. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603-04 (2012) (holding that the provision of the Affordable Care Act making the expansion of Medicaid mandatory for the states was unconstitutional coercion in excess of Congress's powers under the Spending Clause); *U.S. v. Morrison*, 529 U.S. 598, 613 (2000) (holding that a provision of the Violence Against Women Act exceeded Congress's authority under the Commerce Clause because Congress can only consider the aggregated effects of economic, rather than noneconomic, activity on interstate commerce); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding the Religious Freedom Restoration Act exceeded Congress's authority under Section 5 of the Fourteenth Amendment because it lacked “congruence and proportionality” to the constitutional infirmity being remedied); *U.S. v. Lopez*, 514 U.S. 549, 561 (1995) (holding that a provision of the Gun-Free School Zones Act exceeded Congress's authority under the Commerce Clause because it regulated non-commercial activity).

8. *U.S. ex rel. Anti-Discrimination Ctr.*, 712 F.3d at 773.

prevalence of exclusionary zoning. This article focuses narrowly on exclusionary zoning because it is a widespread practice that has a deep historical connection to residential racial and ethnic segregation. Clearly, states will need to develop strategies for addressing other fair housing challenges, as well. Second, despite requiring statutory changes, they must be based on proven policies from other states. Third, their adoption must move the discourse surrounding land use regulation in a direction where a more dramatic rethinking of the state's role is possible. A handful of states have pursued policies that satisfy these criteria to varying extents.⁹ California, Connecticut, Massachusetts, and New Jersey all have longstanding statutes that seek to mitigate exclusionary zoning through some sort of a state role, whether administrative or judicial.¹⁰ Each offers important lessons.

This article elaborates a vision of the specific policy features that state land use reforms should have in order to embody the three broad characteristics noted above and play an important role in AFFH efforts. To do that, the first section of this article explores the legal basis for this article's definition of states and the scope of their authority. The second section catalogues the history of exclusionary zoning and its connection to residential racial segregation. The third section looks at the policy features, both those found in existing laws and more innovative solutions that should be part of a state legislative reform package that addresses the AFFH duty. The fourth section situates that package in the context of policy rationales that have contemporary political salience. Lastly, the article expresses the aspiration that such reforms could contribute to a paradigm shift in the discourse of land use regulation.

I. The Nature and Power of States as HUD Program Participants

a. *Who is the grantee?*

The conclusion that states as whole entities, rather than individual agencies, for purposes of the duty to AFFH is compelled by the McKinney-Vento Homeless Assistance Act of 1987, as well as HUD's regulations implementing Consolidated Planning requirements that govern the Community Development Block Grant (CDBG) program, the HOME Investment Partnerships Program (HOME), and the Housing Opportunities for Persons with AIDS (HOPWA) program.¹¹ Under McKinney-Vento, which authorized the creation of the Emergency Solutions Grant program (ESG – formerly known as the Emergency Shelter Grant), a state is “each of the several States, the District

9. *See infra* note 9.

10. CAL. GOV'T CODE § 65580 (2000); CONN. GEN. STAT. ANN. § 8-30g (2013). MASS. GEN. LAWS ANN. Ch. 40B, § 20 (2003); N.J. STAT. ANN. § 52:27D-303 (2015).

11. *See* 42 U.S.C. § 11371(8) (1997); 24 C.F.R. § 91.5 (2016).

of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, The Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.”¹²

By contrast, the authorizing statute for the CDBG program, which is representative of the other two block grant programs, defines a state more broadly as “any State of the United States, or any instrumentality thereof approved by the Governor; and the Commonwealth of Puerto Rico.”¹³ This definition could arguably support the interpretation that individual state agencies, rather than state governments as whole entities, are program participants. However, HUD’s regulation implementing the Consolidated Planning requirement attached to those programs defines states in a manner consistent with McKinney-Vento.¹⁴ Those regulations have been in place for over six years, which is the statute of limitations for challenging the validity of regulations under the Administrative Procedure Act.¹⁵ As the regulation is minimally vulnerable to challenge and all states receive ESG allocations that unambiguously carry responsibilities for states as whole entities, the scope of agencies or branches of a state’s government to which the duty to AFFH applies is clear—it applies to all of them.

b. States in the federal system

States have expansive powers that enable them to pursue a broad array of policy objectives. Unless a specific constitutional provision that constrains state action applies or such action is preempted by federal law in an area of federal power, state governments can essentially legislate on any issue and use any enforcement tool to effectuate that policy.¹⁶ In recent years, state power has grown appreciably as the U.S. Supreme Court has limited the scope of Congress’s authority to legislate under the Commerce Clause, Section 5 of the Fourteenth Amendment, and the Spending Clause in *U.S. v. Lopez*, *U.S. v. Morrison*, *City of Boerne v. Flores*, and *National Federation of Independent Business v. Sebelius*.¹⁷ The Court’s decisions in these cases all have the effect of limiting the circumstances in which federal law might preempt state law by

12. 42 U.S.C. § 11371(8).

13. 42 U.S.C. § 5302(a)(2) (2007); *See also* 42 U.S.C. § 12902(9) (2015) (defining the term “state” for purposes of the AIDS Housing Opportunity Act); 42 U.S.C. § 12704(2) (2015) (including a similar definition of the term “state” for purposes of the HOME Investment Partnerships Program).

14. *See* 24 C.F.R. § 91.5.

15. *See* 28 U.S.C. § 2401(a) (2011); *Impro Prod., Inc. v. Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983) (stating that the statute of limitations for challenges to agency action under the Administrative Procedure Act is six years).

16. *See Jacobson v. Mass.*, 197 U.S. 11, 24-25 (1905) (outlining the scope of the police power in the federal system while upholding a state law requiring vaccination for smallpox).

17. *See supra* note 6 and accompanying text.

invalidating (or finding alternative grounds for sustaining) federal statutes and, in the case of *National Federation of Independent Business*, limiting the power of Congress to use grant conditions to bind states to requirements that the body could not legislate directly.¹⁸

In addition to recent limits on the power of Congress to restrict or otherwise control the activities of states, the Court has constrained the ability of private parties to challenge state action as violative of federal law.¹⁹ Three cases are emblematic of this trend. First, in *Alexander v. Sandoval*, the Court held that there was no private right of action to enforce the U.S. Department of Transportation's regulation for the disparate impact claims under Title VI of the Civil Rights Act of 1964 and articulated a restrictive test, requiring that statutes include "rights-creating language" for determining whether federal laws are enforceable by private parties.²⁰ Next, in *Gonzaga University v. Doe*, the Court short-circuited an attempt to use 42 U.S.C. § 1983, which provides a right of action for individuals to challenge state action that violates a federal right, to circumvent its decision in *Sandoval*.²¹ The *Gonzaga* Court established that the same test applied for determining whether federal statutes are enforceable through § 1983.²²

Lastly, in *Armstrong v. Exceptional Child Center*, the Court held that the federal Medicaid statute was not enforceable by private parties, whether through the Supremacy Clause of the U.S. Constitution or through the inherent equitable powers of the federal courts.²³ Actions to enforce the Medicaid statute historically proceeded under § 1983 until *Gonzaga* foreclosed that path.²⁴ The *Armstrong* Court held that the Supremacy Clause does not provide a private right of action to enforce federal rights but merely imposes a rule of decision for cases in which state and federal law conflict.²⁵ The Court stated that, while the federal courts have equitable powers to enjoin state action that violates federal rights as in *Ex Parte Young*, there are limitations on whether courts should exercise that power that severely restrict its scope.²⁶ Commentators have observed that the Court appeared to

18. See *supra* note 6 and accompanying text.

19. See *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015) (holding there was no private right of action to seek injunctive relief with respect to violations of the Medicaid provisions of the Social Security Act); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (holding that there was no private right of action under 42 U.S.C. § 1983 to enforce the Family Educational Rights and Privacy Act); *Alexander v. Sandoval*, 532 U.S. 275, 288, 293 (2001) (holding that there was no private right of action to enforce the Department of Transportation's regulation prohibiting policies or practices with discriminatory effects under Title VI of the Civil Rights Act of 1964).

20. 532 U.S. at 288, 293.

21. 536 U.S. at 287.

22. *Id.* at 302.

23. 135 S. Ct. at 1378.

24. *Id.* at 1387.

25. *Id.* at 1383.

26. *Id.* at 1385.

bend over backwards to avoid cognizing judicial enforcement of the Medicaid statute, misapplying its newly articulated test to the facts at hand.²⁷

Federal authority to adopt laws that might limit state policymaking and the ability of private parties to enforce what federal laws remain valid have diminished. This state of affairs has increased the power of state governments in proportion to that reduction in federal power.

c. States and localism

One of the more common rhetorical tactics of states that are trying to justify the failure to constrain local authority is that certain areas of policymaking are the province of exclusive municipal control. The degree of legal foundation for this assertion varies from state to state, but ultimately the source of all local authority is in state law. In theory, this means that states – defined broadly to include all of their branches of government – are responsible for all local decision-making.

Nonetheless, practicalities may intervene and are, at minimum, important for understanding what steps might be necessary in order to actually implement state land use reforms that mitigate exclusionary zoning. The primary relevant division among states in initiating that discussion is whether a state follows the Dillon’s Rule, is a home rule state, or is somewhere in between those two poles.²⁸ Secondly, among home rule states, it is important to determine whether the source of legal authority for that designation is found in the state constitution, a statute, or the common law. Notwithstanding that the content of a state constitution is within the control of a state, amending a state constitution in order to allow the state to supersede local land use regulations would be a more laborious, long-term endeavor than modifying a statute.

It is helpful to briefly define what these different regimes entail. Under Dillon’s Rule, the powers of municipalities are limited to those which the state has explicitly granted or which are necessarily implied by an explicit grant of authority.²⁹ With respect to local land use regulation, the most common explicit grant of power is a state zoning enabling act.³⁰ States that adhere to Dillon’s Rule may vary somewhat in how rigorously courts police the limits of local authority, particularly

27. Steve Vladeck, *Armstrong: Is Utterly Disingenuous Statutory Interpretation Ever Worth It?*, PRAWFSBLAWG (Mar. 31, 2015, 8:27 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/armstrong-is-utterly-disingenuous-statutory-interpretation-ever-worth-it.html>.

28. As of the time of publication, 29 states follow Dillon’s Rule and nine are strong home rule states. The remaining 12 states have either statutory or constitutional grants of home rule authority, but either the substantive scope of that authority is limited or that authority is not granted to all municipalities.

29. See *Arlington Cnty. v. White*, 528 S.E.2d 706, 708 (Va. 2000).

30. See VA. CODE ANN. §§ 15.2-2280-2316 (2016).

those which are purported to have been necessarily implied by the state legislature.³¹ Under home rule, local governments are generally presumed to have broad powers.³² However, even in states in which there is a constitutional basis for home rule, state legislatures may abrogate the authority of home rule municipalities by adopting specific legislation.³³ A very few states, however, impose limits on the types of laws that state legislatures can pass that limit home rule. For example, the Kansas Constitution requires that any such laws apply uniformly to all municipalities.³⁴ Because state legislatures, even in home rule states, generally can displace local regulatory power by enacting specific laws, it is unlikely that a constitutional amendment would ever be necessary to set the stage for enhanced state regulation of land use.

Although the law of home rule is an important consideration, so is the culture. This is the case even in states where there is no longstanding legal authority for home rule. For example, Westchester County Executive Rob Astorino referred to home rule as a “power long cherished in New York” in arguing against HUD’s attempts to bring the county into compliance with the duty to AFFH by rooting out exclusionary zoning in affluent, predominantly white municipalities.³⁵ Although the New York State Constitution and the state’s General Laws have home rule provisions,³⁶ they are relatively limited in scope, stopping short of endowing municipalities with the police power, and of recent vintage in comparison with other states. Notwithstanding the state’s home rule laws, its courts continue to articulate Dillon’s Rule in weighing the scope of local governmental power.³⁷ There is nothing in New York law that would prevent the state from statutorily imposing a regime with the power to override local land use decisions.³⁸ Some, however, would likely see such a law as a significant cultural shift.

31. 528 S.E.2d at 712.

32. See FLA. CONST. art. VIII, § 2(b) (2014) (“[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law”).

33. See OHIO CONST. art. XVIII, § 3 (2016) (limiting municipalities’ home rule powers to regulations that “are not in conflict with general laws”). However, a small number of state constitutions impose limits on the types of laws that state legislatures can pass that limit home rule. See KAN. CONST. art. XXII, § 5(b) (2014) (limiting the power of the state legislature to preempt local home rule to “statutes of statewide concern applicable uniformly to all cities”).

34. *Id.* (limiting the power of the state legislature to preempt local home rule to “statutes of statewide concern applicable uniformly to all cities”).

35. Alfred Branch, *Astorino Defends County on Affordable Housing Efforts*, BEDFORD-KATONAH PATCH (July 24, 2015), <http://patch.com/new-york/bedford/astorino-defends-county-affordable-housing-efforts>.

36. See N.Y. CONST. art. IX, § 2 (2002); N.Y. MUN. HOME RULE LAW § 10 (2011).

37. See *Sureway Towing, Inc. v. Martinez*, 779 N.Y.S.2d 109, 111 (N.Y. App. Div. 2004).

38. *Id.*

II. Exclusionary Zoning, States, and Residential Racial Segregation

a. *Early Origins*

The problem of residential racial segregation is inextricable from the history of land use regulation in the United States. Zoning, which emerged as a widespread practice in the 1910s and 1920s,³⁹ is very much a product of its time in two meaningful respects. First, zoning proponents' attempts to methodologically determine the highest and best use of land reflected the ideology of the Progressive Era reformers.⁴⁰ Although zoning ordinances have grown vastly more complicated over time, early ordinances straightforwardly classified parcels of land with regard to two characteristics: the types of uses allowed and the intensity of uses permitted.⁴¹ These early ordinances also imposed detailed restrictions on building heights, minimum lot sizes, set-backs, and other features.⁴² For example, a zoning ordinance might classify land into three types of use: R for residential, C for commercial, and I for industrial. There may be three intensities of use: 1 for low density, 2 for medium density, and 3 for high density. Thus, a parcel zoned R-1 would be restricted to low-density residential use. Second, from the start, the practice was used to exclude perceived outsiders in terms of race, national origin, religion, and socioeconomic status.⁴³ Indeed, even before the advent of traditional zoning, municipalities attempted to use their regulatory power to allocate space between groups of people on the basis of race.⁴⁴

A review of two seminal cases that reached the Supreme Court, *Buchanan v. Warley* and *Village of Euclid v. Ambler Realty Co.*, is instructive. In *Buchanan*, a white property owner sought specific performance of a contract to sell his property to an African American buyer.⁴⁵ The buyer's obligation to purchase under the contract was contingent on the ultimate determination of whether he had the right to occupy the parcel.⁴⁶ Under Louisville's local ordinances, it was unlawful for an African American to reside in a home on a majority-white block.⁴⁷ The Supreme Court invalidated the ordinance on the grounds that it violated the Due Process Clause of the Fourteenth Amendment by irrationally and unjustifiably restricting the seller's right to alienate

39. Christopher Silver, *The Racial Origins of Zoning in American Cities*, ARIZ. STATE UNIV., <http://www.asu.edu/courses/aph294/total-readings/silver%20-%20racialoriginsofzoning.pdf> (last visited Feb. 13, 2016).

40. DAVID M.P. FREUND, COLORED PROPERTY 50-51 (2007) (discussing the "scientific" origins of land use planning).

41. *Id.* at 82 (describing zoning ordinance of Euclid, Ohio adopted in 1922).

42. *Id.*

43. See KENNETH T. JACKSON, CRABGRASS FRONTIER 241-43 (1985).

44. *Id.*

45. *Buchanan v. Warley*, 245 U.S. 60, 69 (1917).

46. *Id.* at 70.

47. *Id.* at 70-71.

property.⁴⁸ Although Louisville's ordinance was at issue in *Buchanan*, that ordinance was reflective of a nationwide trend toward explicit racial zoning reflected in local laws in Baltimore, among other cities.⁴⁹ Those ordinances quickly fell away after the Court's decision, and racist local governments looked to other strategies for maintaining residential segregation.⁵⁰

Traditional zoning, as it developed at that time, proved to be a remarkably effective tool for doing so. New York City adopted the nation's first zoning ordinance in 1916, just two years before the Court's decision in *Buchanan*, and the practice spread rapidly over the course of the next two decades.⁵¹ In particular, zoning held a strong allure for newly forming suburban municipalities outside of industrial cities in the northeast and Midwest.⁵² The populations of these cities were booming at the time due to a combination of European immigration (prior to the adoption of restrictive laws in 1921 and 1924), and the first Great Migration of African Americans from the rural South, beginning just before World War I.⁵³ In the wake of World War I, nativist and white supremacist sentiment were at their height, Prohibition became the law of the land, and the Ku Klux Klan expanded from a regional to a national political force.⁵⁴ In this context, economically mobile white Protestants effectively used zoning to create buffers between the neighborhoods in which they resided and those in which perceived outsiders were permitted to live.⁵⁵

The Village of Euclid, Ohio was one such enclave that rapidly developed during the post-World War I era. Euclid, now a city, is located immediately to the east of Cleveland along the shores of Lake Erie. Though a majority of its population is African American today, just 1.3% of its population was African Americans in the 1920 Census.⁵⁶ Meanwhile, between 1910 and 1920, the size of Cleveland's African American population had more than quadrupled from 8,448 to 34,451.⁵⁷ Its adoption of a zoning ordinance in 1922 initiated a sequence of events that led to the Supreme Court giving its imprimatur to zoning. In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court applied a permissive rational basis standard in upholding Euclid's zon-

48. *Id.* at 82.

49. FREUND, *supra* note 39, at 59.

50. *Id.*

51. JACKSON, *supra* note 42, at 241-42.

52. FREUND, *supra* note 39, at 70-72 (describing proliferation of zoning ordinances in Michigan).

53. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 8-15 (2010).

54. FREUND, *supra* note 39, at 14-15.

55. *Id.* at 54-61.

56. U.S. Census Bureau; Census 1920, Ohio, Composition and Characteristics of the Population for Places of 2,500 to 10,000 (1922).

57. U.S. Census Bureau; Census 1920, Ohio, Age, for Cities of 10,000 or More (1922); U.S. Census Bureau; Census 1910, Ohio, Age, for Cities of 25,000 or More (1913).

ing ordinance in the face of a challenge to its validity under the Due Process Clause.⁵⁸

Sometimes forgotten in light of the Court's decisive opinion in *Euclid* is the decision of the U.S. District Court for the Northern District of Ohio, which the Court overturned.⁵⁹ In a decision holding that *Euclid*'s zoning ordinance violated the Due Process Clause, Judge Westenhaven saw past the facts of the instant case, which involved a property owner that wished to use its land for industrial purposes, to write that "the result to be accomplished is to classify the population and segregate them according to their income or situation in life."⁶⁰ The only reason why one household might live in a mansion, another in a duplex, and a third in an apartment, Judge Westenhaven concluded, was socioeconomic status.⁶¹ Thus, economic exclusion and, by extension, racial exclusion, were at the heart of zoning from its inception. And, though Judge Westenhaven's opinion reflected the prevailing white supremacism of his times in suggesting that the Louisville ordinance struck down in *Buchanan* might have been more justifiable than *Euclid*'s ordinance,⁶² it was clear at the time that economic exclusion meant racial and ethnic exclusion, as well.⁶³

b. Exclusionary Zoning and the Fair Housing Act

A new status quo emerged out of *Buchanan* and *Euclid*, which, despite some contrary currents, remains in place today. Explicit racial zoning, like that of Louisville in *Buchanan*, was not permissible, but race-neutral zoning that separated people on the basis of housing density and often restricted density altogether was acceptable.⁶⁴ The predictable effect, and often the intent, of the latter form of zoning, has been intense residential racial segregation. Among the many reasons for this causal relationship have been explicitly racially discriminatory federal mortgage lending policies that pushed middle-class and affluent African Americans into the rental housing market and the broader longstanding correlation between race and socioeconomic status in the United States.⁶⁵ With the revival of the Equal Protection Clause in the decades following *Euclid* and the passage of the Fair

58. *Vill. of Euclid v. Ambler Realty Co.*, 277 U.S. 365, 390 (1926).

59. *See Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 317 (N.D. Ohio 1924), overruled by *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

60. *Id.* at 309, 316-17.

61. *Id.* at 316.

62. *Id.* at 312-13.

63. *See* Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 606-08 (2001) (discussing the race relations context of *Euclid*); Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 60-61 (1993) (tracing the race-based origins of facially neutral land use controls).

64. Kosman, *supra* note 62, at 75, 79.

65. *See, e.g.*, FREUND, *supra* note 39, 99-175 (discussing the history of discriminatory mortgage lending policies and practices).

Housing Act (FHA) in 1968, new lines of attack in the struggle for inclusive land use policies emerged.⁶⁶

In the 1970s, three major cases illuminated the contours of fair housing and civil rights advocates' ability to challenge exclusionary zoning ordinances and reinforced the nexus between traditional, often called Euclidean, zoning and segregation. In *United States v. City of Black Jack*, the U.S. Court of Appeals for the Eighth Circuit held that the zoning ordinance of a developing suburb of St. Louis, Missouri violated the FHA because of its unjustified discriminatory effect.⁶⁷ Although the Civil Rights Division of the U.S. Department of Justice litigated the case in the Eighth Circuit, the case arose out of failed attempts by an affordable housing developer with the mission of promoting residential integration to build in Black Jack.⁶⁸ The City both incorporated and adopted its zoning ordinance, in substantial part, with the purpose of derailing that development proposal.⁶⁹ The case was the first in which a court applied the disparate impact or discriminatory effects test in deciding a case under the FHA.⁷⁰ *City of Black Jack* armed advocates with a powerful tool for combatting exclusionary zoning.⁷¹

The Supreme Court followed *City of Black Jack* by mitigating its utility in *Warth v. Seldin*, a case that hinged on the issue of standing in exclusionary zoning cases.⁷² In *Warth*, a variety of plaintiffs challenged the validity of the zoning ordinance of Penfield, New York, an affluent suburb of Rochester.⁷³ They alleged that the ordinance unconstitutionally excluded low-income people but did not include a claim of race discrimination in violation of the FHA.⁷⁴ Unlike in *City of Black Jack*, there was no developer prepared to build affordable housing in the event of an increase in the allowable density.⁷⁵ Thus, in assessing whether the individual plaintiffs who wished to move to Penfield could demonstrate injury-in-fact, the Court concluded that the plaintiffs had not demonstrated that, "absent the respondents' restrictive zoning practices, there [was] a substantial probability that they would have been able to purchase or lease in Penfield."⁷⁶ That holding was significant and has informed many lower court decisions on standing

66. See James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. Rev. 89, 111-14 (1993) (discussing the use of the Fair Housing Act to challenge exclusionary zoning).

67. *U.S. v. City of Black Jack, MO*, 508 F.2d 1179, 1188 (8th Cir. 1974).

68. *Id.* at 1182.

69. *Id.* at 1182-83.

70. *Id.* at 1184-85, 1188.

71. *See id.*

72. *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975).

73. *Id.* at 490.

74. *Id.*

75. *Id.* at 504.

76. *Id.*

in FHA cases because, unlike the *Warth* Court's decision with respect to the standing of white residents of Penfield who desired to live in a more diverse community, the plaintiffs who wished to move to Penfield failed to demonstrate Article III standing and not just prudential standing.⁷⁷

Lastly, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington Heights I*), the Supreme Court clarified that disparate impact claims are not cognizable under the Equal Protection Clause and articulated a test for inferring discriminatory intent from circumstantial evidence.⁷⁸ The underlying case involved a municipality's refusal to rezone land to allow a nonprofit affordable housing developer to build townhomes for low and moderate-income households in a predominantly white suburb to the northwest of Chicago.⁷⁹ In light of the demographics of the region, building the housing would have had the effect of fostering residential racial integration.⁸⁰ The Court decided the case shortly after issuing its decision in *Washington v. Davis*, which had already held that discriminatory intent was necessary to prove a violation of the Equal Protection Clause, but which was decided after the Seventh Circuit decision that the Court reversed in *Arlington Heights I*.⁸¹ The Court's test for inferring discriminatory intent has become the touchstone of disparate treatment analysis in exclusionary zoning cases under the FHA.⁸²

It is important to note that the Court remanded the case to the Seventh Circuit for further proceedings on the question of whether Arlington Heights' refusal to rezone the property in question violated the FHA in light of its disparate impact.⁸³ In *Arlington Heights II*, the Seventh Circuit held that it did, building upon the foundation laid by the Eighth Circuit in *City of Black Jack*.⁸⁴ Thus, by the late 1970s, it was clear the FHA had the potential to serve as a tool for remedying exclusionary zoning, but the constraints of standing doctrine and the difficulty of proving discriminatory intent through circumstantial evidence somewhat curtailed the effectiveness of that tool.

c. Exclusionary Zoning and Due Process

Although the Supreme Court's decision in *Euclid* gave municipalities a wide berth to adopt restrictive zoning and land use policies, that case did not put the theory that exclusionary zoning raises serious due

77. *Id.* at 517-18.

78. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-69 (1977).

79. *Id.* at 255.

80. *Id.*

81. *Id.* at 269-70.

82. *Id.* at 266-68.

83. *Id.* at 272.

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

process concerns to rest for two reasons.⁸⁵ First, although the rational basis test articulated by the Court in *Euclid* was deferential, the Court did not foreclose the possibility that some extreme policies might be discarded as arbitrary or otherwise unreasonable.⁸⁶ In fact, in *Nectow v. City of Cambridge*, decided just two years after *Euclid*, the Supreme Court held that the city's decision to zone the plaintiff's property, which was alleged to be better suited to industrial or commercial purposes in light of adjoining uses, as residential violated the Due Process Clause.⁸⁷ Although there has been a notable lack of federal due process cases building on *Nectow*,⁸⁸ the case still stands for the proposition that rational basis review in land use cases need not be entirely toothless.

While there are far more certain avenues for challenging exclusionary zoning than federal due process claims, the Supreme Court's Equal Protection Clause jurisprudence with respect to disability status and sexual orientation over the last three decades suggests one potential path forward.⁸⁹ There is a colorable argument that discriminatory animus against low-income people motivates zoning restrictions on multi-family housing, mobile homes, and other types of housing that are likely to be affordable to low-income households. Although socioeconomic status is not a protected class under the Equal Protection Clause,⁹⁰ a desire to harm people because of their socioeconomic status by depriving them of access to housing may not have a rational basis.

85. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

86. See *id.*

87. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928).

88. Despite its arguably progressive outcome, *Nectow*, in its application of Substantive Due Process, was very much a product of a product of the conservative *Lochner* era. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding that New York's law establishing the maximum number of hours that bakers could work violated the Due Process Clause). The Supreme Court's shift away from the robust application of the Due Process Clause beginning in 1937 might have dissuaded litigants from bringing Substantive Due Process challenges to land use restrictions. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that Washington state's minimum wage law for women did not violate the Due Process Clause).

89. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that discriminatory animus was not a rational foundation for a policy prohibiting state or local government entities from adopting anti-discrimination protections for sexual orientation); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) (holding that "a bare. . . desire to harm a politically unpopular group" could not be a rational basis for a zoning ordinance limiting the location of group homes for persons with intellectual disabilities) (quoting *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

90. See *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 22-23 (1973) (holding that Texas's system of school financing did not violate the Equal Protection Clause or the Due Process Clause because poor people did not comprise a protected class and there was no fundamental right to education).

From the racial justice standpoint of promoting integration, it is important to bear in mind what the Due Process Clause might bring to the table that the FHA would not. Principally, the FHA is unlikely to provide significant leverage in homogeneous regions that are heavily white. The demographics of those regions, however, are not set in stone, and development patterns that unfold while those areas are not diverse are likely to affect levels of segregation as they diversify. Such change can occur quite rapidly.

Second, and with more power, state constitutions generally have their own due process clauses, which state courts can interpret as providing stronger protections than the Due Process Clause of the Fourteenth Amendment. Most notably, in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, the New Jersey Supreme Court held that, under that state's constitution, municipalities must use their zoning authority to allow for the development of their fair share of the regional need for low- and moderate-income housing.⁹¹ The court referenced both due process and equal protection principles in explaining the rationale for its decision, but the decision's focus on the inconsistency of Mount Laurel's zoning ordinance with the general welfare is more consistent with due process analysis.⁹² *Mount Laurel* and its progeny led New Jersey's legislature to adopt a statutory scheme for state regulation of local zoning that is discussed in detail in Section III of this article.⁹³

A few other states, while not embracing as active of a judicial role as in New Jersey, have some level of meaningful judicial review of exclusionary zoning policies that appears to go beyond that provided for by the Supreme Court in *Euclid*. The New Hampshire Supreme Court held that municipalities must consider the welfare of individuals who live outside of their boundaries in exercising their zoning powers in order to comply with the state's zoning enabling act and that, as a result, restrictive zoning may be impermissible.⁹⁴ The court did not reach the constitutional issue in that case, but its interpretation of the enabling statute was consistent with due process principles.⁹⁵ In contrast to New Jersey, the court narrowly circumscribed developers' access to a builder's remedy for exclusionary zoning, leaving the burden of proving that a proposed use is reasonable on the developer.⁹⁶ In *Willistown Township v. Chesterdale Farms, Inc.*, the Supreme Court of Pennsylvania held that municipalities must "provide for a fair share of . . . acreage for apartment construction."⁹⁷ This is arguably a substan-

91. *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 67 N.J. 151, 174 (1975).

92. *Id.* at 174-75.

93. N.J. STAT. ANN. §§ 52:27D-301-329.9 (1985).

94. *See Britton v. Town of Chester*, 134 N.H. 434, 440-41 (1991).

95. *Id.*

96. *Id.* at 443-44.

97. *Twp. of Willistown v. Chesterdale Farms Inc.*, 341 A.2d 466, 468 (Pa. 1975).

tially lower bar for a municipality to clear than that of *Mount Laurel* or *Britton* as the inquiry is focused on the reasonableness of the percentage of a municipality's land to be zoned for multi-family housing rather than the relationship between the amount of land and regional need for affordable housing.⁹⁸ In *Berenson v. New Castle*, the New York Court of Appeals adopted what, in practice, has turned out to be a similar approach.⁹⁹ Although the rhetoric of that court's decision focused on whether municipalities have considered the regional need for affordable housing,¹⁰⁰ subsequent decisions applying the decision have not been successful in the absence of near total bans on multi-family housing.¹⁰¹ Although due process challenges to exclusionary zoning fact an uphill struggle, targeted attempts to build upon this area of the law under state constitutional provisions may expand the fair housing advocacy toolkit.

d. Exclusionary Zoning Today

Although FHA litigation has proven successful in reducing some barriers to the development of affordable housing in targeted communities, the strategy generally has not had a systemic effect. Observers can find proof of that contention in the fact that exclusionary zoning is still relatively widespread and in the persistence of litigation to this day. If the major exclusionary zoning lawsuits of the 1970s would have had their intended effect, local governments that were not defendants in those actions would be deterred from engaging in similar practices. Three important trends in contemporary efforts to eradicate exclusionary zoning through FHA litigation are worthy of note.

First, as an empirical matter, restrictive residential zoning is still quite common, particularly in metropolitan areas that are highly segregated by race. For example, in Westchester County, of the 31 predominantly white municipalities targeted for the development of affordable housing development under the consent decree in *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 26 towns and villages allow multi-family housing development as-of-right on less than 10% of all residentially zoned land.¹⁰² Eight of those towns and villages allow such development as-of-right on less than 1% of residentially zoned land.¹⁰³ Additionally, according to the Fair Housing Center of Greater Boston, 43% of municipalities in Greater

98. *Id.*; See *supra* notes 90, 93 and accompanying text.

99. *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975).

100. *Id.* at 242.

101. See *Suffolk Hous. Serv. v. Town of Brookhaven*, 511 N.E.2d 67, 70 (N.Y. 1987); *Suffolk Interreligious Coal. on Hous. v. Town of Brookhaven*, 575 N.Y.S.2d 548, 549-50 (N.Y. App. Div. 1991).

102. Monitor's Final Report on Westchester County's Analysis of Municipal Zoning, Exhibit 2, *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, No. 06-CV-2860 (S.D.N.Y. Sept. 13, 2013).

103. *Id.*

Boston allow multi-family housing on less than 10% of their land, and about 10% of municipalities either ban multi-family housing altogether or only allow multi-family housing for seniors, which is less likely to be occupied by people of color than family-occupancy housing.¹⁰⁴ Similar patterns are replicated throughout the country, particularly in the Northeast and Midwest.

The second is that advocates continue to litigate lawsuits similarly to *City of Black Jack* and *Arlington Heights II*.¹⁰⁵ There has not been a huge volume of these cases, and, for every successful challenge, there has been at least one that faltered in light of the standing requirements of *Warth*, an inability to marshal adequate statistical evidence, or the strength of the municipality's justification for its zoning policies.¹⁰⁶ Even when plaintiffs have succeeded, the relief that courts have been willing to grant has sometimes been meager, and the amount of time that it has taken to achieve some of those victories has been immense.¹⁰⁷ Despite those difficulties, the Supreme Court's recent decision upholding the disparate impact standard in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* has the potential to breathe new life into exclusionary zoning litigation as Justice Kennedy's majority opinion identified exclusionary zoning cases as comprising the heartland of the FHA.¹⁰⁸ Overall, traditional exclusionary zoning lawsuits under the FHA are still a viable tool for combatting exclusionary zoning; however, they have proven more successful at securing individualized relief on a case-by-case basis than they have at providing a general deterrent effect.

The third is *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County (Westchester)*, the recent landmark case construing the duty to AFFH that played a major role in motivating

104. *1970s-Present: Restriction of Multi-Family Zoning*, THE FAIR HOUSING CENTER OF GREATER BOSTON, http://www.bostonfairhousing.org/timeline/1970s-present-Local-Land_use-Regulations-2.html (last visited Oct. 26, 2015).

105. *See, e.g., Many Mgmt. Inc. v. Vill. of Garden City*, 985 F. Supp. 2d 390 (E.D.N.Y. 2013) (holding that a decision to rezone a property to allow townhomes but not apartments violated the FHA); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009) (holding that a moratorium on multi-family development violated the FHA); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (holding that a municipality's one-acre minimum lot size requirement for residential development violated the FHA).

106. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 65 AM. U. L. REV. 357 (2013). In particular, identifying plaintiffs with standing to challenge exclusionary zoning has been difficult. Affordable housing developers are often best positioned to prove that they have suffered injury as a result of land use barriers, but they may be unwilling to file lawsuits because they tend to be repeat players who are dependent upon municipal goodwill in order to function.

107. *Id.*

108. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2511 (2015).

HUD to develop its new regulation.¹⁰⁹ Although the plaintiff in *Westchester* brought its action under the False Claims Act based on the failure to properly engage in required planning activities rather than the FHA, the issue of exclusionary zoning has dominated discussions about the implementation of the settlement.¹¹⁰ Pursuant to a consent decree, the county was required to produce a new Analysis of Impediments (AI), the planning document that preceded the AFH, to Fair Housing Choice, among other requirements.¹¹¹ The county still has not prepared an AI that HUD has found acceptable because the county has failed to identify exclusionary zoning in any of its villages and towns.¹¹² As a result, HUD has reallocated tens of millions of dollars in federal grant funds from the county to other jurisdictions.¹¹³ Although HUD has not taken a similarly hard line against other jurisdictions by requiring them to identify and take action against exclusionary zoning in order to receive federal funds, the systemic dimensions of that type of approach are clear.¹¹⁴ Where case-by-case FHA litigation has proven inadequate to the task of eradicating exclusionary zoning, tying the receipt of federal funds to action to dismantle such segregative policies, including on the part of lesser units of local government, could lead to progress.

III. Successfully Promoting Residential Racial Integration through State Land Use Reform

As the litigation discussed in Section II of this article makes clear, most attempts to remediate exclusionary zoning have taken place at the local level; however, as the discussion of the role and powers of states in Section I makes clear, state governments have the ability and the obligation to take action to eradicate exclusionary zoning that perpetuates residential racial segregation, as well. The *Westchester* case, although involving a local government, illustrates how a larger unit of government may be responsible for the policies and practices of its

109. *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

110. Stipulation and Order of Settlement and Dismissal, *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, No. 06-CV-2860 (S.D.N.Y. Aug. 10, 2009).

111. *Id.*

112. *Westchester Cnty. v. U.S. Dep't of Hous. & Urban Dev.*, 778 F.3d 412 (2d. Cir. 2015).

113. *Id.*; *But see* Press Release, Governor Andrew M. Cuomo, Governor Cuomo, Congresswoman Lowey Announce Plan to Make \$5 Million Federal Community Development Investments Available to Westchester County Communities (Feb. 9, 2015) (on file with author), available at <https://www.governor.ny.gov/news/governor-cuomo-congresswoman-lowey-announce-plan-make-5-million-federal-community-development> (announcing the State of New York's plan to provide CDBG, HOME, and ESG funds available to communities in Westchester County).

114. *U.S. ex rel. Anti-Discrimination Ctr.*, 668 F. Supp. 2d at 564.

sub-parts.¹¹⁵ A handful of states have taken the initiative to develop and implement reforms to their land use regulation regimes that have the effect of reducing exclusionary zoning. This section addresses how three of those models operate when viewed through a race-conscious prism.

a. *New Jersey*

The New Jersey Fair Housing Act¹¹⁶ is in some ways the gold standard for state law innovations that mitigate exclusionary zoning in a manner that is well calibrated to achieve AFFH goals. At the same time, that system was the result of and continues to be fraught with litigation.¹¹⁷ That conflict is both a reflection of its effectiveness, which has riled exclusionary suburbs, and its complexity, which has even baffled supporters at times.¹¹⁸ Regardless, it is well worth the effort to try to understand how the law has worked in the past and is intended to work.

Under the New Jersey Fair Housing Act, an administrative agency, the Council on Affordable Housing (COAH), is responsible for determining each municipality's fair share of the regional need for housing that is affordable to moderate-income, low-income, and very low-income households.¹¹⁹ Under the statute, moderate-income households are defined as those earning between 50% and 80% of the area median income (AMI), low-income households are those making between 30% and 50% of AMI, and very low-income households are those making less than 30% of AMI.¹²⁰ Once COAH establishes the size of those allocations of units, individual municipalities that seek to avoid builder's remedy lawsuits are responsible for developing plans that provide a reasonable opportunity for the development of housing to meet those needs.¹²¹ When the process has worked effectively, compliant jurisdictions have generally met their obligations through the use of mandatory inclusionary zoning and through rezoning develop-

115. *Id.* at 548.

116. N.J. STAT. ANN. §§ 52:27D-301-329.9 (1985).

117. *See, e.g., In re Adoption of N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Hous.*, 110 A.3d 31 (N.J. 2015); *South Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*); *South Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (*Mount Laurel I*).

118. For instance, in 2011, the New Jersey Legislature adopted a bill substantially simplifying the provisions of the New Jersey Fair Housing Act and had the support of fair housing advocates in doing so. Governor Chris Christie vetoed the bill. *See* Matt Friedman, *Gov. Christie Rejects N.J. Bill's Affordable Housing Minimum Requirement*, NJ.COM (Jan. 25, 2011, 6:00 AM), http://www.nj.com/news/index.ssf/2011/01/gov_christie_rejects_nj_afford.html.

119. N.J. STAT. ANN. § 52:27D-307.

120. *Id.* § 52:27D-304.

121. *Id.* § 52:27D-309.

able land in order to accommodate higher density.¹²² When municipalities do not adopt effective plans, advocates are able to bring judicial challenges to those inadequate plans,¹²³ and developers may bring so-called “builder’s remedy” suits in order to allow them to construct housing that includes an affordable component.¹²⁴

A few things stand out about the New Jersey Fair Housing Act from a fair housing perspective that make the law a model for other states to follow. First, the law focuses on units that are affordable to households earning below 30% of AMI and between 30% and 50% of AMI in addition to those making between 50% and 80% of AMI.¹²⁵ Some other states focus exclusively on the production of units at between 50% and 80% of AMI, as do many jurisdictions with mandatory inclusionary zoning ordinances nationwide.

In most metropolitan areas, the correlation between race and ethnicity, on the one hand, and socioeconomic status, on the other, is likely to be much more pronounced below 50% of AMI than it is above that threshold.¹²⁶ Second, assessing housing need regionally better accords with the obligation to overcome, rather than simply mitigate, residential segregation.¹²⁷ By contrast, Massachusetts and Connecticut effectively set each municipality’s obligation at 10% of the municipality’s own housing stock, which is far below what any municipality’s fair share is likely to be. Third, a planning process informed by robust community engagement can empower historically

122. *Id.* § 52:27D-311.

123. *See In re Twp. of Warren*, 622 A.2d 1257 (N.J. 1993) (with the Public Advocate representing three public interest entities).

124. *See Mount Olive Complex v. Twp. of Mount Olive*, 774 A.2d 704 (N.J. Super. Ct. App. Div. 2001).

125. N.J. STAT. ANN. § 52:27D-303.

126. *See* MARGARET C. SIMMS ET AL., RACIAL AND ETHNIC DISPARITIES AMONG LOW-INCOME FAMILIES 11 (2009). Data that demonstrates the correlation between race and ethnicity and extremely low-income or very low-income status is limited because of limitations in Census data; however, according to a 2009 Urban Institute study, 53% of African American families and 45% of Latino families with incomes below 200% of the federal poverty level had incomes that were below 100% of the federal poverty level. By contrast, just 39% of white families with incomes below 200% of the federal poverty line had incomes below 100% of the federal poverty line. It is important to note that, aside from Alaska and Hawaii, there is geographic variation in the federal poverty line so it is not a proxy for AMI. Nonetheless, the data is illustrative of the broader point that there are demographic variations among income segments of the low-income population which tend to reflect greater disadvantage on the part of African American and Latino individuals and families.

127. *Affirmatively Furthering Fair Housing*, FEDERAL REGISTER (Jul., 2015), available at <https://www.federalregister.gov/articles/2015/07/16/2015-17032/affirmatively-furthering-fair-housing>.

marginalized communities, avoid the selection of low quality sites for rezoning, and build long-term political support for the statute.¹²⁸

The main drawbacks to the New Jersey approach are its complexity and the extent to which it has provoked political opposition. Although political challenges can be surmountable, they stymied the effectiveness of that state's law for several years. COAH has failed to adopt valid rules for determining fair share allocations because of Governor Chris Christie's opposition to the underlying statute.¹²⁹ In the face of that intransigence, the New Jersey Supreme Court retook judicial control of the process in 2015, basing obligations on the methodology used for prior rounds of the fair share allocation process.¹³⁰ The court's action was an important victory for fair housing advocates but also casts some doubt on the durability of administrative agencies as vehicles for implementing reforms to land use regulation with respect to affordable housing.¹³¹ As an additional note, the complexity of determining fair share allocations has, at times, led to some conflict with environmental conservation advocates in addition to the more predictable run-ins with suburban local governments.¹³² This occasional source of tension demonstrates the need to adopt a nuanced approach to greenfield development that neither encourages sprawl nor exempts exurban communities from providing opportunities for affordable housing development.

Empirical evidence about zoning and housing production under the New Jersey Fair Housing Act suggests that the existing framework is doing some good, but that greater enforcement of the statute's re-

128. JOHN POWELL ET AL., RECOMMENDATIONS FOR ASSURING ROBUST CIVIC ENGAGEMENT & EQUITY IN DETROIT'S SHRINKING CITY PLANNING EFFORT 2, *available at* http://www.kirwaninstitute.osu.edu/reports/2010/12_2010_EquityEngagement_ShrinkingCities.pdf.

129. See Brent Johnson, *N.J. Supreme Court Rebukes Christie Administration, Puts Courts in Charge of Affordable Housing*, NJ.COM (Mar. 11, 2015, 12:03 AM), http://www.nj.com/politics/index.ssf/2015/03/nj_supreme_court_rebukes_christie_administration_puts_courts_in_charge_of_affordable_housing.html; Salvador Rizzo, *N.J. Supreme Court Blocks Christie's Plan to Abolish Affordable-Housing Agency*, NJ.COM (July 10, 2013, 6:31 PM), http://www.nj.com/politics/index.ssf/2013/07/nj_supreme_court_blocks_christies_plan_to_abolish_affordable-housing_agency.html; Megan DeMarco, *Gov. Christie Abolishes N.J. Council on Affordable Housing*, NJ.COM (June 29, 2011, 9:31 PM), http://www.nj.com/news/index.ssf/2011/06/gov_christie_abolishes_nj_coun.html.

130. *In re N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Hous.*, 110 A.3d 31, 48-49 (N.J. 2015).

131. See Colleen O'Dea, *COAH is History: State's Top Court Declares Troubled Agency "Moribund"*, NJSPOTLIGHT.COM (Mar. 11, 2015), <http://www.njspotlight.com/stories/15/03/11/coah-is-history-supreme-court-declares-troubled-state-agency-moribund/>.

132. See MaryAnn Spoto, *N.J. Appellate Court Upholds Highlands Council Plan to Prevent Housing Development in Environmentally-Sensitive Area*, NJ.COM (Aug. 16, 2011, 5:50 AM), http://www.nj.com/news/index.ssf/2011/08/court_upholds_highlands_counci.html.

quirements is needed in order to truly overcome the effects of exclusionary zoning.¹³³ Between 1980 and 2012, New Jersey produced 52,160 affordable units as a direct result of the *Mount Laurel I* decision and the New Jersey Fair Housing Act, which was enacted in 1985.¹³⁴ This total was higher than the total number of affordable housing units produced through any of the other models discussed in this article for which data is available.¹³⁵ In a 2011 study, a research team from Rowan University found that the proportion of low-density residential development had actually increased, while the proportion of high-density residential development had decreased after the enactment of the New Jersey Fair Housing Act.¹³⁶ However, that study suggested that, but for the law, the imbalance in favor of low-density development would have been even more pronounced.¹³⁷ Indeed, as over 80% of municipalities with fair share obligations under the act have not seen the development of sufficient affordable housing to meet their obligations,¹³⁸ it does not appear that low standards have contributed to prevailing patterns of low-density development. Rather, a significant amount of high-density development has occurred within areas that were slated for such development because of planning initiated in response to statutory obligations.¹³⁹ Although the New Jersey model is better attuned to fair housing goals than any other, a combination of stronger enforcement, more ambitious goals, and a nuanced approach to growth management at the periphery of metropolitan areas might result in a more effective regulatory system for mitigating exclusionary zoning.¹⁴⁰ Lastly, and this is true of all regimes, New Jersey's system remains reliant on the willingness and ability of private developers to build housing including an affordable component as there is no affirmative obligation on the part of municipalities to subsidize development.

133. *In re N.J.A.C.*, 110 A.3d at 48-49.

134. RACHEL G. BRATT, OVERCOMING RESTRICTIVE ZONING FOR AFFORDABLE HOUSING IN FIVE STATES: OBSERVATIONS FOR MASSACHUSETTS 159 (Feb. 10, 2012).

135. *Id.*

136. JOHN HASSE ET AL., EVIDENCE OF PERSISTENT EXCLUSIONARY EFFECTS OF LAND USE POLICY WITHIN HISTORIC AND PROJECTED DEVELOPMENT PATTERNS IN NEW JERSEY: A CASE STUDY OF MONMOUTH AND SOMERSET COUNTIES 22 (2011).

137. *Id.* at 24.

138. BRATT, *supra* note 133, at 126.

139. HASSE ET AL., *supra* note 135, at 23.

140. A significant portion of low-density single family residential development in New Jersey took place outside of so-called Smart Growth Areas. *Id.* at 22. These areas generally have not been targeted for high fair share allocations because of a variety of factors including distance from job centers, lack of supportive services, and environmental concerns. However, zoning barriers in these locations, while high enough to deter affordable housing development, have been too low to dissuade developers from building luxury housing. In order to effectively co-locate new market rate development and new affordable housing, either stricter limits on growth in rural or exurban areas or a higher fair share allocations for such areas may be necessary.

b. *California*

California's Housing Element is a required component of each municipality's General Plan.¹⁴¹ Thus, as in New Jersey, there are opportunities for community engagement in the process of developing the document. Municipalities are required to identify sites and sufficiently zone properties to absorb each community's allocation of the future need for housing for very low-income (between 30% and 50% of AMI), low-income (between 50% and 80% of AMI), moderate-income (between 80% and 120% of AMI), and above moderate-income (greater than 120% of AMI) households.¹⁴² Unlike New Jersey, California does not include allocations of regional housing need for households earning less than 30% of AMI although planning efforts must address those needs in a vaguer manner.¹⁴³ The comparative failure of California's Housing Element requirement to address the needs of households below 30% of AMI makes the model less valuable than that of New Jersey from a fair housing perspective.¹⁴⁴

Like New Jersey, the authority to determine regional housing need is vested in an administrative agency, the California Department of Housing and Community Development.¹⁴⁵ California's system is made more complicated because the sub-allocation of the need to individual municipalities within regions is conducted by the various councils of governments.¹⁴⁶ Thus, for a municipality in Los Angeles County, the state agency would determine the regional housing need for Southern California, and then the Southern California Association of Governments would determine that city or town's share of the regional need. This added layer of administrative governance has positive and negative features. It increases the risk of methodological inconsistency in determining municipalities' allocations of regional housing need, but it also has the potential to increase local buy-in to the system by fostering both the perception and the reality of responsiveness to context-specific concerns.

With respect to enforcement, advocacy organizations can challenge the validity of municipalities' housing elements in state court, and attorney's fees are available to prevailing plaintiffs in those suits. Like in New Jersey, affordable housing developers have a builder's remedy; however, that remedy is only available if at least 49% of its units are

141. CAL. GOV'T CODE § 65580 (2000).

142. *Id.* § 65583(c)(1)(A); *but see* Brian Augusta, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503, 540-41 (1999) (arguing for reforms to the Housing Element law that would require greater specificity in the identification of sites).

143. *See* GOV'T § 65583(a)(1) (2000) (requiring jurisdictions to analyze extremely low-income housing needs).

144. *Id.*

145. *Id.* § 65584.01.

146. *Id.* § 65584.03.

affordable to very low-, low-, and moderate-income households.¹⁴⁷ California, accordingly, has a somewhat weaker mandate than New Jersey though the availability of attorney's fees has proven to be a sufficient incentive to ensure that there is at least some enforcement activity by advocates.¹⁴⁸ In highly populated metropolitan areas that have a solid base of advocacy organizations and community stakeholders that are able to participate in the development of jurisdictional Housing Elements, this enforcement structure is largely adequate. In exurban and rural areas, its weaknesses are more glaring. A court order to redo a Housing Element is only worth so much if no stakeholder groups have the capacity to influence the revision process. Meanwhile, it may be profitable for a developer to construct mixed-income multi-family housing in outlying communities if allowed to do so at a higher density than permitted by existing zoning. The absence of a mechanism for administrative enforcement of California's Housing Element law may be seen as a shortcoming,¹⁴⁹

Unfortunately, it is not possible to determine how many units of affordable housing California has produced as a result of the Housing Element requirement because of a lack of adequate data.¹⁵⁰ Nonetheless, there is clear evidence that new housing in jurisdictions with compliant Housing Elements is more likely to be multi-family housing than in communities that are out of compliance, and there is some support for the contention that the Housing Element requirement has increased housing production overall.¹⁵¹ It also appears that the proportion of California jurisdictions with compliant Housing Elements is higher than the proportion of New Jersey municipalities that met their prior round fair share obligations though it is important to note that a compliant Housing Element is far from a guarantee that low- and moderate-income housing production will meet a California jurisdiction's share of regional housing need.¹⁵² The absence of data on the portion of that housing that is affordable highlights the need to incorporate strong recordkeeping and reporting requirements into any statutory regime. Lastly, it is important to note that, for parts of the period in which the Housing Element has been in effect, California has had other laws, such as the California Coastal Act,¹⁵³ and prevailing state court decisions, such as those limiting the applicability of

147. *Id.* §§ 65583(g), 65589.5(d).

148. *Id.* § 65589.5(k).

149. See Ben Field, *Why Our Fair Share Laws Fail*, 34 SANTA CLARA L. REV. 35, 78 (1993) (arguing that litigation had proven to be a "poor enforcement tool" and that administrative enforcement would be more effective).

150. BRATT, *supra* note 133, at 143-45.

151. *Id.* at 136.

152. *Id.* at 138.

153. See CAL. PUB. RES. CODE §§ 30600(a), 30106 (2016)

inclusionary zoning,¹⁵⁴ that make the development of affordable housing more difficult under some circumstances. Mandatory inclusionary zoning is an especially important tool for ensuring affordability when a statutory regime presupposes that density is a proxy for affordability.

c. Massachusetts and Connecticut

In comparison to New Jersey and California, the Massachusetts¹⁵⁵ and Connecticut¹⁵⁶ models deemphasize the planning process and empower multi-family housing developers. In each state, municipalities in which less than 10% of the housing stock is affordable to households at 80% of AMI are subject to a builder's remedy.¹⁵⁷ Developers in Massachusetts proposing mixed-income housing under such circumstances face a simplified, streamlined application process in trying to secure zoning approval and permits.¹⁵⁸ In both states, if the developer's application is denied, they have the ability to appeal the denial and have their appeal adjudicated under a more favorable standard than would be applicable under nearly all states' land use laws.¹⁵⁹ In Massachusetts, an administrative agency hears that appeal whereas the state courts hear appeals in Connecticut.¹⁶⁰ In Massachusetts, the administrative agency's determination is ultimately appealable to superior court.¹⁶¹ With respect to enforcement, advocates and community members who are not developers do not have the ability to challenge the conduct of municipalities under these laws. Unfortunately, the Massachusetts law does not distinguish between family-occupancy, which is more likely to promote integration, and senior housing in determining eligibility for the builder's remedy.¹⁶² By contrast, although Connecticut does allow municipalities that are seeking to show that they have met the 10% threshold to count elderly units, the statute wisely weights family-occupancy units more heavily than elderly units.¹⁶³

154. See *Palmer/Sixth St. Properties, L.P. v. City of L.A.*, 175 Cal. App. 4th 1396, 1410-11 (Cal. Ct. App. 2009) (holding that the application of mandatory inclusionary zoning to rental properties constituted rent control in violation of the Costa-Hawkins Act).

155. MASS. GEN. LAWS ch. 40B, §§ 20-23 (2003).

156. CONN. GEN. STAT. § 8-30g (2013).

157. MASS. GEN. LAWS ch. 40B, § 20; CONN. GEN. STAT. § 8-30g(k).

158. MASS. GEN. LAWS ch. 40B, § 21; Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L. J. 877, 892 (2006).

159. MASS. GEN. LAWS ch. 40B, § 22; CONN. GEN. STAT. § 8-30g(f).

160. MASS. GEN. LAWS ch. 40B, § 23; CONN. GEN. STAT. § 8-30g(f).

161. MASS. GEN. LAWS ch. 40B, § 22.

162. See Orfield, *supra* note 157, at 892-93 (contending that there is little evidence that the Massachusetts law promotes integration because of its failure to distinguish between family-occupancy and elderly units).

163. CONN. GEN. STAT. § 8-30g(l)(6).

Although Massachusetts and Connecticut deemphasize the planning process, Massachusetts holds out the possibility of avoiding a stringent builder's remedy if municipalities engage in effective planning.¹⁶⁴ Those options, however, are in not nearly as widespread use as equivalent housing plans in New Jersey and California, and the portions of the respective states that remain subject to a builder's remedy are significant. Since Housing Production Plans in Massachusetts must address the needs of very low-income households, any strengthening of the planning components of these statutes is likely to have positive fair housing ramifications.¹⁶⁵

By confining the scope of municipalities' legal obligation to housing that is affordable at 80% of AMI and creating structures that downplay the role of community-based stakeholders and advocates, these laws have clear shortcomings.¹⁶⁶ Additionally, as noted above, it is highly unlikely that a jurisdiction's fair share of affordable housing need would ever comprise just 10% of its own housing stock. Thus, there are real limitations on the potential of these tools to foster significant levels of residential racial and ethnic integration.

The Massachusetts and Connecticut models do have their strengths, however. Namely, they are comparatively much easier to administer and do not require nearly as much expertise as do New Jersey and California.¹⁶⁷ Developers find the streamlined permitting and appeals process to be helpful to their activities, which translates into hard units on the ground.¹⁶⁸ Connecticut also requires developers seeking to use the builder's remedy to engage in affirmative fair housing marketing, which should be mandatory under any type of regulatory regime.¹⁶⁹ Nonetheless, those positive features, while serving a legitimate public purpose by increasing the supply of housing for households earning 80% of AMI, are not well calibrated to serving the goals of the FHA. Additionally, the Massachusetts and Connecticut laws – despite their less ambitious scope – have been subject to the constant threat of repeal or dilution.¹⁷⁰

164. 760 MASS. CODE REGS. § 56.03(4).

165. *Id.* § 56.02.

166. *Id.*

167. *But see* Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 577-79 (1993) (recommending strategies for addressing delays in the Massachusetts administrative appeals process).

168. *Id.* at 555.

169. CONN. AGENCIES REGS. § 8-30g-7(a)(1)(E) (2016).

170. *See, e.g.*, Kathleen Burge, *Critics Push for Repeal of 40B*, THE BOSTON GLOBE (Oct. 17, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/10/17/critics_push_for_repeal_of_40b; Mary E. O'Leary, *Connecticut Lawmakers Fight Affordable Housing Regulations*, THE NEW HAVEN REGISTER (Feb. 5, 2015, 11:19 PM), <http://www.nhregister.com/general-news/20150205/connecticut-lawmakers-fight-affordable-housing-regulations>.

Neither Massachusetts nor Connecticut has been as successful in producing affordable units through their regimes as New Jersey. Between 1969 and 2012, Massachusetts's law resulted in the production of 30,703 units of affordable housing.¹⁷¹ Between 1990 and 2015, developers in Connecticut produced approximately 7,500 units as a result of that state's law.¹⁷² According to an analysis by Professor Rachel Bratt of Tufts University, adjusted for population size, Massachusetts produced 48 units of affordable housing per 10,000 residents while New Jersey produced 62 units of affordable housing per 10,000 residents.¹⁷³ Applying the same methodology to Connecticut, that state has produced 22 units per 10,000 residents. It is important to keep in mind that the Massachusetts program has been in place for the longest duration while the Connecticut program has been in place for the shortest amount of time.¹⁷⁴ Nonetheless, that consideration does not change the fact that New Jersey has been the most productive state on a per year basis while Connecticut has been the least productive.¹⁷⁵ From a fair housing perspective, the Massachusetts model has notably resulted in production through its law occurring in municipalities with high median incomes and predominantly white populations in comparison to communities that have significant amounts of affordable housing that was produced through other programs.¹⁷⁶

d. Extracting a model

In attempting to extract a model for other states from New Jersey, California, Massachusetts, and Connecticut, a handful of features are salient. An effective state land use regulatory regime should: (1) empower local governments, advocacy organizations, and community-based stakeholders to engage in a collaborative planning process that increases acceptance of municipalities' obligations and avoids the risk of adverse site selection for rezoning and/or subsidized development; (2) ensure that both planning activities and enforcement activities address the needs of households earning less than 50% of AMI; (3) require affirmative fair housing marketing in connection with the units produced under the relevant obligation; (4) provide for private enforcement by both multi-family developers and advocacy organizations; and (5) strong recordkeeping and reporting requirements. These features are grounded in lessons learned both from the states that have had these laws and from decades of fair housing advocacy more generally. To some extent, they are also based on common sense.

171. BRATT, *supra* note 133, at 159.

172. See O'Leary, *supra* note 169.

173. BRATT, *supra* note 133, at 159.

174. *Id.*

175. *Id.*; O'Leary, *supra* note 169.

176. BRATT, *supra* note 133, at 159.

1. A Planning Mandate Emphasizing Site Selection and Municipal Buy-In

The implementation of the consent decree in *Westchester* has been replete with controversy, but, unlike in many efforts to remediate exclusionary suburban policies, that controversy has tended not to involve site selection.¹⁷⁷ Chappaqua Station, a proposed 28-unit development in the Town of New Castle that would be located on a sliver of land between train tracks and a highway onramp, is the exception to that rule.¹⁷⁸ Chappaqua Station has faced significant community opposition from individuals based on the poor choice of site, regardless of whether or not they oppose any affordable housing development in their neighborhood.¹⁷⁹ It has also drawn criticism from the Anti-Discrimination Center, the civil rights organization that originally brought the *Westchester* suit.¹⁸⁰ Some of the other development sites that Westchester County is using to fulfill its obligation under the consent decree suffer from similar defects, whether they are geographically isolated, subject to adverse environmental features, and/or on the border of communities with much more diverse populations.

These types of sites may be appealing to developers because they are comparatively inexpensive or are properly zoned for multi-family housing. Their potential to promote meaningful racial or ethnic integration, however, is less than that of developments that are better incorporated into the fabric of communities. They may also raise health or safety risks for their residents. When both exclusionary community opponents and civil rights advocates are in agreement about a site, there may be a real problem, even if there are grounds to doubt the good faith of one side.

Concentrating affordable housing development efforts in high opportunity areas on sites that do not have obvious flaws also has the potential to play an important role in exposing the motivations of area residents who continue to oppose development. When the legitimate reasons for opposing a particular development disappear, only pretext or irrationality remains. In the context of legal challenges to exclusionary zoning, the inability of a municipality to show a convincing reason for its decision to block a proposal is hugely valuable for advocates.

177. *Monitor Identifies Westchester Violation of Consent Decree*, ANTI-DISCRIMINATION CENTER (May 11, 2015), <http://www.antibiaslaw.com/article/monitor-identifies-westchester-violation-consent-decree>.

178. *Id.*

179. David M. Wilson, *Chappaqua Station Affordable Units Back on Track*, THE JOURNAL NEWS (July 3, 2015, 2:37 PM), <http://www.lohud.com/story/money/personal-finance/taxes/david-mckay-wilson/2015/07/03/chappaqua-affordable-housing-track/29667647/> (describing how town board member has not done anything to make alternative site viable for housing).

180. *Monitor Identifies Westchester Violation of Consent Decrees*, *supra* note 176.

Taking a planning-based approach to reducing exclusionary barriers is important from a fair housing perspective because doing so reduces the risk of site selection that does not contribute to integration and harms the health and safety of low-income people of color. In local plans, states should require covered municipalities to identify sites for new affordable housing development that are not isolated from residential neighborhoods, that are not proximate to adverse land uses, and that have reasonable access to amenities.¹⁸¹ These criteria should be expressly incorporated into the applicable statute. The former requirement may seem harder to make objective than the latter two, but the means by which jurisdictions isolate multi-family housing from single-family neighborhoods are well known. Specifically, the law should require the identification of sites that are not separated from single-family neighborhoods by major roads, train tracks, industrial or commercial zones, or large parks. Small parks or two-lane roads may not raise the same issues. The necessary second step that follows site selection based on inclusive principles is rezoning. Without a requirement to ensure that selected sites are appropriately zoned for housing with an affordable component, a site selection requirement is meaningless.

The type of planning process described above would give municipalities a substantial amount of ownership over the process of reducing exclusionary zoning. The implementation of such a policy may still entail political controversy, but the magnitude of that furor may be lessened over that which a process that solely empowers developers might generate. Additionally, aside from the prospect of municipal buy-in to the process, structuring state regulation of exclusionary zoning as a planning mandate allows state officials to sell the structure to the electorate as being one that empowers localities. From a messaging stand point, it is helpful to return to the fundamental observations that states have an obligation to eliminate exclusionary zoning at the municipal level and that exclusionary local zoning is often unlawful. Compared to the potential consequences of liability for violations of the FHA, the loss of federal funds, or a stringent builder's remedy, a planning mandate with strong site selection and rezoning requirements is a clear "second-best" solution, even for resistant municipalities.

2. Focus on Very Low-Income and Extremely Low-Income Households

From a fair housing perspective, this criterion of an effective state regulatory regime is straightforward. In many regions across the coun-

181. See Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of October 25, 2010 through April 25, 2011, *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, No. 06-CV-2860 (S.D.N.Y. Apr. 25, 2011).

try, non-Latino whites may comprise a relatively similar proportion of the population making between 50% and 80% of AMI to that of African Americans and Latinos.¹⁸² At the same time, it is very unlikely that, outside of areas with very small populations of people of color, non-Latino whites will make up a similar proportion of the population earning less than 50% of AMI as African Americans and Latinos.¹⁸³ For example, in the Washington, D.C. metropolitan area, the AMI for Fiscal Year 2015 is \$109,200.¹⁸⁴ The Census Bureau's breakdown of household income by race and ethnicity does not precisely match the relevant percentiles of AMI for affordable housing eligibility, but the data nonetheless paints a vivid picture. 21.1% of non-Latino white households¹⁸⁵ earn between \$60,000 and \$100,000 as opposed to 23.7% of African American households¹⁸⁶ and 26.4% of Latino households.¹⁸⁷ By contrast, 24.2% of non-Latino white households earn less than \$60,000¹⁸⁸ as opposed to 46.3% of African American households¹⁸⁹ and 44.5% of Latino households.¹⁹⁰

With this knowledge of the importance of housing that is affordable below 50% of AMI, it is critical that states suffuse their statutory regime with an attention to the needs of very low- and extremely low-income housing. The specific points at which that attention should be incorporated are (1) the allocation of regional housing need, (2) the planning obligation of municipalities, and (3) the criteria for developers being able to assert a builder's remedy. States should give municipalities a menu of actions that they could take to address very low- and extremely low-income housing needs in the portions of their statutes elaborating upon the planning mandate. Lastly, while a typical builder's remedy may allow a developer to qualify if it is proposing housing that would be 20% affordable at 80% of AMI, a builder's remedy that is sensitive to fair housing concerns could require developers to build housing wherein 15% of units are affordable at 80% of AMI and 5% are affordable at 50% of AMI.

182. SIMMS ET AL., *supra* note 125.

183. *Id.*

184. *FY 2015 Income Limits*, U.S. DEP'T OF HOUS. AND URBAN DEV. (Mar. 6, 2015), <http://www.huduser.gov/portal/datasets/il/il15/index.html>.

185. *2009-2013 American Community Survey 5-Year Estimates, Table B19001H*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Sept. 22, 2015).

186. *2009-2013 American Community Survey 5-Year Estimates, Table B19001B*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Sept. 22, 2015).

187. *2009-2013 American Community Survey 5-Year Estimates, Table B19001I*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Sept. 22, 2015).

188. *See* source cited *supra* note 184.

189. *See* source cited *supra* note 185.

190. *See* source cited *supra* note 186.

3. Require Affirmative Fair Housing Marketing

When done well, affirmative fair housing marketing can play an important role in ensuring that development results in integration in practice, rather than merely in theory. Additionally, since many developers and municipalities are familiar with the HOME program's affirmative marketing requirements, instilling those principles into projects undertaken in connection with planning obligations should be uncomplicated. On a related note, neither municipalities nor developers should impose residency preferences with respect to affordable units in housing constructed in conjunction with a state regulatory regime. Residency preferences may violate the FHA and are likely to undercut the effectiveness of affirmative fair housing marketing efforts because applicants reached by marketing efforts would not be eligible for the housing under the terms of the preferences.

4. Prioritizing Enforcement by Advocates over Enforcement by Developers

When the planning process breaks down and municipalities continue exclusionary policies, there will be a need for private enforcement. The state administrative agency has a stake in ensuring compliance with the planning mandate but may face significant political hurdles to taking action against municipalities. Thus, without enforcement, any regulatory regime will crumble. That is the lesson of Minnesota, which has a law that shares some operational characteristics with California, but lacks meaningful enforcement provisions, such as a builder's remedy or a private right of action and prevailing party attorney's fees for community-based organizations and other housing advocates.

States should design their laws with the goal of empowering advocacy organizations to serve as the primary private enforcers of the law. They should do this by ensuring that the statute is written to recognize the standing of advocacy organizations to challenge inadequate or unimplemented municipal plans and by providing that prevailing plaintiffs in challenges to local plans are entitled to reasonable attorney's fees and costs. The statutory backdrop for California's Housing Element requirement puts advocates in a position to do this valuable enforcement work.

Developers still have a role to play in enforcing the law through builder's remedy suits, particularly in rural or exurban areas with limited advocacy capacity to engage in public participation processes around plans, but that role should be comparatively deemphasized. The most effective way of doing so is simply to follow the recommendations above for empowering advocates to challenge plans in court. If prevailing party attorney's fees are available, such lawsuits may be more practical for community-based organizations than intensive en-

agement in the planning process would be. Another, more novel way of ensuring the continuing role of advocates in the enforcement process would be to statutorily recognize the right of advocates to intervene in builder's remedy suits. In that event, if a developer is using the enforcement mechanisms of a state law to pave the way for development at a site that, while located in a high opportunity community, does not advance fair housing goals because of its adverse characteristics, the advocacy organization would be able to get those concerns before a judge.

5. Strong Recordkeeping and Reporting Requirements

States should require local governments to maintain records documenting not just their compliance with the requirement to prepare plans and rezone specified sites but also development that occurs on those sites or on sites that are developed as a result of builder's remedy lawsuits. Data maintained for reporting purposes on an annual basis should include the number of developments proposed; the number of developments actually started; the number of developments completed; the number of units by bedroom size for all developments; any affordability restrictions that apply to units; application data in relation to the Fair Housing Act's protected characteristics; and occupancy data in relation to those same characteristics. This type of data is necessary for determining whether developers and landlords are meaningfully complying with affirmative marketing requirements, gauging whether the location of affordable housing is translating into increased residential integration, and deciding what policy changes might more effectively address barriers to affordable housing development in high opportunity areas.

IV. Grounding Reform in Current Political Reality

States can clearly learn important lessons from the experiences of New Jersey, California, Massachusetts, and Connecticut. Having those models to point to as evidence of success should be a selling point for other states that are considering reform. The current political and social context offers other strong arguments for the urgency of reform, as well. Beyond the legal obligations of states as grantees of federal housing and community development funds, moving to eliminate exclusionary zoning could mitigate the harmful effects of concentrated poverty, serve valuable environmental goals, and facilitate the efforts of employers outside of central cities to attract and retain diverse, high-quality workforces. These are the types of arguments that should be salient across a broad range of states. Clearly, it will be easier to achieve reform in more politically progressive states, but the business community may be interested in policies that enable more of their workers to live closer to their jobs. The influence of the business com-

munity in moderate and conservative states could be leveraged to support policies that further fair housing choice.¹⁹¹

Likewise, avoiding the concentration of affordable, multi-family housing and distributing that housing more equitably across regions has fiscal benefits. When the tax base of individual communities is eroded over time, states and counties have to absorb the cost one way or the other. Policies that encourage the concentration of poverty by sealing off certain communities from affordable housing lead to reduced income tax revenue at the state level. As Patrick Sharkey's landmark book *Stuck in Place* demonstrates, childhood exposure to concentrated poverty significantly reduces the future earnings of individuals.¹⁹²

With respect to environmental concerns, remediating exclusionary zoning serves two important functions. First, allowing increased housing supply within the footprint of existing suburban communities and creating a framework whereby any further removed municipality would be subject to the same obligations should result in a reduction in the demand for housing in outlying areas.¹⁹³ Doing so would preserve open space. Second, enabling low-income people of color to live closer to suburban and exurban job centers could further reduce lengthy commutes.¹⁹⁴ By grounding appeals for state oversight of local zoning with respect to affordable housing in these types of concerns as well as in states' legal obligations, advocates should be able to make a compelling case for change.

V. Building a Bridge toward a New Land Use Regulation Paradigm

As Section II of this article illustrates, the road to the current land use regulatory context in the United States is a full century long. The first six decades of that process took on the appearance of a headlong

191. Although policies like those outlined in this article have not been adopted outside of more traditionally progressive states, the support of the business community for some of these policies has been encouraging and may suggest the existence of receptive audiences in other states. See Michelle Chapman, *Chamber Working to Preserve & Enhance State-Level Housing Production Policies*, GREATER BOS. CHAMBER OF COMMERCE (Oct. 17, 2011), <http://bos-tonchamber.com/chamber-working-to-preserve-enhance-state-level-housing-production-policies>; *In-Depth Case Studies*, HOUSINGPOLICY.ORG (July 18, 2011), http://www.housingpolicy.org/toolbox/strategy/policies/employer_assisted_housing.html?tierid=202 (detailing employer programs to support affordable housing, including in Georgia and Mississippi).

192. PATRICK SHARKEY, *STUCK IN PLACE* 162 (2013).

193. See Rolf Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 ENV'T & PLAN. B: PLAN & DESIGN 555 (1999) (finding that land use controls "that mandate low densities are found cumulatively to increase sprawl").

194. See Emily Badger, *The Commuting Penalty of Being Poor and Black in Chicago*, CITYLAB (Feb. 21, 2014), <http://www.citylab.com/commute/2014/02/commuting-penalty-being-poor-and-black-chicago/8457> (noting the higher commuting costs and longer commutes faced by African American Chicago residents as a result of the spatial mismatch of jobs and housing).

race toward exclusionary policies while the last four decades have been marked by occasional but ultimately not transformative attempts to press the brakes and restore balance. None of those attempts have fundamentally reshaped how people in communities on the ground think about land use regulation. As evidenced by the rhetoric of local policy-makers like Westchester County Executive Rob Astorino, many continue to see exclusionary zoning as something that is natural, inevitably local, and supportive of individual property rights. Of course, both historically and theoretically, it is none of those things.

By initiating conversations about statutory reform, states can reorient the popular understanding of zoning to what it can and, under federal law, must be. Zoning can be a tool for reducing households' exposure to environmental harms. It can be a tool for ensuring that workers have access to jobs and employers have access to workers. It can be a tool for minimizing the cost of providing public services and infrastructure. It can be a tool for protecting environmentally sensitive areas. Zoning is, and always has been, a manifestation of the robust powers of state governments, and not municipalities. If this conception of zoning informs public policy, through statutory reforms based on existing models, zoning can be a tool for affirmatively furthering fair housing.