Federal Anti-Segregation Milestones Demand Local Mobilization

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In June 2015, the US Supreme Court affirmed a legal tool that stands to hold municipalities and lenders accountable to fair housing and residential integration goals. In July, the Department of Housing and Urban Development released a rule that offers new points of leverage in the fair-housing planning process. However, both will require sustained mobilization if they are to have any real impact.

The past year has witnessed the most vigorous public discussion of residential segregation and fair housing in the US in decades. Organizing by Black Lives Matter activists has brought attention to ways in which municipal fragmentation, racial residential segregation, and the concentration of poverty contribute to stark racial inequalities in political power and access to opportunity. At the same time, the Supreme Court, in June of this year, upheld a crucial aspect of the Fair Housing Act[1]—disparate impact liability—necessary to challenge exclusionary zoning, reverse redlining, and counter other discriminatory housing practices. In July, the US Department of Housing and Urban Development (HUD) released a long-awaited new rule[2] that provides tools to support "meaningful actions (…) that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity." Finally, in August, fair housing was the star of a new HBO miniseries, *Show Me a Hero*[3], created by David Simon of *The Wire* fame. This article reviews how the United States came to be characterized by high levels of racial residential segregation. It analyzes the meanings of the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* (576 US __ (2015)) and of HUD's new Affirmatively Furthering Fair Housing rule, and speculates on the effect these milestones could have if advocates mobilize locally.

A brief history of discriminatory public and private housing policies

Although levels of average metropolitan-area black–white segregation have declined somewhat over the past three decades, they remain high (roughly 0.59 measured through the dissimilarity index[4]), and levels of Latino–white segregation have remained relatively consistent (roughly 0.50). Indeed, racial residential segregation has been one of the characteristic features of the US urban landscape for more than a century. As Douglas Massey describes it, "white Americans made a series of deliberate historical decisions to deny blacks full access to urban housing and to enforce their

1 See: www.scotusblog.com/case-files/cases/texas-department-of-housing-and-community-affairs-v-the-inclusive-communities-project-inc.

2 See: http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-084.

3 See: www.hbo.com/show-me-a-hero.

4 The dissimilarity index, which is the most commonly used measure of segregation, quantifies the unevenness with which two different groups (e.g. whites and Latinos) are distributed across neighborhoods within a metropolitan area. The measure ranges from 0 to 1, with a value of 0 indicating a completely even spatial distribution of the two groups and a value of 1 indicating complete spatial separation.

spatial isolation in society" (Massey 2008, p. 39). White mob violence against integrated neighborhoods in the late 1890s and early 1900s drove African Americans from their homes and was reinforced by local zoning restrictions and then racially restrictive covenants that largely prohibited African Americans from moving into white neighborhoods for the following half-century or more[5] (Brooks and Rose 2013; Higginbotham 1991).

Subsequent federal policy institutionalized existing discrimination in the real-estate, banking, and insurance industries. In 1935, the federal Home Owners' Loan Corporation supported lending policies that came to be known as "redlining," by creating "residential security maps" that appraised real-estate risk levels, consistently grading neighborhoods that were multiracial or predominantly African-American as high-risk. (Squires 1994, p. 53). These federal policies reinforced private lending policies that meant that residents of predominantly non-white neighborhoods would have to pay significantly more for mortgage financing, if they could obtain it at all. The Federal Housing Administration, the Veterans' Administration, and the majority of the banking industry discriminated in the mortgage programs that facilitated widespread suburbanization in the 1950s and 1960s, effectively locking black households out of the opportunity to move to new suburbs and limiting their ability to accumulate home equity. By purchasing subsidized homes in all-white postwar suburbs, white Americans "came to accept as natural the conflation of whiteness and property ownership with upward social mobility" (Self 2003, p. 16). Federally funded urban renewal programs from the 1950s into the 1970s razed many black neighborhoods that were seen as encroaching on white business districts and elite institutions, further dispossessing black households.

Together, the spatial segregation of African Americans through discrimination in home sales and rentals and the systematic disinvestment in black neighborhoods through discrimination in lending made it exceedingly difficult for African American families to accumulate home equity during the long, postwar economic boom (Oliver and Shapiro 2006). The most significant attempt to address this segregation was the Fair Housing Act (FHA), enacted in response to the urban uprisings that followed Martin Luther King's assassination in 1968. The FHA outlawed discrimination on the basis of race, religion, national origin, or sex in the sale, rental, or financing of a home. Although the FHA provided an essential framework prohibiting ongoing discrimination in housing, public funding for enforcement has been limited and its effect on the entrenched structures of discrimination has been significantly less than hoped.

Indeed, during the lending boom of the late 1990s and 2000s, many lenders exploited continuing high levels of residential segregation and targeted historically underserved black and Latino neighborhoods for high-cost loans in a process known as reverse redlining,[6] in which there was a two-tiered mortgage lending market, with separate and unequal products targeted at different neighborhoods (Steil 2011; Hwang, Hankinson, and Brown 2015). Even after controlling for credit scores, loan-to-value ratios, the existence of subordinate liens, and housing and debt expenses relative to individual income, black and Latino borrowers were significantly more likely to receive a high-cost loan than others (Bayer, Ferreira and Ross 2014; Rugh, Albright and Massey 2015). This discriminatory lending contributed to higher foreclosure rates in neighborhoods of color and the extraction of massive quantities of wealth from borrowers of color, further entrenching racial disparities in wealth at the household and neighborhood levels.

Can the past year's legal and policy developments make any dent in this system of entrenched segregation and racial inequality?

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[5] See: http://thinkprogress.org/economy/2014/08/14/3471237/ferguson-housing-segregation.

[6] See: www.nhi.org/online/issues/139/redlining.html.

The *Inclusive Communities* case

The largest government support for affordable housing is the Low-Income Housing Tax Credit (LIHTC) program administered by the Department of the Treasury and the Internal Revenue Service.[7] Indeed, the LIHTC program has contributed to the construction of more than 2.5 million housing units since the program's creation in 1986, roughly a third of all of the rental housing built in the United States in that time period (Schwartz 2014). The LIHTC program largely leaves each state to determine how tax credits within the state should be distributed[8] (Ellen *et al.* 2015).

In 2008, a non-profit fair-housing organization based in Dallas, Texas, the Inclusive Communities Project,[9] sued the Texas Department of Housing and Community Affairs (DHCA), alleging that the state's policies regarding the allocation of federal tax credits for affordable housing development perpetuated segregation. More than 90% of the affordable (non-elderly) units built with LIHTC funding in the city of Dallas were located in census tracts with a majority of non-white residents. Further, the Texas DHCA approved projects that were located in neighborhoods whose residents are mostly people of color at a significantly higher rate (49.7%) than it approved developments proposed for neighborhoods that were mostly white (37.4%).

The Inclusive Communities Project argued that, whether or not it could prove that the Texas DHCA had intended to discriminate against black and Latino homeseekers, Texas DHCA was still liable because its policies regarding the allocation of tax credits had a disparate impact on the basis of race despite the availability of less discriminatory alternatives. This argument was not novel, but it had been approved by all of the 10 federal appeals courts that had considered the question, and the trial court and the appellate court in this case concurred. The Supreme Court nevertheless granted review, suggesting that at least four of the justices wanted to overturn this settled precedent.

The Fair Housing Act makes it unlawful to "refuse to sell or rent (…) or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin" (42 USC § 3604(a)). The key issue in the *Inclusive Communities* case is whether the phrase "otherwise make unavailable or deny (…) because of race" encompasses claims based on the consequences (impact) of an action rather than the actor's intent.

In a decision written by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* (576 US __ (2015)), the Court affirmed that disparate impact claims are viable under the Fair Housing Act, preserving an essential tool for fair-housing and civil-rights advocates. The decision affirms courts' power to focus not just on the intent of the enactors of a policy but on the policy's actual effects, and in so doing to take into account measurable disparities if those disparities can be tied to a concrete policy and there is a less discriminatory alternative available.

The most groundbreaking aspect of the decision is potentially its reference to "unconscious prejudices" (p. 17). In the decision, the Court notes that disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment" (p. 17). Research in social psychology has established the ubiquity of implicit biases and the effects they have on our actions, with significant detrimental effects on members of historically excluded groups (e.g. Steele 1997; Greenwald and Banaji 1995; Kang *et al.* 2010). Courts, however, have not generally recognized the importance of unconscious prejudices. Instead, courts have often limited the reach of antidiscrimination laws to a narrow focus on actions or

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[7] The LIHTC program gives states and some local agencies the authority to issue federal tax credits for the construction or renovation of affordable housing units. Affordable housing developers apply to the LIHTC allocating agency for credits for a specific project. If the project is allocated the credits, then a syndicator, such as Enterprise Community Partners or the Local Initiatives Support Corporation, generally purchases the credits on behalf of an investor or group of investors in exchange for an equity stake in the housing development. This investor capital allows the developer to borrow less to finance the construction, and thus keep rents in the project more affordable.

[8] See: http://furmancenter.org/research/iri/discussion14.

[9] Website: www.inclusivecommunities.net.

individuals that express an explicit intent to discriminate. By recognizing the reality that many contemporary discriminatory actions are either disguised or unconscious, the decision opens up the possibility for greater attention to the broader antisubordination principle that is the foundation of civil-rights statutes like the FHA, one that seeks to address group-based inequalities even where there is not proof of malicious intent (Fiss 1976; Sturm 2001; Bagenstos 2006).

The Affirmatively Furthering Fair Housing rule

HBO's *Show Me a Hero* chronicles the struggles in the late 1980s and early 1990s over desegregation in Yonkers, a city in Westchester County, immediately north of New York City. In 1985, a federal judge found the city guilty of intentional discrimination in segregating its schools and public housing and ordered the city to build 200 units of scattered-site public housing in predominantly white neighborhoods. Residents and the city council refused to comply with the judge's order until the city was essentially bankrupted by fines for contempt of court.

The experience of Yonkers is not a relic of the past, however. The same discrimination, intransigence, and refusal to permit affordable housing in wealthy white communities in Westchester has again been the subject of federal litigation for the past decade[10]—and a federal court found in 2009 that Westchester had lied to HUD by claiming it had analyzed the impediments to fair housing, when in fact it had not. Westchester and HUD agreed that Westchester would build 750 units of affordable housing over seven years and take other actions to promote fair housing, but the county executive has instead vetoed fair-housing laws and refused to comply with the settlement agreement. Because the county has made clear that it will not use HUD funds in a way that furthers fair housing, HUD has finally refused to disburse federal community development funds to Westchester.

Westchester is the most dramatic example of the challenges HUD faces in ensuring that municipalities, especially wealthier and whiter ones, comply with the FHA's requirement that any entity that receives federal housing and community development funds takes meaningful steps to overcome patterns of segregation. To clarify the FHA's Affirmatively Furthering Fair Housing requirements, HUD this summer released a rule that spells out more clearly what it means to comply with civil-rights and fair-housing laws. The rule obligates HUD to provide municipalities and the public with data about patterns of segregation and disparities in access to high-performing schools, jobs, transportation, and environmental hazards. The rule also requires municipalities receiving HUD funds to engage in a more rigorous analysis of the local impediments to fair housing and to articulate steps it will take to overcome such obstacles. In addition, it requires municipalities to engage local communities in the preparation of the required Assessment of Fair Housing. The rule also states that HUD will not accept any Assessment of Fair Housing that is inconsistent with civil-rights or fair-housing requirements, presumably rendering that municipality ineligible for HUD funds until the Assessment is corrected. In response to concerns from state and local governments, HUD decided to phase in implementation of the rule and to give entities receiving less than $500,000 more time to comply. Roughly 20 localities will have an Assessment of Fair Housing due in 2016, with many more to follow in conjunction with the submission of their Consolidated Plans to HUD.

The new legal tools need grassroots forces to combat inequalities effectively

Although these changes are significant, advocates worry that the rule does not contain sufficient enforcement provisions, that HUD will not have the resources to effectively review the submissions within the required 60-day window, and that HUD may not have the political will to actually reject incomplete or inadequate Assessments.

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[10] See: www.antibiaslaw.com/westchester-case.

Given these concerns about HUD's capacity to effectively enforce the new rule, it appears that the burden may rest again on advocates to engage in sustained municipality-by-municipality mobilization and make the most of the new data and community participation requirements in order to hold local governments accountable. The need for mobilization at the local level is made that much more difficult by the fact that those communities that have historically been most successful at excluding poor and working-class people and people of color are those where there will likely be the fewest resident constituents to actually push for change.

The *Inclusive Communities* decision affirms a crucial tool that fair-housing advocates need in order to hold exclusionary municipalities and discriminatory lenders accountable. The new Affirmatively Furthering Fair Housing (AFFH) rule creates new points of leverage in the planning process for civil-rights advocates to press local governments to address persistent disparities in access to opportunity. Both will require sustained mobilization to actually have an impact.

At the same time, this renewed focus on fair housing must recognize the risk of further stigmatizing blackness or poverty by focusing relentlessly on integration in a way that celebrates whiteness, even if unintentionally, as the measure of opportunity or achievement[11] (Pattillo 2014). In addition to an unflinching assault on continuing exclusion and discrimination in access to housing and neighborhoods, we must continue to innovate and invest in creating equal access to opportunity wherever individuals choose to live. As Rucker Johnson (2014) has written, "placing brown bodies next to white bodies does not osmotically improve the life trajectory of Blacks, nor does it infuse Blacks' wealth holdings or resources with that of Whites."[12]

Groups such as PolicyLink[13] have worked with advocates and local leaders to use the new AFFH rule as a catalyst for conversation and action around racial disparities,[14] to ensure that the focus on fair housing amounts not just to moving housing units but also to providing real access to opportunity. Similarly, organizations like the Fair Housing Justice Center[15] have long pioneered rigorous paired-testing programs that have identified continuing discrimination by municipalities, banks, and landlords[16] and turned those cases over to litigators to use the tools the Fair Housing Act provides to attack that discrimination. Entrenched patterns of residential segregation continue to facilitate the hoarding of valuable resources by wealthy, predominantly white communities. The court's ruling and the new HUD rule provide stronger tools to challenge this persistent inequality, but only if we can marshal the grassroots force to put them to productive use. To address continuing racial inequality, we need more than one "heroic" mayor—we need a movement of courageous advocates.

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11 See: http://furmancenter.org/research/iri/pattillo.

12 See: http://furmancenter.org/research/iri/johnson.

13 Website: www.policylink.org.

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