

Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy

Justin D. Cummins*

Introduction	340
I. The Context and Consequences of Current Legal and Policy Failure.....	341
A. The Significance of Housing: The Close Nexus with Critical Institutions	342
B. The History of Housing Patterns: Free-Market Choice for Some.....	351
C. The Ramifications of a Racialized Housing Market: Regional Decline	358
D. The Aftermath of the Fair Housing Act: In Pursuit of a Dream Deferred?	361
II. State-Wide Initiatives: An Alternative Approach	364
A. The Typical Provisions of Fair Share Policies: Calls for System-Wide Action	364
B. The Implications of Fair Share Policies: Promises Yet to Be Fulfilled.....	367
C. Criticisms of the Fair Share Principle Assessed: Flawed Attacks	371
III. A Regional Strategy for the Twin Cities Metropolitan Area: A Proposed Application	377
A. A Regional Policy Considered: Toward a Vision of Substantive Equality	378
B. Regional Fair Share Properly Conceived: A Structurally Transformative Approach	382
Conclusion	389

* Senior Research Assistant, The Institute on Race and Poverty; J.D. expected 1997, University of Minnesota Law School; M.A. expected 1997, Hubert H. Humphrey Institute of Public Affairs; B.A. 1992, Haverford College.

I would like to thank the exceptional staff of *Law and Inequality*, especially Sarah H. Garb, Kent Klaudt and Robin Preble, as well as Jim Hilbert, Tom Luce, Barbara Lukermann, John Powell, and Jay Wilkenson. I also would like to thank my father for his love, support, and infinite insight—he truly has been an inspiration to me throughout my life; my sister Bridget, for bringing me such joy since I witnessed her birth into this world 15 years ago; and my brother Brendan for being my dearest friend—stay strong Bro and always do the right thing! S.T.P.

We will neglect our cities to our peril, for in neglecting them we neglect the nation.¹

Introduction

Although analysts and policymakers of almost any ideological stripe agree that the central cities and their inhabitants face increasingly formidable and complex difficulties in the United States,² substantial disagreement over the proper solution(s) continues. The real debate about the nation's future, then, should center on the most effective ways of addressing what is happening to urban areas and the surrounding metropolitan regions. Many analysts³ and prominent Democrats and Republicans⁴ allege that a law-and-order approach or other get-tough measures are best. As the war on drugs exemplifies, however, stiffer and mandatory sentences, a dramatic increase in the number of crimes punishable by death, and the expenditure of millions of taxpayer dollars to expand law enforcement efforts have done little to reduce crime, much less address the larger issues facing central cities and their residents.⁵ These primarily punitive policies have not been, and cannot be, effective because they focus on symptoms—crime and alleged irresponsibility—rather than causes—geographic, economic, and social isolation.

This article evaluates an alternative policy, one that takes a structurally transformative approach by affirmatively and systematically addressing housing patterns. In this context, structurally transformative means fostering a fundamental change in the provision and location of affordable housing and, by implication, a substantial change in economic and social arrangements. This policy,

1. President John F. Kennedy, Message to Congress (Jan. 30, 1962).

2. See *infra* notes 12-16, 23-28, 41-52, 92-97 and accompanying text (describing the decline of central cities and the effects of central-city isolation on employment, education, social contacts, access to health care and capital).

3. See, e.g., John J. DiIulio Jr., *Comment on Douglas S. Massey's Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1275, 1280-83 (1995) (arguing that moral decline and disintegrating family structure underlie the urban crisis, and that the proper response should be to place more police on the streets).

4. See, e.g., Douglas Jehl, *Clinton to Use Drug Plan to Fight Crime*, N.Y. TIMES, Feb. 10, 1994, at D20 (describing President Clinton's plan, half of which was devoted to law enforcement and the other half to drug-abuse prevention); Katharine Seelye, *Anti-Crime Bill as Political Dispute: President and G.O.P. Define the Issue*, N.Y. TIMES, Feb. 21, 1995, at A16 (explaining the struggle between Democrats and Republicans over control of the crime issue).

5. See MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 81-125 (1995) (documenting the draconian, racially discriminatory, and ineffective nature of the war on drugs).

commonly known as Fair Share,⁶ starts from the recognition that prevailing housing practices significantly contributed to, and now maintain, the severe segregation that created the current crisis afflicting metropolitan areas around the nation.⁷ Generally speaking, Fair Share policies require each community in a region to fulfill its statutory or state constitutional obligation to further the general welfare by providing an equitable portion of the affordable housing needed in its region.

Part I of this article explores the economic and social implications of housing in the United States. Part I also illustrates many of the problems with past and present housing patterns, and shows that existing federal laws do not adequately address these problems. Part II summarizes the main elements of different Fair Share policies adopted by states across the nation, and explores the consequences and shortcomings of these policies. Part III suggests improvements to existing Fair Share strategies that would further one of the primary objectives of the Fair Housing Act (FHA)⁸—racial integration—and better advance one of the foremost goals of Fair Share policies—economic integration. Part III also considers additional benefits of such an approach and suggests how it could be implemented.

I. The Context and Consequences of Current Legal and Policy Failure

Three main arguments against a structurally transformative housing strategy recur: (1) housing is not the critical issue, so we should not divert our limited resources to such a costly enterprise; (2) even if housing were a central element of the intensifying metropolitan crisis, housing patterns have been shaped by consumer choice and the workings of the free-market system, not discrimination; and (3) existing laws, most notably civil rights legislation such as the FHA, root out any lingering discrimination and correct any market imperfections. According to the perspective on which these

6. Fair Share is a term of art that refers to the principle animating state legislative enactments and state court rulings that require all municipalities in a region to provide enough low- and moderate-income housing to meet the needs of the residents of that region. See *infra* notes 124-44 and accompanying text (describing the legislation of numerous states that embodies the Fair Share principle); note 210 and accompanying text (discussing court decisions adopting the Fair Share principle pursuant to state constitutional guarantees).

7. See, e.g., Douglas Massey et al., *Migration, Segregation, and the Geographic Concentration of Poverty*, 59 AM. SOC. REV. 425 (1994) (explaining that segregation, not middle-income flight, has concentrated poverty and the accompanying difficulties in central-city neighborhoods).

8. 42 U.S.C. §§ 3601-3631 (1994).

arguments are based, a structurally transformative policy is unnecessary, perhaps even excessive. Although many legal analysts and policymakers accept one or more of the above arguments as true,⁹ the validity of any of them is not at all certain. Assessing their validity requires careful consideration of each argument in the context of the United States' experience, past and present.

A. *The Significance of Housing: The Close Nexus with Critical Institutions*

Many factors have an impact on life-chances and choices. Meaningful access to decent jobs, adequate schools, informal information and mentoring networks, quality health care, and vital sources of financial capital all play a critical role in the types of opportunities available to people. When one recognizes the close links between housing and each of these factors, the centrality of housing and the importance of housing policy become apparent; housing—or place—functions as the focal point where all of these critical economic and social forces and practices intersect. This reality is known as the geography of opportunity.¹⁰

1. Housing and Access to Employment Opportunities

One of the most evident connections between housing and meaningful opportunity is in the employment context. The link between where one lives and one's employment prospects is particularly significant and can have a large impact on low-income residents.¹¹ Most low-income people residing in metropolitan areas of the United States have been confined to central cities.¹² How-

9. See, e.g., John J. DiIulio Jr., *The Impact of Inner-City Crime*, 96 PUB. INTEREST 28, 35-38 (1989) (arguing that the urban crisis stems from rising lawlessness and intimidation by criminal elements of the population); Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1215 (1981) (arguing it is actually inclusionary zoning practices that distort the housing market).

10. See generally James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUSING POL'Y DEBATE 231, 231 (1995) (illustrating that where one lives has a profound impact on one's opportunities in numerous aspects of economic and social life).

11. Robert Cervero, *Jobs-Housing Balancing and Regional Mobility*, 55 J. AM. PLAN. ASS'N 136, 136 (1989).

12. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 160-61 (1993) (documenting the extreme degree of poverty and isolation concentrated in central-city communities); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 33 (1987) (describing the severe racial and economic segregation of metropolitan areas). The Twin Cities metropolitan area provides a case in point: the core area has about 50% of the region's poverty despite being home for only 14% of the region's population. METROPOLITAN COUNCIL, *KEEPING THE TWIN CITIES VITAL: REGIONAL STRATEGIES FOR CHANGE IN THE FULLY DEVELOPED AREA* 44 (1994).

ever, an increasing percentage of jobs around the nation have moved from these central cities to the suburbs.¹³ Consequently, a rapidly expanding spatial mismatch¹⁴ has emerged between low-income central-city residents and jobs, especially those paying adequate wages while requiring modest skills. Realistic employment opportunities for central-city residents have diminished accordingly.¹⁵

Insufficient transportation systems have combined with this decentralization of jobs to exacerbate the spatial mismatch. Many low-income residents cannot afford a car and thus rely heavily on public transportation for mobility. Public transportation, however, connects central-city communities to the surrounding suburbs inadequately, if at all. Low-income residents, therefore, have difficulty obtaining and maintaining employment that is not closely located to where they live. In other words, the ability of low-income central-city residents to learn about and commute to jobs declines as proximity to them declines.¹⁶ The success of the Gautreaux mobility program¹⁷ shows the converse is also true: a reduction in the

13. For example, between 1972 and 1990, Chicago witnessed an 11% drop in the number of jobs available, while the surrounding suburbs experienced a 50% jump in the number of jobs created. John Handley, *Planners Debate Role of Central Cities*, CHI. TRIB., May 8, 1993, § 4, at 3. Similarly, jobs located in Atlanta, recently touted as one of the most vibrant and economically robust urban areas in the nation, decreased from 40% to 28% of the regional supply between 1980 and 1990. Keith Ihlanfeldt, *The Spatial Mismatch Between Jobs and Residential Locations Within Urban Areas*, 1 CITYSCAPE J. 219, 225 (1994). Meanwhile, jobs located in Atlanta's northern suburbs increased from 39% to 51% of the regional share. *Id.* Likewise, in the Twin Cities metropolitan area, the suburbs captured 64% of new jobs created between 1980 and 1990. METROPOLITAN COUNCIL, *supra* note 12, at 9. A study conducted by the United Way finds that the suburbs captured 67% of newly created jobs. THE FACE OF THE TWIN CITIES: ANOTHER LOOK 24 (1995).

14. Spatial mismatch refers to the increasing distance between where many people live and the location of jobs.

15. See, e.g., Ihlanfeldt, *supra* note 13, at 223-24 (describing studies of the increasing spatial mismatch); George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1424 (1993) (explaining the disparities in employment); John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26 (1989) (listing the effects of the changing job market on urban populations); Wilson, *supra* note 12, at 102 (describing the changing job market in urban areas); Duran Bell, Jr., *Resident Location, Economic Performance, and Public Employment*, in PATTERNS OF RACIAL DISCRIMINATION 55, 55 (George M. von Furstenberg et al. eds., 1974) (listing the findings of various scholars who have concluded that job opportunities have declined in the central cities).

16. See Galster, *supra* note 15, at 1433 (explaining the importance of social systems in learning about job opportunities); see also generally John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL'Y DEBATE 371 (1992) (reviewing the literature of the effects of housing on employment opportunities).

17. A class action lawsuit filed by residents of Chicago's housing projects produced this program, the lawfulness of which the United States Supreme Court ultimately affirmed. *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976). During the last 15 years, this program has enabled over 15,000 Chicago families previously living in

spatial mismatch improves labor market participation by low-income central-city residents.¹⁸

2. Housing and Access to Educational Opportunities

Education is another critical institution directly linked to housing or place.¹⁹ Where a family lives usually determines where its children attend school.²⁰ Even in metropolitan areas that offer some form of school choice, residential location plays a large role in determining where children attend school. Otherwise stated, residential patterns reproduce themselves in the schools.²¹ Thus, the vast majority of low-income children living in central cities, usually children of color, attend city schools.²² Unique dynamics and synergistic stresses emerge here at the intersections of race and poverty;²³ the larger amount of neighborhood, health, and social

public housing projects to move to affordable housing in other parts of the city or the surrounding suburbs. Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1740 (1993). Almost all participants in this program are families of color headed by single mothers who received substantial public assistance prior to participation. Janet Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57, 93-94 (1994).

18. Participants who moved to the suburbs, and thus closer to the locus of employment opportunities, are 25% more likely to be employed than demographically indistinguishable participants who moved to other parts of Chicago. Susan J. Popkin et al., *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux Program Participants*, 12 J. POL'Y ANALYSIS & MGMT. 556, 563-64 (1993). Moreover, those who have never worked prior to moving to the suburbs—the hard-core unemployed—are 53% more likely to be employed than those who have moved to other parts of the city. *Id.* Furthermore, those who have moved to the suburbs are more likely to believe that the move improved their labor market experiences, while those who moved to other parts of the city are more likely to think that the move did not better their employment situation. *Id.* at 565.

19. See, e.g., Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1405 (1995) (discussing the interrelationship between housing and schools and the value of linking the two when implementing integration policies).

20. Drew S. Days, III, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737, 1763-67 (1986) (book review) (explaining that school desegregation efforts often achieve only limited success because of the failure to link school integration efforts to housing integration efforts).

21. *Id.*

22. Galster, *supra* note 15, at 1440. Minneapolis schools epitomize the severe segregation of low-income students of color in central city schools: nearly 60% of students come from low-income families and nearly 60% are children of color. MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (forthcoming 1996) (manuscript at 57-59, on file with author).

23. See, e.g., George C. Galster, *A Cumulative Causation Model of the Underclass: Implications for Urban Economic Development Policy*, in *THE METROPOLIS IN BLACK & WHITE* 190, 190-202 (George C. Galster & Edward W. Hill eds., 1992) (describing the obstacles to advancement created by the interaction of racism and economic deprivation); Alex Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA.

difficulties faced by these children means the city schools need greater resources to meet the needs of their students than those required by suburban schools.²⁴ In this context, central-city schools with the same resources as suburban schools would be deficient. The reality, however, is worse. Central-city schools typically have fewer resources than suburban schools.²⁵ In addition to possessing insufficient resources and inadequate staffing, central-city schools provide an inadequate education because of the compounding effect of racial and economic segregation. At the most fundamental level, confining children to racially and economically segregated schools significantly hampers their academic achievement.²⁶ Conversely,

L. REV. 1595, 1638-46 (1995) (showing that people trapped at the intersections of race and poverty face uniquely constrained life-chances and choices); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1289-90 (1995) (describing the problems at the intersections of race and poverty as different in kind and magnitude); Douglas Massey, *America's Apartheid and the Urban Underclass*, 68 SOC. SERVICE REV. 471, 471 (1994) (illustrating that discrimination-induced segregation blocks socio-economic mobility and leads to the isolation of people by race and poverty with the concomitant creation and perpetuation of various forms of disadvantage).

24. Children living in neighborhoods of concentrated poverty, for example, are substantially more likely to drop out of school. Jonathan Crane, *Effects of Neighborhoods on Dropping Out of School and Teenage Childbearing*, in THE URBAN UNDERCLASS 299, 317 (Christopher Jencks & Paul E. Peterson eds., 1991). See also PAMELA KEATING & JEANNIE OAKES, EDUC. COMM'N STATES, ACCESS TO KNOWLEDGE: BREAKING DOWN SCHOOL BARRIERS TO LEARNING 3-4 (1988) (explaining that the interaction of racism and poverty continue to generate barriers in the educational setting and identifying the need for policies to address the effects of racial and economic isolation in schools); MARGARET M. WILLIAMS, U.S. DEP'T OF HOUS. & URB. DEV., RACE, POVERTY, AND EDUCATIONAL ACHIEVEMENT IN AN URBAN ENVIRONMENT (1972) (examining trends in standardized examination scores and determining that the interrelationship of racism and poverty undermines academic achievement).

25. The nation's 47 largest urban districts consequently spend \$873 less per pupil than suburban districts. Galster, *supra* note 15, at 1441.

26. GARY ORFIELD, COUNCIL OF URBAN BOARDS OF EDUCATION, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, at 22 (1993); MASSEY & DENTON, *supra* note 12, at 141-42 (concluding that poor performance becomes the norm in central-city schools); Russell W. Rumberger and J. Douglas Willms, *The Impact of Racial and Ethnic Segregation on the Achievement Gap in California High Schools*, 14 EDUC. EVALUATION & POL'Y ANALYSIS 377, 380 (1992) (describing the performance disparity between schools with high enrollments and those with low enrollments of students of color); WILSON, *supra* note 12, at 57-58 (concluding that low performance becomes a cycle in segregated schools).

maintaining an integrated²⁷ learning environment benefits both students of color and white students.²⁸

The experience of Louisville, Kentucky and adjacent Jefferson County highlights the connection between housing and education. Legislators and policymakers explicitly acknowledged this link in *Newburg Area Council v. Board of Education*.²⁹ Following the initi-

27. Integration should not be equated with assimilation. Integration, properly understood, means that *people of all backgrounds* help to create and benefit from the rich mosaic that constitutes a truly inclusive society. Meaningful integration occurs when we collectively transform ourselves, one another, and the larger world—not to the advantage of any one group, but rather to the benefit of all members of society. For a recent discussion of the true meaning and value of integration, see John Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 774-78 (1996). See also JOHN DEWEY, *DEMOCRACY AND EDUCATION* 1-23 (1916) (discussing how meaningful education, that which provides the bedrock for a truly participatory democracy, involves interacting with those who have different backgrounds, perspectives, and identities).

28. See, e.g., WIS. LEGISLATIVE AUDIT BUREAU, AN EVALUATION OF THE CHAPTER 220 PROGRAM 3-7 (1994) (examining the benefits of Milwaukee's integration program); CHRISTINA MELDRUM & SUSAN EATON, THE HARVARD PROJECT ON SCHOOL DESEGREGATION, RESEGREGATION IN NORFOLK, VIRGINIA: DOES RESTORING NEIGHBORHOOD SCHOOLS WORK? 48 (1994) (observing that standardized exam scores for students of color increased by more than 20 points, and scores for white students increased by nearly 20 points during the enforcement of a school integration policy); DAVID W. GRISSMER, ET AL. RAND CORP., STUDENT ACHIEVEMENT AND THE CHANGING AMERICAN FAMILY xli-xlii, 107 (1994) (discussing the benefits of integration policies); JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 177-88 (1984) (analyzing the benefits of integration); Jomills H. Braddock II & James McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY & CHOICE 6-7 (1988) (explaining that nearly every study shows that integration improves the academic performance of students of color and either improves or does not adversely affect the academic achievement of white students); Jean B. Stanford & Fred K. Bellot, *Ten-Year Longitudinal Study of Memphis State University Campus School Reading Achievement Scores as They Relate to Proportional Court Ordered Desegregation*, ANNUAL MEETING OF THE MID-SOUTH EDUCATIONAL RES. ASS'N 32-33 (Nov. 1982) (describing improved reading levels after integration).

Moreover, education extends beyond formal book-learning; it involves the formation and development of civic skills in an increasingly multiracial and multicultural society. An integrated setting provides a superior environment for this more meaningful education. DEWEY, *supra* note 27, at 12-13 (discussing the importance of different perspectives in education).

29. 489 F.2d 925, 930-32 (6th Cir. 1973). The *Newburg* court held that the Louisville district, in which there had been state-imposed segregation and in which over 80% of the schools are racially identifiable, is not a unitary system. *Id.* at 931. Where none of the districts of Jefferson County operated unitary school systems, all vestiges of state-imposed segregation must be eliminated within each school district in the county. *Id.* at 932. To accomplish this purpose, state-created school district lines shall impose no barrier. *Id.* For other federal cases explicitly linking housing and education, see, e.g., *United States v. Yonkers*, 837 F.2d 1181, 1219-21 (2d Cir. 1987) (holding that the city of Yonkers' practice of confining the construction of public housing to neighborhoods populated primarily by people of color and the board of education's neighborhood school policy combined to provide evidence that the city contributed to segregated schools through its segregative housing practices), *cert. denied*, 486 U.S. 1055 (1988); *Liddell v. Board of Educ.*, 667 F.2d 643, 647 (8th Cir.

ation of housing and school integration plans in 1975 pursuant to the settlement in the case, metropolitan neighborhoods became less segregated, minimizing the need for future busing to achieve school integration.³⁰ As the schools became more integrated, student performance improved in nearly every measurable respect. While white elementary school students performed better on reading and mathematics exams at every grade level, African-American students improved at an even greater rate.³¹ The achievement gap consequently narrowed by as much as seven percentile points.³²

The Gautreaux program³³ further reveals the importance of residential location to educational opportunity for children. Children of families that moved to affordable housing in the suburbs through the Gautreaux program have superior educational and social experiences and higher academic achievement compared to children of demographically indistinguishable families that moved to other parts of Chicago proper.³⁴

3. Housing and Access to Information and Mentoring Networks

The connection between housing and informal, but nonetheless crucial, information and mentoring networks also illustrates the centrality of housing. Where one lives substantially determines the nature, extent, and variety of these interpersonal and institutional contacts.³⁵ For example, neighbors often provide useful information about educational and occupational opportunities and act as role models when they use methods of relating and styles of com-

1981) (upholding *Adams v. United States*, 620 F.2d 1277, 1292-97 (8th Cir. 1980), which ruled that the segregation of St. Louis schools could be remedied by an integration policy that implicates housing patterns), *aff'd*, 667 F.2d 643 (8th Cir.), and *cert. denied*, 454 U.S. 1081 (1981).

30. KENTUCKY COMM'N ON HUMAN RIGHTS, SCHOOL AND HOUSING DESEGREGATION ARE WORKING TOGETHER IN LOUISVILLE AND JEFFERSON COUNTY, 1975-1983 (1983).

31. *Id.* at 6-8.

32. *Id.* at 6.

33. See *supra* note 17 (describing the Gautreaux mobility program).

34. For example, 95% of suburban school attendees successfully complete high school while only 80% of city school attendees graduate. James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1533 (1993). Moreover, suburban school attendees go on to college at more than twice the rate of their city school counterparts. *Id.* at 1534. Suburban school attendees also benefit from a more multiracial education, the vital value of which the United States Supreme Court recognized in its landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Rosenbaum et al., *supra*, at 1535-39.

35. See Edelman, *supra* note 17, at 1736 (1993) (explaining the importance of information and mentoring contacts to present and future success).

munication conducive to economic and social mobility.³⁶ Formal community associations, such as local merchant groups, neighborhood political organizations, and places of worship, can play an integral role in stabilizing and mobilizing economic, social, and psychological resources for advancement.³⁷ People living in low-income central-city communities, however, have become increasingly isolated—geographically, economically, and socially—from these critical contacts. Therefore, they do not typically receive the same encouragement or have sufficient resources to maintain educational excellence, long-term labor market participation, or meaningful involvement in public life.³⁸

Housing also determines the nature, extent, and variety of contacts because housing location dictates people's proximity to violent crime. Many central-city residents limit their social contacts and labor market participation for fear of falling victim to the violent crime engulfing their neighborhoods.³⁹ Moreover, the indiscriminate targeting of central-city residents, especially people of color,⁴⁰ by law-enforcement bodies also limits, if not eliminates, access to critical networks.

36. See *id.* (describing the importance of peers); Popkin et al., *supra* note 18, at 571 (concluding that the effect of new role models was one reason for the success of the Gautreaux program).

37. Galster, *supra* note 15, at 1433-34.

38. See *id.* at 1434 (citing findings that people living in concentrated poverty have fewer social contacts). This segregation, combined with the fragmentation and privatization of society, undermines democracy. See generally HARRY BOYTE, *COMMONWEALTH: A RETURN TO CITIZEN POLITICS* (1989) (describing the importance of active citizenship in the political arena). For a more extensive discussion of democracy and public life, see *infra* notes 155-61 and accompanying text.

39. Galster, *supra* note 15, at 1436. People confined to low-income central-city neighborhoods must endure an environment rife with escalating violence. Between 1972 and 1991, the number of violent crimes—murder, manslaughter, forcible rape, robbery, and aggravated assault—committed in the United States increased by 128%. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991*, at 58 (1992). In addition, gun-related deaths increased by 233% among African-American teenagers during the 1980s. Edelman, *supra* note 17, at 1699 n.8. Moreover, gangs continue to operate in the central cities, seemingly with impunity. ELLIOT CURRIE, *RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE* 12, 175-76 (1993).

40. TONRY, *supra* note 5, at 186-87. Although the overall crime rate among African-Americans remained relatively stable nationally over the last 20 years, incarceration rates tripled. *Id.* at 4. Moreover, according to a study conducted by the St. Paul Tenant's Union, a review of 213 search warrants found that 95% of suspects identified were people of color. Anthony Lonetree, *Tenant Group Calls Police Unit Racist: St. Paul Officials Say Charges False*, STAR TRIB. (Minneapolis), May 23, 1995, at B1. In essence, living in central cities means a greater likelihood of police harassment or incarceration.

Imprisonment not only subjects people to physical brutality, it also leaves psychological scars that make former inmates less likely to obtain access to information and mentoring networks and therefore to become productive members of society. In many cases, incarceration has the added deleterious effect of creating hardened

4. Housing and Access to Health Care

Housing location also has implications for the health of metropolitan residents. Few affordable and comprehensive health care facilities can be found in central-city communities, especially in low-income neighborhoods.⁴¹ Even if a low-income community is close to a health-care facility, the facility often has insufficient staffing and resources.⁴² The infant mortality rate in central-city communities consequently rivals the rate in many developing nations.⁴³ In addition, as the New York City experience illustrates, inadequate access to health care contributed to the reactivation of encapsulated primary tuberculosis and made the successful completion of the full six- to nine-month drug-treatment course by infected individuals less likely.⁴⁴ This has created multiple-drug-resistant

criminals who plague the communities into which they are freed, perpetuating the cycle of crime, violence, and isolation that decimates central cities. Dillulio, *supra* note 9, at 37; see also Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1214-17 (1995) (describing the segregation-induced cycle of violence and destruction devastating central-city neighborhoods).

41. See Sidney D. Watson, *Health Care in the Inner City: Asking the Right Question*, 71 N.C. L. REV. 1647, 1650-54 (1993) (explaining that federal budget cuts forced many primary-care clinics in the central cities to close and that private hospitals also abandoned urban neighborhoods and their residents); David Kindig et al., *Trends in Physician Availability in 10 Urban Areas from 1963 to 1980*, 24 INQUIRY 136, 140 (1987) (finding that of 10 cities studied, the number of office-based primary physicians in low-income central-city neighborhoods declined 45% between 1963 and 1980); see also David Williams & Chiquita Collins, *U.S. Socioeconomic and Racial Differences in Health: Patterns and Explanations*, 21 ANN. REV. SOC. 349 (1995) (arguing that racial and socioeconomic inequality in health is the most important public health issue in the nation); James W. Fossett et al., *Medicaid in the Inner City: The Case of Maternity Care in Chicago*, 68 MILBANK Q. 111, 120 (1990) (describing the lack of health-care facilities in impoverished areas).

42. See Watson, *supra* note 41, at 1650-51 (discussing New York as an example); see also Joseph F. Sullivan, *In Newark, Downtown Glitter Battles Neighborhood Gloom*, N.Y. TIMES, Aug. 13, 1991, at A1 (describing the inadequate resources in central city communities); Bruce Lambert, *AIDS Drives Jobs Away, Report Says*, N.Y. TIMES, Mar. 7, 1989, at B1 (reporting on a study sponsored by the Rockefeller Foundation and 17 other private organizations that revealed the health care crisis will drive away businesses and jobs unless governmental officials and agencies act to remedy an inadequate system in New York City).

43. See Watson, *supra* note 41, at 1649 ("[N]ineteen developed countries have lower infant mortality rates than the United States."). See also generally Richard Davis, *Adolescent Pregnancy and Infant Mortality: Isolating the Effects of Race*, 23 ADOLESCENCE 899, 907 (1988) (concluding that the isolation of low-income people in central-city neighborhoods plays a crucial role in the increasing infant mortality rate).

44. R. Wallace & D. Wallace, *Inner-City Disease and the Public Health of the Suburbs: The Sociogeographic Dispersion of Point-Source Infection*, 25 ENV'T & PLAN. 1707, 1708-09 (1993) (explaining that the isolation of low-income communities undermines the physical health of the residents of central-city neighborhoods and, eventually, the residents of the rest of the region); see also Watson, *supra* note 41, at 1649 (describing the higher incidence of tuberculosis among people of color).

strains of the disease.⁴⁵ Moreover, because of this lack of meaningful access to health facilities, other incurable or untreatable contagious diseases, such as the Human Immunodeficiency Virus (HIV), now proliferate in central-city neighborhoods around the nation.⁴⁶ Further, environmental discrimination exacerbates the health crisis that is plaguing residents of low-income central-city neighborhoods.⁴⁷ Land-use, environmental, and other governmental authorities permit a disproportionate amount of landfills, toxic waste dumps, incinerators, and other hazardous sites to be located in or near low-income communities of color, exposing residents to an array of dangers not usually faced by suburban residents.⁴⁸

5. Housing and Access to Sources of Financial Capital

Finally, housing location often significantly affects people's access to financial markets and thus their future material well-being. Two of the most common and accessible ways people enhance their economic standing are by starting, expanding, or acquiring small businesses and by building, renovating, or buying homes. Even taking into account differences in education and financial resources, however, bankers are less willing to lend to a prospective entrepreneur who locates in a central-city community, particularly a community of color.⁴⁹ The ability to accumulate wealth in the form of home equity similarly depends on the availability of loans. People living in central cities, especially people of color, receive a disproportionately small percentage of mortgage loans, even when controlling for a variety of factors that serve as proxies for residential

45. Wallace & Wallace, *supra* note 44, at 1708-09.

46. *Id.* at 1707 (analyzing the rapid spread of tuberculosis and HIV in impoverished areas).

47. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 764-68 (1993) (discussing the environmental racism executed through zoning ordinances). See also generally Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, 54 HUMANIST 9, 9 (1994) (illustrating that communities of color and low-income neighborhoods must endure a strikingly higher degree of exposure to toxins than other members of society).

48. See, e.g., Robert D. Bullard, *Ecological Inequities and the New South: Black Communities Under Siege*, 17 J. ETHNIC STUD. 101, 105 (1990) (observing that, although African-Americans make up only 20% of the region's population, low-income African-American neighborhoods contain 60% of the region's landfills); Sylvia Drew Ivie, *Ending Discrimination in Health Care: A Dream Deferred*, in U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES IN HEALTH CARE DELIVERY 282, 295 (1980) (describing environmental hazards in the central cities). See also Austin & Schill, *supra* note 47, at 9 (describing the disproportionate amount of toxins located near communities of color).

49. See, e.g., Timothy Bates, *Small Business Viability in the Urban Ghetto*, 29 J. REGIONAL SCI. 625, 635-37 (1989) (describing the pervasiveness of discrimination in the lending industry).

financing demand.⁵⁰ At a more basic level, many banks simply do not locate in central-city neighborhoods. This lack of access denies many residents of these neighborhoods the chance to open even a modest savings account, much less buy a home and accumulate significant wealth.⁵¹ People of color therefore face formidable obstacles to achieving material well-being, especially when they locate in central cities.⁵² As will be discussed below, the discrepancy in access to financial markets is neither an accident nor a natural outgrowth of the free-market system.

The close nexus between housing and the nation's critical institutions—the labor market, schools, information and mentoring networks, health-care facilities, and financial entities—underscores the significance of housing for all members of society. Thus, while each of these institutions can have important consequences for people, it would be misleading and illogical to consider them without also considering the role of housing. Moreover, as the discussion above indicates, housing functions as the point at which all of these important economic and social realities intersect. Housing—or place—plays an integral role in creating and shaping people's environment and access to the opportunity structure and therefore life-chances and choices. Housing, then, should be one of the primary issues in the debate about the growing metropolitan crisis.

B. The History of Housing Patterns: Free-Market Choice for Some

Housing patterns in the United States can be summed up with one word: segregated. Any semblance of racial integration following the Civil War rapidly disappeared with the onset of industrialization and the migration of many African-Americans from farms to

50. Galster, *supra* note 15, at 1444 (citations omitted).

51. Julianne Malveaux, *Entitlement or Pork? Budget Cutting Discussions Should Start with Homeowner Deductions*, 25 BLACK ENTERPRISE 25, 25 (1994) ("The low incidence of black home ownership is partly responsible for gaps in black-white wealth levels, since home equity is the key way that families accumulate wealth. As more families borrow against their homes for college tuition, new business capital and other purposes, the ownership gap exacerbates black-white differences in access to capital."); James E. Long & Steven B. Caudill, *Racial Differences in Homeownership and Housing Wealth, 1970-1986*, 30 ECON. INQUIRY 83, 99 (1992) ("[B]lacks in the United States own a disproportionately low share of aggregate housing wealth for two distinct reasons. First, blacks are less likely than whites to own their own houses. Second, black-owned houses have lower market values than white-owned houses.")

52. See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 136-51 (1995) (illustrating that public and private policies construct barriers to access to financial and housing markets, substantially hampering the ability of people of color to accumulate wealth and secure a better life).

northern cities at the end of the nineteenth century.⁵³ Although southern cities enforced Jim Crow laws that could maintain racial subjugation without housing segregation, they constructed highly segregated neighborhoods much like those in northern municipalities.⁵⁴ Racial and economic⁵⁵ segregative housing patterns continue across the nation, notwithstanding the gains of the civil rights movement.⁵⁶ The construction and maintenance of racially and economically isolated neighborhoods flow directly from institutional and individual discrimination.⁵⁷

53. MASSEY & DENTON, *supra* note 12, at 26. Between 1860 and 1910, for instance, the indices for racial isolation in Milwaukee, St. Louis, and Chicago increased from 59 to 67, 39 to 54, and 50 to 67, respectively. *Id.* Indices exceeding 50 reveal that African-Americans were more likely than not to have an African-American neighbor and thus experience a moderate degree of racial isolation; indices exceeding 60 show there was a high degree of racial isolation. *Id.* at 20-26. Between 1910 and 1940, the indices for racial isolation in Milwaukee, St. Louis, and Chicago jumped from 67 to 93, 54 to 93, and 67 to 95, respectively. *Id.*

54. *Id.* at 26. By 1950, for example, Miami, Atlanta, and Norfolk had indices of 98, 92, and 95, respectively. *Id.* at 47. Even though racial indices in northern and southern cities declined slightly by 1980, they nonetheless remain high. *Id.* at 64.

55. Because of the high correlation between race and income, racial segregation often means economic segregation and vice-versa. See generally MASSEY & DENTON, *supra* note 12 (explaining that racial segregation concentrates poverty); Rodney A. Erickson & Theodore K. Miller, *Race and Resources in Large American Cities: An Examination of Intraurban and Interregional Variations*, 13 URB. AFF. Q. 401 (1978) (documenting the close relationship between race and access to, or possession of, resources and wealth).

56. Drew S. Days III, *Introductory Remarks, The Fair Housing Act After Twenty Years*, 6 YALE L. & POL'Y REV. 332, 332-33 (1988) (comparing the improved employment opportunities for African-Americans created by Title VII of the Civil Rights Act of 1964 and the increased political participation of African-Americans because of the Voting Rights Act of 1965, with the failure of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) to increase housing opportunities significantly for African-Americans); METROPOLITAN COUNCIL, *supra* note 12, at 31.

57. See, e.g., ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 25-26 (1994) (recognizing the significance of racially motivated value judgments by whites against African-Americans in residential segregation); DENNIS JUDD & TODD SWANSTROM, *CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY* 155 (1994) (discussing discriminatory real estate and lending practices and threats of violence in the suburbs as reasons for the isolation of African-Americans in central-city neighborhoods); Reynolds Farley, *Neighborhood Preferences and Aspirations Among Blacks and Whites*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 161, 183-85 (G. Thomas Kingsley & Margery Turner eds., 1993) (concluding that racial stereotypes strongly influence people's residential decisions, ultimately leading to discrimination against African-Americans); DAVID RUSK, *CITIES WITHOUT SUBURBS* 28-29 (1993) (describing race as the primary reason for defining white suburbs as "good neighborhoods"); Margery A. Turner, *Limits on Neighborhood Choice: Evidence of Racial and Ethnic Steering in Urban Housing Markets*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 117, 125-40 (Michael Fix & Raymond Struyk eds., 1993); MARGERY A. TURNER ET AL., U.S. DEP'T OF HOUSING & URBAN DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS vi-vii (1991) (describing discriminatory practices experienced by minority house seekers) [hereinafter HOUSING DISCRIMINATION STUDY]; WILSON, *supra* note 12, at 33-34 (describing low income African-Americans in central cities as the most discriminated-against group in the United States);

1. Federal Governmental Discrimination in the Housing Market

The federal government directly engaged in discriminatory housing practices and perpetuated residential segregation. In 1933, federal officials created the Home Owners' Loan Corporation (HOLC) to make home ownership widely available to the public.⁵⁸ The HOLC provided funds for refinancing urban mortgages in danger of default and granted low-interest loans to former owners who had lost their homes to foreclosure so they could regain their properties. The HOLC, however, also introduced the practice of redlining.⁵⁹ Federal authorities consequently induced the channeling of mortgage funds away from central-city communities of color and toward outlying, white neighborhoods.⁶⁰ HOLC's practice of redlining also had a profound effect on the underwriting practices of the Federal Housing Authority (FHA)⁶¹ and of the Veteran's Administration (VA) during the 1940s and 1950s.⁶² The great majority of FHA and VA mortgages went to white suburbs rather than to communities of color in central cities.⁶³ The New York City region provides a stark portrayal of the disparity: per capita lending in suburban Long Island was sixty times greater than that in the Bronx.⁶⁴

Since the 1950s, federal authorities, in collaboration with state and local officials, have used urban renewal projects to divide

Johnson, *supra* note 23, at 1611-16; Martha Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1669-75 (1995) (describing systematic discrimination by the government and employers against African-Americans); Ihlanfeldt, *supra* note 13, at 227 (naming multiple studies that reflect discriminatory patterns in housing preferences); Florence Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 CLEARINGHOUSE REV. 312, 342 (1990) (concluding that white Americans fail to recognize the discriminatory effects of post-Civil Rights Act segregation).

58. MASSEY & DENTON, *supra* note 12, at 51-54.

59. Schill & Wachter, *supra* note 23, at 1310-11; MASSEY & DENTON, *supra* note 12, at 51. This procedure systematically undervalues racially or ethnically diverse central-city neighborhoods, which officials deem risky areas for investment.

60. Johnson, *supra* note 23, at 1611-12; MASSEY & DENTON, *supra* note 12, at 52. Private banks followed HOLC's lead. MASSEY & DENTON, *supra* note 12, at 52-53. This fact can be attributed largely to the HOLC practice of circulating the agency's residential map demarcating redlined neighborhoods around the industry. *Id.* at 53-54.

61. The FHA was the predecessor to the United States Department of Housing and Urban Development.

62. Schill & Wachter, *supra* note 23, at 1308-11; MASSEY & DENTON, *supra* note 12, at 52.

63. Schill & Wachter, *supra* note 23, at 1311; MASSEY & DENTON, *supra* note 12, at 54.

64. MASSEY & DENTON, *supra* note 12, at 54.

housing further along racial lines.⁶⁵ Urban renewal programs typically displace African-Americans and force them to move to racially and economically isolated neighborhoods or housing projects. Until 1962, government officials expressly required these housing projects in almost all states to be racially segregated.⁶⁶ In addition to using urban renewal projects, government and planning authorities continue to construct highways to separate and isolate communities of color.⁶⁷

2. State and Local Governmental Discrimination in the Housing Market

One of the first forms of institutional discrimination at the state and local levels found expression in early twentieth-century municipal ordinances. In 1910, for example, Baltimore's city council passed an ordinance establishing separate white and African-American neighborhoods in the city.⁶⁸ By 1916, St. Louis, Atlanta, New Orleans, Oklahoma City, and several other cities required racially segregated housing.⁶⁹

White civic leaders and realtors also created neighborhood improvement associations. Although whites chartered these associations ostensibly to ensure neighborhood security and maintain property values, in reality these organizations focused on precluding the entry of families of color, especially African-Americans.⁷⁰

65. JUDD & SWANSTROM, *supra* note 57, at 138-46 (giving examples of the political and economic results of national urban renewal legislation in many U.S. cities); see also, Beth J. Leif & Susan Goering, *The Implementation of the Federal Mandate for Fair Housing*, in *DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION* 227, 230 (Gary A. Tobin ed., 1987) (discussing the federal government's role in creating and maintaining urban racial segregation); Robert Weaver, *The Urban Complex*, in *URBAN RENEWAL: PEOPLE, POLITICS AND PLANNING* 94 (Jewell Belush & Murray Hausknecht eds., 1967) (criticizing urban renewal as merely an instrument for readjusting, rather than abolishing, racial segregation); Harold McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 *TEMP. L.Q.* 665, 671-72 (1987) (describing urban renewal as a last-ditch and hopeless effort to fix the central-city problems created by decades of racial and economic segregation).

66. JUDD & SWANSTROM, *supra* note 57, at 148; Leif & Goering, *supra* note 65, at 231.

67. Leif & Goering, *supra* note 65, at 230; Forrest White, *Brown Revisited*, *PHI DELTA KAPPAN*, Sept. 1994, at 19 (identifying Mobile, Alabama, as one city using highways to racially segregate its neighborhoods and schools).

68. MASSEY & DENTON, *supra* note 12, at 41.

69. *Id.*

70. *Id.* at 36-37. These associations used various techniques toward this end: lobbying city councils for zoning restrictions, threatening boycotts of realtors who sold to African-Americans, clamoring for public investment in their neighborhoods to increase property values beyond the economic means of most African-Americans, and withdrawing their patronage from white businesses that catered to African-American clients. *Id.*; see also Thomas Sugrue, *Crabgrass-Roots Politics: Race*

The associations found their most effective tool in the form of racially restrictive covenants.⁷¹ By the 1920s, local real estate boards played a leading role in ensuring the widespread use of these covenants.⁷² Moreover, until the 1950s, state governments and courts vigilantly enforced racially restrictive covenants.⁷³

In addition to promoting and enforcing these covenants, real estate boards perpetuated housing segregation by encouraging the discriminatory practice of door-shutting: the absolute refusal to rent or sell to any African-Americans or other people of color. Realtors also engaged in block busting.⁷⁴ The resulting white flight ensured that no sooner would a neighborhood begin to become integrated, than it would become segregated again. State governments, in conjunction with the federal government, have heavily subsidized this flight to the suburbs by providing \$123 billion for highway construction and billions more for infrastructure expansion and maintenance.⁷⁵

The enactment of exclusionary zoning ordinances continues to be another popular tactic used by state and local governments. Since the 1950s, many communities have used this device to make the purchase of homes or the rental of other forms of housing within

Rights, and the Reaction Against Liberalism in the Urban North, 1940-1964, 82 J. AM. HIST. 551, 558-63 (1995) (describing activities and slogans of Detroit neighborhood associations).

71. MASSEY & DENTON, *supra* note 12, at 36-37. See also Sugrue, *supra* note 70, at 558 (discussing the enforcement of restrictive covenants as the impetus for the creation of neighborhood associations). These contractual agreements among property owners prohibited the owners from permitting any African-American to own, occupy, or rent his or her property. The contract bound the signatory and his or her heirs for a set period of time, usually 20 years. In the event of a violation, any party to the covenant could seek enforcement from the courts and sue for damages.

72. MASSEY & DENTON, *supra* note 12, at 36-37.

73. See, e.g., *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946) (upholding the legality of racially restrictive covenants and enforcing the covenant at issue before the Missouri Supreme Court), *cert. granted*, 331 U.S. 803 (1947), and *rev'd*, 334 U.S. 1 (1948).

74. MASSEY & DENTON, *supra* note 12, at 37-38. This strategy involved advising white homeowners, often misleadingly, that they should sell their property before real estate values drop when African-Americans begin to move into their neighborhood. Such warnings reinforced the prejudice and racial fear of many white homeowners, causing them to sell their property immediately and move to allegedly safer and better neighborhoods. Historian Thomas Sugrue recently provided a vivid example of this practice in Detroit: "one [real estate] broker paid a Black woman to walk her baby down an all-white block, to spark fears that 'Negroes [were] taking over this block or area' and that the residents 'had best sell now while there was still a chance of obtaining a good price.'" Sugrue, *supra* note 70, at 560.

75. JUDD & SWANSTROM, *supra* note 57, at 180-81, 207-09, 392 (describing the close relationship between suburban growth and various government policies concerning, for example, mass transit and property taxes, as well as highway construction); MASSEY & DENTON, *supra* note 12, at 44-45 (attributing the demand for highway construction as originating from middle-income suburbanites).

their boundaries too costly or otherwise impractical for low- to moderate-income people.⁷⁶ In other words, these zoning laws create regulatory barriers to economically integrated housing.⁷⁷ Because of the high correlation between race and poverty, exclusionary zoning ordinances also preserve the exclusively white composition of many suburbs around the country.⁷⁸ In sum, these zoning laws have constructed and continue to maintain racial and economic segregation across metropolitan regions around the nation.⁷⁹

3. Individual Discrimination in the Housing Market

Individual or informal discriminatory treatment following the Civil War first took the form of violence directed against people of color in the late nineteenth century. The pattern typically began with threatening letters and personal harassment. Mob violence, cross-burnings, and physical attack then followed.⁸⁰ Chicago provides a graphic example of such violence in the early twentieth century: between 1917 and 1921, vigilantes bombed fifty-eight African-American homes, one house every twenty days.⁸¹ This communal violence against people of color living in integrated or predominantly white areas prompted many non-whites to seek

76. Schill & Wachter, *supra* note 23, at 1333-35.

77. See generally Mahoney, *supra* note 57 (describing economic and residential segregation as both a cause and product of housing patterns); Schill & Wachter, *supra* note 23 (same); MASSEY & DENTON, *supra* note 12 (same).

78. Schill & Wachter, *supra* note 23, at 1334; JUDD & SWANSTROM, *supra* note 57, at 212-13.

79. The Twin Cities region exemplifies this reality. Of the 10 suburbs considered in a recent study of Twin Cities housing practices, only one provided subsidized housing on a par with the regional average. BARBARA L. LUKERMANN & MICHAEL P. KANE, CENTER FOR URBAN AND REGIONAL AFFAIRS, LAND USE PRACTICES: EXCLUSIONARY ZONING, DE FACTO OR DE JURE? AN EXAMINATION OF THE PRACTICES OF TEN SUBURBAN COMMUNITIES IN THE TWIN CITIES METROPOLITAN AREA 10-11 (1994). That Coon Rapids, Eden Prairie, Edina, Lakeville, Maple Grove, Minnetonka, Plymouth, and Woodbury, among other suburban municipalities, continue to provide absolutely no public housing exacerbates the shortage of affordable housing in the Twin Cities metropolitan area. *Id.*

80. Historian Arnold Hirsch recently offered a powerful account of segregationist violence through the eyes of an African-American family that moved to an all-white neighborhood:

Crowds repeatedly threw bricks, stones, and sulfur candles through their windows, forcing the Howards to replace their living room window-panes with plywood . . . The pattern of resistance quickly became apparent. If Blacks insisted on living in the neighborhood, they would be harassed day and night. Those whites who would have tolerated, if not befriended, them were made to fear for their own safety.

Arnold Hirsch, *Massive Resistance in the Urban North: Trumbull Park, Chicago, 1953-1966*, 82 J. AM. HIST. 522, 527 (1995).

81. MASSEY & DENTON, *supra* note 12, at 35 (describing the polarization that occurred as a result of violence and other forms of discrimination).

safety in numbers. Therefore, a substantial number of people of color relocated in racially segregated and isolated communities.⁸²

Informal discriminatory practices take many forms, such as racial steering, in addition to mob violence.⁸³ White realtors and property owners have also advertised selectively to target only white applicants.⁸⁴ Moreover, many white realtors and property owners have lied to inquiring people of color, telling them that they have no housing available.⁸⁵ Studies conducted in New York City and Chicago provide a glimpse of the pervasiveness of informal discrimination. In the New York City region, white realtors have used forty-six different techniques to exclude African-Americans from white neighborhoods.⁸⁶ Likewise, whites in the Chicago metropolitan area have used twenty-six different methods to maintain and reinforce residential segregation.⁸⁷

These informal discriminatory practices persist, thwarting the housing preferences of millions of consumers.⁸⁸ For instance, ninety-five percent of African-Americans would prefer to live in a racially diverse, or even predominantly white, neighborhood but continue to be excluded systematically from many would-be integrated communities.⁸⁹ In fact, numerous econometric models indicate that if discrimination were to be eliminated, housing segregation would decrease by up to fifty percent.⁹⁰

As this discussion reveals, governmental discrimination at all levels has dictated policies and practices since the turn of the century. The free-market system, as it turns out, has not been free of racial and economic discrimination. People of color and low-income citizens, therefore, continue to lack the choices and opportunities that others may take for granted.⁹¹

82. *Id.* at 33-42.

83. Realtors using this strategy deliberately show whites homes or apartments exclusively in white neighborhoods, while showing people of color homes or apartments solely in communities of color. MASSEY & DENTON, *supra* note 12, at 99-101, 104.

84. *Id.*

85. *Id.*

86. *Id.* at 50.

87. *Id.* at 99-101, 104.

88. DOWNS, *supra* note 57, at 25-26.

89. See, e.g., MASSEY & DENTON, *supra* note 12, at 91.

90. George Galster, *Research on Discrimination in Housing and Mortgage Markets: Assessment and Future Direction*, 3 HOUSING POL'Y DEBATE 639, 659 (1992).

91. See generally JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995) (showing that discrimination in the housing market continues to limit the opportunities of African-Americans and Latinos to participate fully in the economic and social spheres of the United States).

C. *The Ramifications of a Racialized Housing Market:
Regional Decline*

In addition to thwarting consumer preference, racial discrimination and the concomitant racial and economic segregation significantly contribute to the decline of central cities.⁹² As previously discussed, residential segregation makes it more difficult for central-city residents to obtain and maintain employment at a living wage, secure an adequate education for their children, and acquire access to vital financial markets.⁹³ Discrimination and segregation consequently isolate central-city neighborhoods and their low-income residents, who consequently have little meaningful opportunity to improve their circumstances. As this racial and economic isolation increases, blight flight⁹⁴ by businesses and middle-income residents also increases, exacerbating the fiscal and service-provision crises afflicting central cities. The rapidly shrinking commercial and residential tax base and accompanying deterioration of services set in motion the spiral of urban decline.⁹⁵ Urban decay, however, does not stop at city boundaries. As Detroit, Los Angeles, New York City, Chicago, Philadelphia, St. Louis, Miami, and Washington, D.C. demonstrate, central-city deterioration expands to cause inner-ring suburban decay that, in turn, induces regional de-

92. See, e.g., RUSK, *supra* note 57, at 40-47 (comparing economic factors between cities as a function of growth ability); MASSEY & DENTON, *supra* note 12, at 55 (linking the increased demand for social services in central cities to the further flight of the middle-income whites to suburbs); see also *supra* notes 23-24 and accompanying text (describing the vicious cycle of deprivation and despair in central cities that flows from segregation).

93. See *supra* notes 10-52 and accompanying text (discussing the impact of housing on other critical areas of life).

94. Blight flight describes the exodus from areas with higher rates of poverty, deteriorating housing stock, declining commercial districts, and higher crime rates.

95. See, e.g., JUDD & SWANSTROM, *supra* note 57, at 238-41 (delineating the costs of suburbanization); Rodrick Wallace, *Expanding Coupled Shock Fronts of Urban Decay and Criminal Behavior: How U.S. Cities Are Becoming "Hollowed Out,"* 7 J. QUANTITATIVE CRIMINOLOGY 333, 350 (1991) (describing the reduction of services as a source of community destruction); McDougall, *supra* note 65, at 672 (referring to the privileges and advantages enjoyed by suburbanites at the expense of residents of central cities); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 126 (1982) (concluding that socioeconomic inequalities are a major source of violent crime).

cline.⁹⁶ In short, the conditions of the central cities ultimately determine the conditions of the region.⁹⁷

1. The Importance of Central Cities to Suburbs

Business and civic leaders, as early as the late nineteenth century, recognized this connection between the fate of central cities and their surrounding regions.⁹⁸ Just as in the nineteenth century, suburbs currently depend on several important economic and social functions performed by central cities and their residents. First, central cities act as hubs for area systems and networks serving the entire metropolitan region.⁹⁹ Second, central cities provide a place where creative, face-to-face contacts between business, organizational, science, political, and media leaders can occur.¹⁰⁰ Finally, central cities continue to be the prime location for specialized facilities and activities.¹⁰¹

2. The Inextricable Link Between Central Cities and Suburbs

In addition to relying on the economic and social activities located in the central cities, the suburbs remain connected to the actual conditions of central cities in several respects. First, central cities continue to be the focal point for tourism and leisure.¹⁰² Be-

96. See DOWNS, *supra* note 57, at 57-59 (advocating broader definitions of community to bond central cities to suburbs, and vice-versa); RUSK, *supra* note 57, at 40 (citing studies that link economic progress in metropolitan areas to a small income gap between the city and suburbs); RICHARD VOITH, FEDERAL RESERVE BANK OF PHILADELPHIA, DO SUBURBS NEED CITIES? 20-21 (1994) (concluding that a strong correlation exists between city and suburban growth in income, population, and property values); Wallace & Wallace, *supra* note 44, at 1719 ("Central urban areas and their suburbs . . . constitute, from a public health viewpoint, a single, strongly interlinked urban-suburban ecosystem.").

97. Wallace, *supra* note 95, at 352-53. See also Steve Brandt, *Falling Values Sap Tax Base of Metro Core*, STAR TRIB. (Minneapolis), Mar. 10, 1996, at B1 (documenting the spread of declining property values from the cities of St. Paul and Minneapolis to the surrounding suburbs).

98. JUDD & SWANSTROM, *supra* note 57, at 4.

99. For instance, electrical power grids, water supply and highway systems, and telephone networks emanate from central cities in most parts of the nation. Even many airports are located within central cities, as in New York City, Atlanta, Los Angeles, Washington, D.C., and Miami. DOWNS, *supra* note 57, at 52-55.

100. Edward Glaeser, *Cities, Information, and Economic Growth*, 1 CITYSCAPE: J. POL'Y DEV. & RES. 9, 34 (1994) (explaining that central cities facilitate the information exchange and idea creation that remain critical to future prosperity).

101. For example, many major medical centers, wholesale suppliers, and theater companies, orchestras, and other cultural activities depend for survival on the central city because of its region-wide accessibility. DOWNS, *supra* note 57, at 52-55.

102. Central cities function as the locus for tourism and leisure because public monuments, redeveloped waterfronts, zoos, convention centers, and sports stadiums are typically located there. JUDD & SWANSTROM, *supra* note 57, at 334, 394.

cause tourism and leisure are two of the fastest-growing sectors of the United States and world economies, central cities remain extremely important to future economic vitality.¹⁰³ Second, central cities function as an anchor for regional commerce and sustainable economic growth. When businesses leave central cities because of urban decline, these businesses often leave not only the central city, but the entire region.¹⁰⁴ Third, the spillover of bad conditions in central cities adversely affects the quality of life in the surrounding suburbs.¹⁰⁵ Finally, as central cities continue to decline, suburban residents bear a disproportionate financial burden in addressing the expanding matrix of problems.¹⁰⁶

Because the suburbs and their residents continue to be significantly affected by the circumstances faced by central cities and their inhabitants, all residents of any metropolitan region should be concerned about the racialized nature of the housing market.¹⁰⁷ The persistence of racial discrimination means the intensification of segregation and the perpetuation of isolation. Segregation and isolation cut off central-city residents from most, if not all, avenues of mobility, producing mutually reinforcing and self-perpetuating synergistic stresses that create additional poverty.¹⁰⁸ The resulting decay and despair eventually touch everyone because regional decline invariably follows central-city decline.

103. Most other industrialized nations recognize this and have therefore invested trillions of dollars to improve and preserve the vitality of urban areas. *Id.*

104. For instance, 40% of the firms that moved out of Philadelphia during its fiscal crisis in the 1980s abandoned the entire metropolitan area. DOWNS, *supra* note 57, at 56.

105. Crime and health problems often spread to suburban communities. Wallace, *supra* note 95, at 339-40. See also DOWNS, *supra* note 57, at 55-57 (discussing the spillover of bad conditions from central cities to nearby suburbs). Moreover, city air and water pollutants can taint suburban supplies. *Id.* at 56.

106. The increased government expenditures necessary to confront these problems will eventually require tax increases. Because suburban residents typically pay higher taxes due to their comparatively higher average incomes, they will bear the bulk of this tax burden. DOWNS, *supra* note 57, at 56-59. See also Massey, *supra* note 40, at 1231-32 (concluding that as urban African-American communities continue to deteriorate, white suburbanites will inevitably pay the cost).

107. It should go without saying that, in the interest of promoting social justice alone, citizens should be concerned with the inequities endemic in the housing market and the resulting economic and social inequalities that hamper the ability of millions to realize the "American Dream."

108. See *supra* note 23-24 and accompanying text (discussing the problems at the intersections of race and poverty).

D. The Aftermath of the Fair Housing Act: In Pursuit of a Dream Deferred?

In an effort to eliminate racial discrimination in the housing market, Congress enacted the Fair Housing Act (FHA) in 1968 and amended it in 1988.¹⁰⁹ Congress designed the FHA to issue in a new era in which a combination of public and private enforcement, coupled with voluntary acceptance of prohibitions of discrimination, would open up previously unavailable housing to racial and ethnic minorities particularly. In so doing, the act was to retard the growth of starkly segregated housing patterns in our major metropolitan areas, where rings of white suburbs encircle largely African-American and Hispanic center cities.¹¹⁰ The original and amended legislation, however, fails to eliminate the more subtle forms of discrimination occurring now, and has, therefore, been unable to reverse the trend of residential segregation.¹¹¹

1. The Persistence of Discrimination and the Perpetuation of Segregation

Private lenders help maintain segregative housing patterns by continuing to reject applicants of color at an exceedingly high rate.¹¹² The extreme disparity between the loan rejection rates of similarly situated whites and people of color can be explained by nothing other than discrimination.¹¹³ In addition to private lenders, local governments around the nation have been instrumental in preserving, and even increasing, housing segregation. They con-

109. 42 U.S.C. §§ 3601-3631 (1994).

110. Guido Calabresi, *Preface*, in *THE FAIR HOUSING ACT AFTER TWENTY YEARS* 7, 7 (Robert G. Schwemm ed., 1988).

111. For example, a recent study sponsored by HUD reveals that African-Americans and Latinos experience discrimination in the rental market 53% and 46% of the time, respectively. *HOUSING DISCRIMINATION STUDY*, *supra* note 57, at vi-vii. Discriminatory treatment occurs even more frequently in the home-buyer market: 59% of the time for African-Americans and 56% of the time for Latinos. *Id.*

112. For instance, a study published by the Federal Reserve Bank of Boston reveals that people of color are 60% more likely to be rejected than similarly situated white applicants. Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data 2* (1992) (on file with author).

A recent study of the upper Midwest indicates that discriminatory practices also pervade this region. ANDRIANA ABARIOTES ET AL., *WESTERN ECONOMICS ASSOCIATION, DISPARITIES IN MORTGAGE LENDING IN THE UPPER MIDWEST: SUMMARY OF RESULTS USING 1992 HOME MORTGAGE DISCLOSURE ACT DATA* 34 (June 1994). Nearly 70% of the disparity between loan rejection rates of people of color and whites in the Twin Cities flows from discriminatory treatment of similarly qualified loan applicants. *Id.* at ES-3. Moreover, very little of the gap in loan rejection rates between African-Americans or Asian-Americans and whites in the Twin Cities region can be explained statistically by loan, borrower, or neighborhood traits. *Id.*

113. *Id.* at 34.

tinue to enact, or refuse to amend, zoning ordinances that have the effect of unduly limiting or entirely eliminating any realistic opportunity to build affordable housing.¹¹⁴ These ordinances consequently perpetuate racially and economically segregated housing patterns.¹¹⁵

2. The Fair Housing Act in Perspective

The inability of the FHA to compel private and public actors to cease discriminatory practices is not accidental.¹¹⁶ Members of Congress dramatically weakened the FHA's enforcement mechanisms to facilitate passage of the legislation.¹¹⁷ Although Congress strengthened the enforcement provisions of the FHA in 1988,¹¹⁸ the statute remains a weak mechanism for ensuring meaningful access to suitable housing for people of color. The high correlation between race and poverty means that many low-income residents also continue to lack sufficient access to housing because of the inability of the FHA to prevent many forms of discrimination.

Like the original legislation, the substance of the amended FHA reflects a mischaracterization of the problem as individual acts of discrimination in a larger race-neutral framework. Even the amended FHA, therefore, ignores the reality and impact of systemic

114. See LUKERMANN & KANE, *supra* note 79, at 9-10.

115. See *supra* notes 76-79 and accompanying text (discussing barriers to integrated housing).

116. Charles Lamb, *Congress, the Courts, and Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115, 1127 (1982) (identifying and analyzing the limitations of the FHA).

117. Senator Everett Dirksen of Illinois spearheaded the push for diluting the power and reducing the scope of the FHA. MASSEY & DENTON, *supra* note 12, at 193. Senator Dirksen's amendments eliminated HUD's authority to hold hearings, issue complaints, and publish cease-and-desist orders. *Id.* The amendments also reduced penalties for violations of the FHA. *Id.* Moreover, if HUD could not resolve a dispute, the FHA only permitted HUD to refer the case to the United States Attorney General. *Id.* at 196. The FHA authorized HUD to refer such cases only if it had evidence of a "pattern or practice" of discrimination or if the alleged discrimination raised an issue "of general importance." *Id.*; see also GEORGE METCALF, *FAIR HOUSING COMES OF AGE* 3-14, 85-86 (1988) (discussing the provisions of the FHA and their implications). Officials, however, rarely found that discrimination against an individual African-American satisfied these criteria. *Id.* According to a study by the United States Commission on Civil Rights, HUD referred only 10% of cases it could not resolve to the United States Attorney General, a very small percentage of which were ever pursued by the Attorney General. MASSEY & DENTON, *supra* note 12, at 197.

118. The amendments extend the time to file a housing discrimination complaint from 180 days to two years, allow attorney's fees and court costs to be recovered by successful plaintiffs, and raise punitive awards to \$10,000 for a first offense. MASSEY & DENTON, *supra* note 12, at 210-11. The United States Attorney General, Department of Justice, and HUD also now have authorization to take a more aggressive approach to addressing housing discrimination. *Id.*

and systematic discrimination. Moreover, the FHA's case-by-case approach relies heavily on an individual claimant's willingness to take on the tremendous financial and emotional burden of enduring a protracted litigation process. Furthermore, the success of the FHA's piecemeal approach hinges largely on the extent to which the United States Attorney General, the Justice Department, the United States Department of Housing and Urban Development (HUD), and the President wish to advance the goals of the FHA.¹¹⁹ One election can re-orient one or all of these offices and thus have a dramatic impact on the efficacy of the FHA.

Another fundamental flaw of the FHA is its continued reliance on a tort or criminal liability model that requires the identification of a violation, the detection of a perpetrator, and proof at trial that the perpetrator's act violates federal housing statutes. Using this model poses several problems. Most injured parties do not recognize when a violation of the law occurs.¹²⁰ In addition, since realtors, lenders, and owners often engage in subtle forms of discrimination, an aggrieved party has significant difficulty establishing liability. Even in the context of the more reasonable disparate impact standard,¹²¹ individual claimants have substantial difficulty showing that they have been discriminated against in a legally cognizable way. As a consequence, only a few of the meritorious cases actually have been litigated.¹²² The case-by-case approach embodied in the FHA, therefore, allows the overarching system of exclusion and segregation to persist.

Notwithstanding the adoption of civil rights legislation and policies, most notably the FHA, discrimination persists to this day. In a real sense, discrimination-induced geographic, economic, and social isolation prove to be equally, if not more, effective at perpetuating inequality than the Jim Crow laws they replaced.¹²³ More than any time since the Civil War, this nation needs a fundamental

119. *Id.* at 211-12.

120. John Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1574, 1584 (1993).

121. This standard does not require a showing of discriminatory intent on the part of the defendant(s) for a plaintiff to prevail; instead, a plaintiff need only show that the existing housing policies or practices have had a substantially adverse effect on members of a protected class without demonstration of a sufficient business justification. See generally ROBERT SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* (1990).

122. Boger, *supra* note 120, at 1583-84 (discussing the difficulties experienced by plaintiffs when they try to seek a remedy for housing discrimination from federal courts).

123. See *supra* parts I.A and I.B (analyzing the relationship between adequate housing and success in the United States, and the ways systematic discrimination prevents this success for people of color).

change in housing practices and thus a transformation in economic and social arrangements.

II. State-Wide Initiatives: An Alternative Approach

The preceding discussion regarding the significance of housing on one's economic and social life reveals why analysts and policy-makers should refocus their attention on housing patterns. Moreover, the analysis of the history of housing practices shows that discrimination and racial and economic segregation continue, even if not officially sanctioned. To address these problems of discrimination and segregation, as the discussion about the inadequacy of the FHA illustrates, policymakers should adopt an affirmative and broad-based approach. Fair Share legislation has been drafted toward these ends.

A. *The Typical Provisions of Fair Share Policies: Calls for System-Wide Action*

State legislatures have enacted Fair Share legislation to encourage increased construction of affordable housing. Fair Share statutory schemes generally require each region and its constituent communities to provide an equitable portion of the state's affordable housing need.¹²⁴ From the beginning, New Jersey has led the Fair Share movement. New Jersey's legislation¹²⁵ requires municipalities to take definitive action to provide affordable housing. In-

124. See generally Jerome Rose, *Is There a Fair Share Housing Allocation Plan That Is Acceptable to Suburban Municipalities?*, in AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING 114 (Jerome Rose & Robert Rothman eds., 1977) (discussing Fair Share policies and their implications).

125. N.J. STAT. ANN. §§ 52:27D-301-329 (West 1986 & Supp. 1995). The statute reads in relevant part:

[E]very municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families *The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation There are a number of essential ingredients to a comprehensive planning and implementation response, including the establishment of reasonable fair share housing guidelines and standards, the initial determination of fair share by officials at the municipal level and the preparation of a municipal housing element . . . and continuous State funding for low and moderate income housing Since the urban areas are vitally important to the State, construction, conversion and rehabilitation of housing in our urban centers should be encouraged. However, the provision of housing in urban areas must be balanced with the need to provide housing throughout the State for the free mobility of citizens.*

Id. § 52:27D-302 (emphasis added).

clusionary zoning is one of the most popular techniques used to compel the provision of affordable housing.¹²⁶ Density bonuses, which increase the permitted density of a development as the amount of affordable housing provided increases, and mandatory set-asides, which require developers to reserve a certain portion of units in a development for low- or moderate-income residents, provide the two main mechanisms for inclusionary zoning.¹²⁷ In addition to requiring the use of density bonuses and mandatory set-asides, the New Jersey statute authorizes the use of tax abatements,¹²⁸ infrastructure improvements and expansion,¹²⁹ the donation or use of municipally owned land,¹³⁰ and the allocation of public funds to encourage the construction of affordable housing.¹³¹

Oregon has also pioneered Fair Share legislation.¹³² Its law compels municipalities¹³³ to designate buildable lands¹³⁴ and provide for the construction of needed housing through flexible zoning measures.¹³⁵ New Hampshire, another Fair Share state,¹³⁶ has adopted legislation requiring all communities to provide reasonable opportunities for the siting of manufactured housing, a popular form of affordable housing in New Hampshire suburbs.¹³⁷ California's Fair Share statutory scheme embodies a different approach because it compels every community to adopt a long-term development plan that has a housing element.¹³⁸ This element must in-

126. The term inclusionary zoning refers to laws that mandate the creation of incentives to provide more economically and/or racially balanced housing.

127. N.J. STAT. ANN. § 52:27D-311(1) (West 1986 & Supp. 1995).

128. *Id.* § 52:27D-311(6).

129. *Id.* § 52:27D-311(4).

130. *Id.* § 52:27D-311(5).

131. *Id.* § 52:27D-311(7)-(8).

132. OR. REV. STAT. ANN. §§ 197.005-.845. (Butterworth 1991 & Supp. 1994). "The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for seasonal and year-round farm workers, is a matter of state-wide concern." *Id.* § 197.307(1).

133. *Id.* § 197.307(3) ("Housing, including housing for seasonal and year-round farm workers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.").

134. *Id.* § 197.295(1) ("'Buildable lands' means lands in urban and urbanizable areas that are suitable, available and necessary for residential uses.").

135. *Id.* § 197.307(3).

136. N.H. REV. STAT. ANN. §§ 674:1-53 (1986 & Supp. 1994). The Master Plan that guides the development of each municipality shall include "[a] housing section which analyzes existing housing resources and addresses *current and future housing needs of residents of all levels of income of the municipality and of the region* in which it is located. . . ." *Id.* § 674:2 (III) (emphasis added).

137. *Id.* § 674:32.

138. CAL. GOV'T CODE §§ 65580-89 (West 1983 & Supp. 1995).

The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order. . . . The

clude five-year projections for ways to meet any outstanding housing needs.¹³⁹ Massachusetts' Fair Share legislation¹⁴⁰ authorizes a still different approach; it streamlines the appeals process for developers, facilitating challenges to zoning that unduly burden the construction of affordable housing.¹⁴¹ To ensure compliance, Massachusetts also withholds federal and state assistance grants from municipalities that implement exclusionary zoning ordinances or other unreasonable restrictions on private development of low-income housing.¹⁴²

In most Fair Share states, regional governmental bodies or, if no such entities exist, relevant state agencies determine housing needs and enforce the provision of the appropriate housing stock. In California, for example, the Department of Housing and Community Development oversees the determination of regional needs.¹⁴³ Some states have established agencies expressly to identify and enforce Fair Share obligations. New Jersey created the Council on Affordable Housing to monitor the affordable housing provision process.¹⁴⁴

The Fair Share laws adopted in different states strive to promote greater economic integration of communities by distributing affordable housing in a fair fashion. These policies usually use a combination of market incentives and mandates to encourage municipal cooperation. Fair Share states either create a governmental body or authorize an existing agency to oversee the implementation process.

provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government. . . . Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make *adequate provision for the housing needs of all economic segments of the community*. . . . The Legislature recognizes that in carrying out this responsibility, *each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs*.

Id. § 65580 (emphasis added).

139. *Id.* § 65583(c).

140. MASS. ANN. LAWS ch. 40B, §§ 1-29 (Law. Co-op. 1993).

[R]equirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town. . . .

Id. ch. 40B, § 20.

141. *Id.* ch. 40B, § 22.

142. Mass. Exec. Order No. 215 (1982).

143. *Id.* § 65584(c).

144. N.J. STAT. ANN. § 52:27D-305 (West 1986 & Supp. 1995).

B. The Implications of Fair Share Policies: Promises Yet to Be Fulfilled

Fair Share legislation offers the prospect of dramatically changing economic and social circumstances in metropolitan areas across the nation. As currently drafted and implemented, however, Fair Share laws fall short of expectations and needs.

1. The Potential of Fair Share Policies

One of the major outgrowths of existing Fair Share policies has been a more systematic approach to providing affordable housing. In this context, system-wide enforcement, in place of the ineffectual case-by-case method of the FHA, becomes feasible. As New Jersey demonstrates, the supply of affordable housing can increase appreciably. Between 1983 and 1988, 23,000 housing units were completed or under development pursuant to New Jersey's Fair Share legislation. In contrast, only 1,700 federally subsidized units were constructed in the state between 1985 and 1988.¹⁴⁵ The Massachusetts Fair Share policies have also enjoyed some success, reducing the prevalence of exclusionary zoning and thus facilitating a greater availability of affordable housing.¹⁴⁶

In addition to providing the potential to compel construction of sufficient affordable housing in an equitable fashion, Fair Share laws can have a standardizing effect, preventing a regulatory commons problem. A regulatory commons problem occurs when individual municipalities overregulate land and consequently produce market inefficiencies.¹⁴⁷ In the context of housing practices, these inefficiencies take the form of negative externalities.¹⁴⁸ Housing

145. See Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1209 (1989) (describing the accomplishments of New Jersey's Fair Share legislation).

146. Roisman & Tegeler, *supra* note 57, at 350.

147. William Fischel, *Regulation for Revenue: The Political Economy of Land Use Exactions*, 13 J. POL'Y ANALYSIS & MGMT. 792, 795-96 (1994) (book review) (explaining that efficiency suffers when each municipality can regulate land use without regard to the consequences for adjacent areas or the region as a whole); McDougall, *supra* note 65, at 668 (describing municipalities acting as monopolies rather than efficient markets).

148. Negative externalities, also known as detrimental externalities, are costs imposed on parties who neither participated in nor consented to the transaction that produced the costs. These costs reflect market inefficiencies because the producer of the costs did not compensate those on whom the costs were imposed. Thus, the cost-creating transaction (and the creator of the negative externalities) escapes the disciplining effect of the market mechanism. See WILLIAM BAUMOL & ALAN BLINDER, *MICROECONOMICS: PRINCIPLES AND POLICY* 6, 249 (1991). In other words, suburban property owners and land use authorities have not paid for what they received—economic and social advantages at the expense of central cities and their residents. See *infra* text accompanying notes 196-99.

practices, such as exclusionary zoning and other types of discrimination, create these negative externalities¹⁴⁹ by thwarting consumer choice.¹⁵⁰ Fair Share policies can remedy this market failure—thereby improving economic efficiency—by making municipalities and property owners fully face and internalize¹⁵¹ the costs of their zoning and housing practices.¹⁵²

Fair Share legislation also could be an effective poverty-reduction mechanism. Dispersing affordable housing would not simply spread poverty around the region evenly but should also reduce the overall poverty rate of the metropolitan areas.¹⁵³ If designed properly and implemented fully, Fair Share laws would help those trapped at the intersections of race and poverty. Such policies would break up the matrix of mutually reinforcing, self-perpetuating stresses that flourish in geographically, economically, and socially isolated neighborhoods by creating and expanding access to critical institutions and, therefore, access to the opportunity structure and avenues for meaningful advancement. By eliminating the convergence of stresses, Fair Share policies would both reduce the poverty in the immediate area and pave the way for central-city and, ultimately, region-wide growth.¹⁵⁴ The net effect would be less poverty in the region as a whole.

In addition, properly conceived and executed Fair Share policies would help to build a more democratic society. Democracy, in its most meaningful sense, grows out of a vibrant public life that creates a truly inclusive system in which all citizens have the capacity and opportunity to participate.¹⁵⁵ However, in order to have this vibrant public life and thus true democracy, there must be mu-

149. The matrix of synergistic stresses that accompany increasing geographic, economic, and social isolation—which people commonly refer to as urban decline or urban decay—exemplify these negative externalities. See *supra* notes 23-24 and accompanying text (discussing these stresses).

150. See *supra* notes 88-91 and accompanying text (giving examples of limited choices).

151. The term internalize means that municipalities and property owners pay for the costs of their discrimination which, prior to the implementation of corrective measures such as Fair Share legislation, they had shifted onto other sectors of the economy and society.

152. Seymour Schwartz & Robert Johnston, *Inclusionary Housing Programs*, 49 J. AM. PLANNING ASS'N 3, 4-5 (1983).

153. Rosenbaum, *supra* note 10, at 263-66; Donald DeMarco & George Galster, *Prointegrative Policy: Theory and Practice*, 15 J. URB. AFF. 141, 155-57 (1993); Popkin et al., *supra* note 18, at 569-71.

154. See *infra* notes 188-93 and accompanying text.

155. See BOYTE, *supra* note 38 (discussing the importance of an open and inclusive public life to democracy); KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 2-10 (1989) (explaining the importance of meaningful equality to citizenship and, by implication, democracy); see also DEWEY, *supra* note 27, at 85-88.

tual and self-respect.¹⁵⁶ Racial and economic integration together continue to provide the best way to cultivate this respect and understanding.¹⁵⁷ A well-known historian recently offered an elegant statement of the meaning and value of integration:

From Frederick Douglass and Wendell Phillips in the nineteenth century to Martin Luther King Jr., integration has meant not the absorption of blacks into the pre-existing white social order but the transformation of American society so as to give real meaning to the principle of equality. Properly under-

For a discussion of the importance of a more egalitarian and participatory political, economic, and social environment as well as the dangers of an increasingly self-interested public life, see BENJAMIN BARBER, *THE DEATH OF COMMUNAL LIBERTY* (1977) (analyzing the success of a self-governing Swiss community); C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (1977); S.M. Shumer, *Machiavelli: Republican Politics and its Corruption*, 7 POL. THEORY 5 (1979) (discussing liberal democracy and the importance of balancing market assumptions with individual development).

156. SARA EVANS & HARRY BOYTE, *FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA* 68 (1986); W.E.B. DuBois, *Afterthought: The Problem of Humanity—The "Voice of Voices"—The Fusion of Cultures—Not the "Integration" of Colors*, in A W.E.B. DuBOIS READER 369-70 (Andre Paschel ed., 1971).

157. EVANS & BOYTE, *supra* note 156, at 68 ("For people who have been rendered invisible by the dominant culture, gaining such a transformative sense of themselves requires more than exhortation or experiences of being oppressed. A new sense of self is sustained and augmented in particular sorts of public places where people can discover 'who they are' and to what they aspire on their own terms, and where they can begin to think about what democracy means."); see also powell, *supra* note 27, at 791-92; Jomills Braddock II & Marvin Dawkins, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994) (analyzing the long-term effects of integration on educational, occupational, and societal attainments and concluding that integration provides an indispensable link for people of color to the process that leads to greater participation in society); DuBois, *supra* note 156, at 369 ("So far as human friendship and intermingling are based on broad catholic reasoning and ignore petty and inconsequential prejudices, the happier will be the individual and the richer the general social life. In this realm lies the real freedom toward which the soul of man has always striven: the right to be different, to be individual and pursue personal aims and ideals. Here lies the real answer to the leveling compulsions and equalitarianisms of that democracy which first provides food, shelter and organized security for man."); DEWEY, *supra* note 27, at 101 ("A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. These more numerous and more varied points of contact denote a greater diversity of stimuli to which an individual has to respond; they consequently put a premium on variation in his action. They secure a liberation of powers which remain suppressed as long as the incitations to action are partial, as they must be in a group which in its exclusiveness shuts out many interests.").

For the dangers of failing to create integrated settings, see *The Dynamics of Youth, Hate and Violence*, KLANWATCH: INTELLIGENCE REPORT, Oct. 1995, at 12 (discussing recent studies that reveal the prevalence of negative stereotyping and the concomitant hostility and violence because of segregation).

stood, integration means not only the removal of economic, social and political obstacles to full participation in every area of American life but changes in the contours of personal life so that friendship, comradeship and intimacy between the races can become far more common than is possible today.¹⁵⁸

Fair Share policies could help create the setting in which this interaction and transformation can occur by compelling the creation and preservation of diverse communities. Fair Share legislation, properly designed and fully implemented, would consequently minimize the fragmentation and stigmatization that increasingly undermines the nation's public life and thus maximize the capacity to build meaningful democracy.¹⁵⁹ Fair Share legislation would also help to create a more democratic society by facilitating a socially just distribution of resources and wealth;¹⁶⁰ because of the close connection between wealth and political power, a more equitable and egalitarian distribution of wealth typically results in a more egalitarian political environment.¹⁶¹

2. The Limitations of Existing Fair Share Legislation

Despite their tremendous potential, Fair Share policies continue to have only limited effectiveness. Even in New Jersey, where Fair Share has seen the most success because of greater state intervention, the overall results have been mixed.¹⁶² New Jersey falls short for several reasons. First, its legislation minimizes the ability of developers to bring zoning challenges directly to court.¹⁶³ Second, the statutory scheme does not require communities to market their units affirmatively in communities of color or low-income cen-

158. Eric Foner, *The Great Divide*, 261 THE NATION 487, 488 (1995).

159. See generally CORNELL WEST, RACE MATTERS (1993) (observing that if allowed to persist, racial hierarchy will increase fear and suspicion and consequently destroy any democratic order).

160. See *infra* notes 177-93 and accompanying text (discussing wealth inequities in the United States, relative to other countries).

161. See, e.g., Andrew Meier, *Russia's New Elite Rakes it in but Democracy Has Become a Dirty Word*, N.Y. TIMES, Nov. 30, 1995, at A20 ("[A]n elite managerial class—perhaps 10 percent of the population . . . now control newly privatized state enterprises . . . [and] have been the country's biggest roadblock to preventing understanding and appreciation of democratic values among the Russian people.").

162. See Ellen Lovejoy, *Mount Laurel Scorecard: Evaluation of New Jersey's Fair Share Housing System*, 58 PLANNING 10 (1992); Jeffrey Hoff, *The Mount Laurel Myth*, 6 BUS. J. N.J. 52 (1989).

163. N.J. STAT. ANN. § 52:27D-316(b) (West 1995). The statute states:

Any person who institutes litigation . . . after the effective date of this act challenging a municipality's zoning ordinance with respect to the opportunity to provide for low or moderate income housing, shall file a notice to request review and mediation with the council [Council on Affordable Housing (COAH)] pursuant to sections 14 and 15 of this act.

Id.

tral-city neighborhoods. Third, its Fair Share policies allow suburbs to pay central cities to bear up to fifty percent of suburban affordable housing obligations.¹⁶⁴ Fourth, and most significantly, New Jersey's legislation lacks racial goals and otherwise fails to ensure future racial diversity in affordable housing. The persistence of these four flaws, particularly the fourth, means that the main beneficiaries of New Jersey's Fair Share legislation continue to be marginal middle-income or temporarily low-income whites, such as students, young married couples, and divorcees.¹⁶⁵ Particularly the second, third, and fourth flaws have caused further geographic, economic, and social isolation of communities of color as well as the concomitant intensification and deepening of poverty in New Jersey's central cities.¹⁶⁶ In sum, New Jersey's Fair Share policies have largely ignored people of color, especially low-income individuals—all of whom historically have been victims of discrimination and segregation. New Jersey's overall results, then, have not been substantially better than anywhere else. However, states that take a less assertive approach, such as Pennsylvania¹⁶⁷ and Connecticut,¹⁶⁸ have even less success prompting the building of affordable housing generally, let alone addressing the needs of low-income people of color living in central cities.¹⁶⁹

The shortcomings of existing Fair Share policies could suggest that Fair Share policies should be abandoned completely. In order to determine whether such laws should be nullified or reformulated, the main criticisms of their underlying principle must be evaluated.

C. *Criticisms of the Fair Share Principle Assessed: Flawed Attacks*

Critics of Fair Share policies assert that such laws amount to a double tax on housing construction, raising prices and effectively excluding low-income individuals from a larger portion of the hous-

164. *Id.* § 52:27D-312(a).

165. Boger, *supra* note 120, at 1598-99; Lamar et al., *supra* note 145, at 1242-44.

166. For a general discussion of this phenomenon, see parts I.A-I.D.

167. See, e.g., *Fernley v. Board of Supervisors*, 502 A.2d 585 (Pa. 1985) (holding that a zoning ordinance which prohibited multi-family dwellings was constitutional but that the provision requiring the court to employ Fair Share analysis in determining relief could not be retroactively applied). For a summary and critique of the Pennsylvania approach, see John Hyson, *Pennsylvania Exclusionary Law: A Simple Alternative to Mount Laurel*, 36 LAND USE L. & ZONING DIG., Sept. 1984, at 3, 3-4.

168. See, e.g., *Builders Serv. Corp. v. Planning & Zoning Comm'n*, 545 A.2d 530, 549 (Conn. 1979) (holding that minimum floor area requirements contained in a municipal zoning ordinance were an invalid exercise of municipal police power).

169. Roisman & Tegeler, *supra* note 57, at 353-54.

ing market.¹⁷⁰ Moreover, Fair Share policies involve in-kind subsidies, which many consider to be one of the more inefficient forms of income redistribution.¹⁷¹ Even if in-kind subsidies were an efficient form of redistribution, skeptics allege, Fair Share policies would be insufficient because they primarily benefit marginal middle-income rather than low-income residents.¹⁷² Furthermore, critics conclude, even if Fair Share laws were more effectively redistributive, they would further trample local autonomy and ultimately reduce surrounding property values.¹⁷³

1. The Fair Share Principle and the Impact on the Housing Market

The notion that Fair Share policies artificially inflate housing prices operates on the assumption that there were no market distortions prior to the implementation of Fair Share legislation. As the existence of negative externalities from past and present housing practices indicates, however, this is false.¹⁷⁴ Even if it were true that race- and income-bias do not distort the housing market, the increase in costs alleged by Fair Share skeptics would be minimized through the provision of certain incentives: density bonuses sufficient to permit adequate density relative to land cost, fast-track building permit processing, and partial or total waiver of fees.¹⁷⁵ This criticism also ignores the potential countervailing impact of positive externalities that can come from meaningful racial and economic integration: higher academic achievement, better labor market participation, economic growth, lower crime, diminished need for public assistance, and greater mutual and self-respect and understanding—in essence, economic and social stability.¹⁷⁶

170. See, e.g., Richard Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 709-10 (1983) (concluding that inclusionary zoning, a component of Fair Share policies, may increase the costs of providing multi-family housing and therefore discourage the construction of additional affordable housing to the detriment of low-income residents); Ellickson, *supra* note 9, at 1215-16; William Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 PUB. POL'Y 301, 315-17 (1979) (arguing that Fair Share-type laws would inflate housing prices).

171. Carl Horowitz, *Pitfalls of Housing Redistribution*, 143 U. PA. L. REV. 1379, 1386-91 (1995) (asserting that redistributing wealth through housing is inefficient); Ellickson, *supra* note 9, at 1215.

172. Ellickson, *supra* note 9, at 1215.

173. See, e.g., Sugrue, *supra* note 70, at 557-61 (describing the perception among many residents that the integration of neighborhoods interferes with consumer preferences and drives down property values).

174. McDougall, *supra* note 65, at 694.

175. Schwartz & Johnston, *supra* note 152, at 17.

176. See generally *supra* parts I.A-I.D; Rusk, *supra* note 57, at 1-2 (arguing that cities succeed when more integrated).

2. The Fair Share Principle and the Value of Redistributing Wealth Through Housing

Even if it were true that in-kind transfers are highly inefficient, the centrality of housing, discussed in Part I, makes a compelling case for in-kind transfers in the form of housing.¹⁷⁷ If drafted and implemented correctly, in-kind transfers through Fair Share policies would constitute an effective redistributive mechanism.¹⁷⁸ The extreme and increasing degree of income inequality in the United States underscores the importance of the redistribution that Fair Share laws could achieve. Recent studies reveal that the United States has become the most economically stratified nation in the industrial world: the richest twenty percent own eighty percent of the wealth.¹⁷⁹ Moreover, the richest one percent of the population now has more wealth than the bottom ninety percent.¹⁸⁰ Such stark inequality increases along racial lines.¹⁸¹ The dramatic increase in wealth and income stratification in the United States recently prompted Massachusetts Institute of Technology economist Lester Thurow to write that "[n]o country without a revolution or a military defeat . . . has ever experienced such a sharp shift in the distribution of earnings as America in the last generation"¹⁸²

177. Moreover, housing has become less affordable in general. Increasing numbers of people spend more than 30% of their income on housing. See William Appgar, *An Abundance of Housing For All but the Poor*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 99, 99-109 (G. Thomas Kingsley & Margery Turner eds., 1993); Margery Turner & John Edwards, *Affordable Rental Housing in Metropolitan Neighborhoods*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY, *supra*, at 139-41. In this context, treating housing as a merit good becomes equitable, even necessary.

178. See *infra* notes 192-93 and accompanying text (discussing how the implementation of Fair Share legislation not only increases the availability of affordable housing, but also increases access to employment, educational, informational, health, and economic resources).

179. Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, April 17, 1995, at A1; EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 51-57 (1995) (concluding that the increasing income inequality in the United States has deleterious ramifications).

180. WOLFF, *supra* note 179, at 12. See also Clifford Cobb et al., *If the GDP is Up, Why is America Down?*, ATLANTIC MONTHLY, Oct. 1995, at 59, 72 (reporting that, during the 1980s, the top 1% of the population enjoyed a growth in income of more than 60%, while the bottom 40% of the population saw their incomes drop).

181. For example, the typical white household, with a median net worth of \$44,408, has almost 10 times as much wealth as the typical African-American household, which has a median net worth of \$4,604. Urban Coalition, *The "Wealth Gap" Widens*, CENSUS ANALYSIS UPDATE, Winter 1995, at 1, 2. See generally OLIVER & SHAPIRO, *supra* note 52 (discussing racial inequality based on an analysis of private wealth).

182. Robert Borosage, *The Center Holds Like Glue: Suffocating in a Consensus Budget*, 261 THE NATION 738, 738 (1995).

The growing inequality in the United States poses a challenge to policy-makers and citizens, not only in terms of securing social justice and democracy, but also in terms of achieving economic vitality in the future.¹⁸³ When inequality increases, economic growth often decreases.¹⁸⁴ During the 1980s, while income inequality worsened in the United States relative to France, for instance, France's productivity growth exceeded that of the United States twofold.¹⁸⁵ More strikingly, while income inequality remained much less in Japan, Japan's productivity growth exceeded that of the United States fivefold.¹⁸⁶ The findings of a recent study, examining economic patterns between 1965 and 1990, further supports the proposition that income inequality undermines economic growth. During this time, East Asian nations significantly decreased income inequality and achieved a 5.3% average growth in output per capita per year. In contrast, Western nations did not markedly decrease inequality and only experienced a 2.4% growth per capita per year.¹⁸⁷

In addition to having adverse consequences for the national economy, inequality has a devastating impact on metropolitan regions of the United States. Income inequality, particularly between central cities and their surrounding suburbs, results in less regional economic growth.¹⁸⁸ For example, of forty-eight large metropolitan areas, those with the largest central city-suburban income gap had the smallest increase in jobs.¹⁸⁹ Without structurally transformative intervention, such as Fair Share legislation, this

183. See generally UNDERSTANDING AMERICAN ECONOMIC DECLINE (Michael Bernstein & David Adler eds., 1994) (using historical, institutional, social, and cultural perspectives to explain that inequality can harm economic and social stability).

184. See *infra* notes 188-91 and accompanying text.

185. David Gordon et al., *An Equality-Efficiency Trade-Off?*, 37 DISSENT 510, 512 (1990).

186. *Id.*

187. Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 303 n.493 (citing Nancy Birdsall et al., *Inequality and Growth Reconsidered* (Feb. 1994) (unpublished manuscript on file with the *Stanford Journal of International Law*)); see also MICHAEL TODARO, *ECONOMIC DEVELOPMENT IN THE THIRD WORLD* 169-70 (4th ed. 1989) (associating wider inequality in the income structure of developing countries with a lower per capita income and growth of income); WILLIAM ASCHER, *SCHEMING FOR THE POOR* 21 (1984) (explaining why greater equality in developing countries may be a factor for self-sustaining economic growth); Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1, 23-24 (1955) (arguing that although other factors also contributed to differences in economic performance, inequality played an important role in the retardation of growth).

188. LARRY C. LEDEBUR & WILLIAM B. BARNES, NATIONAL LEAGUE OF CITIES, CITY DISTRESS, METROPOLITAN DISPARITIES AND ECONOMIC GROWTH 13-15 (Sept. 1992) (showing that income inequality means less job growth).

189. *Id.*

trend will persist throughout the nation.¹⁹⁰ A properly conceived Fair Share policy could help halt or even reverse the spiral of decline. Correctly implemented Fair Share legislation would increase the availability of affordable housing in the suburbs for a broad cross-section of the population, giving more central-city residents a real chance to move into those units and therefore enhance their employment, educational, informational, and general economic opportunities.¹⁹¹ The resulting change in housing patterns would probably lessen the strain on existing central-city services and resources, making possible an in-place strategy in the form of public reinvestment, meaningful and socially responsible revitalization, and upkeep of central cities. In other words, more holistic and communally beneficial redevelopment,¹⁹² as opposed to mere gentrification, would then be feasible. Reduced homelessness and a better quality of life for central-city residents are two immediate benefits of this approach. Moreover, the ensuing revival of central cities could attract greater private investment and commerce, eventually increasing the tax base of cities. With more public and private funds, the process of urban recovery and regional health could be sustained over the long-term.¹⁹³

3. The Fair Share Principle and the Assistance of Those Most in Need

The third criticism of Fair Share policies correctly points out that existing laws have done little to change housing patterns or benefit low-income residents, especially people of color. This does not mean, however, that Fair Share strategies should be abandoned; rather existing shortcomings indicate that current approaches must be rethought and reformulated to include explicit racial goals.¹⁹⁴ As the New Jersey experience illustrates, even a

190. See Roy Bahl, *Metropolitan Fiscal Disparities*, 1 CITYSCAPE 293, 302 (1994); see also *supra* notes 13-16 and accompanying text (explaining factors that contribute to the city-suburb income gap).

191. See *supra* part I.A (discussing housing and access to social and economic institutions).

192. This includes, for example, improving and expanding community centers, parks, libraries, and other public spaces in addition to increasing funding for schools and other educational and cultural institutions.

193. To have a lasting impact, such an approach could not be small-scale. Admittedly, this structurally transformative strategy would cost a significant amount and require many years to take full effect. The same could be said, however, about most forms of significant and enduring change. In addition, an appropriately implemented Fair Share policy, in the long term, would more than compensate for the initial outlays because it would effectively address the synergistic dynamics afflicting metropolitan regions around the nation. See *supra* part I.C; *infra* part III.B.

194. See *supra* part I.C (discussing the effects of racialized housing markets and segregation).

more comprehensive Fair Share law will not effectively address the stresses afflicting central-city neighborhoods and their inhabitants without a definitive racial element.¹⁹⁵ This issue will be addressed further in Part III.

4. The Fair Share Principle and Local Autonomy/Property Values

The fourth criticism, that Fair Share policies abrogate local autonomy and destroy property values, ignores the fact that prosperous suburban municipalities have not attained their position on their own. In reality, the federal and state governments have largely subsidized suburban development and prosperity.¹⁹⁶ This fact, alone, should be a sufficient basis for requiring suburbs to reciprocate in some form. That much of suburban growth and prosperity has been *at the expense* of central cities makes the case for suburban reciprocation even more compelling. Examples of this phenomenon range from the free-riding behavior of suburbs and their residents¹⁹⁷ to discriminatory housing practices.¹⁹⁸ The fourth criticism also erroneously assumes that the siting of affordable housing will automatically diminish surrounding housing values. Studies conducted over the last thirty years show this allegation to be a myth: property values actually decline only slightly, if at all.¹⁹⁹

195. See *supra* notes 165-69 and accompanying text (discussing the effectiveness of Fair Share policies).

196. See *supra* notes 58-79 and accompanying text (discussing governmental discrimination in the housing market).

197. Free-riding occurs when individuals or groups enjoy benefits without paying for them. BAUMOL & BLINDER, *supra* note 148, at 253-54. Suburbs and their residents continue to benefit from, for example, proximity to central-city commercial districts, central-city police and fire protection services, and infrastructure maintenance and expansion while providing virtually no compensation in exchange. *Id.*

198. These practices exclude primarily low-income residents and people of color, inducing central-city decline across the nation. See *supra* part I.

199. See EDWARD D. GOETZ ET AL., CENTER FOR URBAN AND REGIONAL AFFAIRS, *THERE GOES THE NEIGHBORHOOD? THE IMPACT OF SUBSIDIZED MULTI-FAMILY HOUSING ON URBAN NEIGHBORHOODS* 12-15 (1996) (analyzing the impact of siting affordable housing on surrounding property values, reviewing over one dozen similar studies, and concluding that affordable housing does not decrease surrounding property values); ROBERT LYONS & SCOTT LOVERIDGE, UNIVERSITY OF MINNESOTA'S DEPARTMENT OF AGRICULTURE AND APPLIED ECONOMICS, *AN HEDONIC ESTIMATION OF THE EFFECT OF FEDERALLY SUBSIDIZED HOUSING ON NEARBY RESIDENTIAL PROPERTY VALUES* i (1993) ("A major finding is that the number of subsidized units near a residential property has a small, statistically negative effect on its value, which diminishes with greater distance."); William Rabiega et al., *The Property Value Impacts of Public Housing Projects in Low and Moderate Density Residential Neighborhoods*, 60 LAND ECON. 174, 178 (1984); Hugh Nourse, *The Effect of Public Housing on Property Values in St. Louis*, 39 LAND ECON. 433, 440-41 (1963). Even assuming that afforda-

Fair Share as a principle and a policy thus continues to be viable and potentially effective. Admittedly, however, Fair Share legislation, as currently designed and applied, has several weaknesses.²⁰⁰ The next section of this article explores possible remedies for these shortcomings.

III. A Regional Strategy for the Twin Cities Metropolitan Area: A Proposed Application

Although Fair Share legislation potentially enhances enforcement and economic efficiency while reducing poverty and fostering a stronger democracy, one global, and potentially serious, problem remains: existing laws do not benefit those most in need. This problem has two components. First, Fair Share policies around the nation continue to be unsatisfactorily implemented and thus have not lived up to their potential because of the prevalence of discrimination and the resistance to integration. Second, even if existing Fair Share laws lived up to their potential, the results still would be inadequate because their compliance standards and policy goals are not sufficiently far-reaching. The first criticism suggests the need for a more explicitly regional approach as part of a national effort. The second criticism points to the need to recast the substance of Fair Share to include several elements, the most crucial of which are an explicit racial dimension, meaningful low-income goals, and an in-place strategy that complements the mobility strategy.

The Twin Cities metropolitan area provides an excellent focal point for evaluating a regional Fair Share policy because this region has a well-established tradition of embracing innovative approaches to the legal, economic, and social issues facing the nation.²⁰¹ Moreover, policymakers in this region have taken steps to

ble housing could substantially depress property values, housing values will remain stable when, for example, 80% of the current estimated value of homes is insured. See J. JOHN PALEN, *THE SUBURBS* 141-45 (1995) (describing how, with the assistance of the Ford Foundation, Oak Park, a suburb of Chicago, implemented a "moral homeowners insurance" program that preserved the housing values as the neighborhoods became more racially and economically integrated). In addition, recent studies indicate that the siting of affordable housing does not increase crime rates or neighborhood instability. It has the opposite effect: crime rates decline and neighborhoods become more stable. See GOETZ ET AL., *supra*, at 2-3.

200. See *supra* notes 162-69 and accompanying text (discussing the limitations of Fair Share legislation).

201. See DAVID MANDELKER & ROGER CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 794-95 (1990) (describing the Metropolitan Council (Met Council) as an important part of an ambitious regional planning and development program); LUKERMANN & KANE, *supra* note 79, at 9-10 (describing innovative approaches to addressing housing needs in the Twin Cities metropolitan area); *infra* note 214 and accompanying text (providing history and an overview of the Metropolitan Council).

address, in particular, the current metropolitan crisis in meaningful and creative ways. Furthermore, the Twin Cities region has only now begun to experience the variety and extent of problems decimating many other metropolitan areas. Examining the dynamics and options in this region, therefore, can show policy-makers how to take the preemptive and structurally transformative action needed to prevent the spiral of decline that now ravages many regions across the nation. In addition, exploring the application of a regional Fair Share strategy can produce effective strategies for rescuing already devastated metropolitan areas such as Detroit, Los Angeles, New York City, Chicago, Philadelphia, St. Louis, Miami, and Washington, D.C.

A. *A Regional Policy Considered: Toward a Vision of Substantive Equality*²⁰²

An explicitly regional Fair Share policy, in the context of a national effort, offers several advantages in addition to promoting greater racial and economic integration and, by implication, ensuring a more equitable distribution of affordable housing, increasing economic efficiency, reducing poverty, and building a more meaningful democracy. The greater latitude afforded local institutions and officials through this recasted approach means more innovation and tailoring of the implementation process to regional particularities. This greater flexibility for local authorities would make a regional Fair Share policy more politically palatable. Moreover, a regional strategy would minimize local governmental fragmentation and jurisdictional rivalry, enhancing an entire region's ability to respond effectively to evolving economic and social challenges.²⁰³ Furthermore, this approach would be more comprehensive, thereby more effective, than the current state-wide approach because regions often cross state boundaries.²⁰⁴

202. This concept reflects the insight that treating differently situated or unequal people the same—as formal equality does—perpetuates inequality. Numerous commentators recognize the distinction between this contextualized understanding of equality and formal equality, therefore avoiding the mistaking of symmetry or rigid neutrality for meaningful equality. For further discussion of this perspective, see, e.g., CATHERINE MACKINNON, *ONLY WORDS* 85-91 (1993); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1514 (1988). See generally Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *STAN. L. REV.* 1 (1991) (noting that a growing number of commentators consider formal equality to be an empty concept and advocating the adoption and promotion of substantive equality).

203. RUSK, *supra* note 57, at 33-35, 47.

204. To avoid jurisdictional conflict, HUD or some other federal agency should implement the coordination of this regional approach.

Perhaps most significantly, an explicitly regional approach should help to foster a more inclusive and participatory socio-political environment by creating and maintaining racially and economically integrated neighborhoods.²⁰⁵ Bringing together people of different backgrounds at the regional level would enable all, rather than a select few, residents to play a meaningful role in shaping their communities.²⁰⁶ This inclusive and participatory environment would increase the possibility of achieving and preserving substantive equality—as opposed to mere formal equality—for all.²⁰⁷

A recasted regional Fair Share policy for the Twin Cities metropolitan area and other regions around the nation would be consistent with the legal underpinnings of existing legislation. Most states implement Fair Share laws in accordance with the regionalism principle. This principle embodies the theory that because of the potentially broad extraterritorial impact of a community's zoning ordinances, each municipality in a metropolitan area must provide its share of regional housing opportunity to further the general welfare.²⁰⁸ As the basis for adopting or affirming policies that vindicate the regionalism principle, state legislatures use statutory authority²⁰⁹ and state courts use the general welfare obligation inherent in the equal protection and substantive due process guarantees of state constitutions.²¹⁰ In the same way, the general welfare obligation under the Minnesota Constitution²¹¹ could serve as

205. See *supra* notes 155-61 and accompanying text (discussing the qualities of a true democracy).

206. See, e.g., EVANS & BOYTE, *supra* note 156; DEWEY, *supra* note 27.

207. See *supra* notes 155-61 and accompanying text; see also *supra* note 202 (discussing the distinction between formal and substantive equality).

208. Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1635-43 (1978) (discussing the regionalism principle and strategies to vindicate the principle).

209. See, e.g., *supra* notes 125-44 and accompanying text (analyzing specific statutory provisions from New Jersey, Oregon, New Hampshire, California, and Massachusetts).

210. See, e.g., *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105 (Pa. 1977) (holding that a township ordinance unconstitutionally excluded multi-family dwellings); *Southern Burlington NAACP v. Mount Laurel*, 336 A.2d 713 (N.J.) (holding that a developing municipality may not, by a system of land use regulations, make it physically and economically impossible to provide low- and moderate-income housing in the municipality for people who need and want it), *cert. denied*, 423 U.S. 808 (1975).

211. The equal protection guarantee under the Minnesota Constitution resembles the equal protection guarantee of the New Jersey Constitution, upon which the New Jersey Supreme Court relied when upholding the most sweeping Fair Share policy in the nation. Compare MINN. CONST. art. I, § 2 ("No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof . . .") with N.J. CONST. art. I ¶ 1 ("All persons are by nature free and independent and have certain natural and unalienable rights . . ."). Although the Minnesota Supreme Court has not expressly interpreted the equal protection clause

authority for adopting the regionalism principle and therefore provide the legal basis for a Twin Cities regional Fair Share policy.

Minnesota policy-makers already have begun to move in the direction of vindicating the regionalism principle, as demonstrated by the recent enactment of the Metropolitan Livable Communities Act (MLCA).²¹² The MLCA creates and distributes incentive funds to municipalities in the Twin Cities metropolitan area that rehabilitate existing affordable housing stock or offer a full range of housing opportunities.²¹³ In addition, the Twin Cities region already has, in the form of the Metropolitan Council (Met Council),²¹⁴ an institutional mechanism to implement a Fair Share policy effectively. The Met Council adopted one of the more ambitious regional planning and development control programs in the nation.²¹⁵ To allocate municipal share equitably, the Met Council developed a formula that calculates each community's share of the following: available land, projected household growth, and multi-family apartment units that could be used either through existing leased housing subsidies or the use of the sizeable rehabilitation subsidy programs.²¹⁶ Moreover, the Met Council took the unique step of

as creating a general welfare obligation to provide affordable housing, the court has stated that "the legislature is empowered to enact legislation for the purpose of . . . general welfare which is legitimately or reasonably related to that purpose." *Spannus v. Century Camera, Inc.*, 309 N.W.2d 735, 745 (Minn. 1981) (citing *St. Paul v. Dalsin*, 71 N.W.2d 855, 858 (Minn. 1955)); see also MINN. STAT. ANN. § 462.357(1) (West 1991) ("For the purpose of promoting the public health, safety, morals and general welfare, a municipality may by ordinance regulate [zoning] . . .").

The Minnesota Land Use Planning Act, MINN. STAT. ANN. §§ 473.851-473.871 (West 1994), could also provide a legal basis for a regional Fair Share policy. See, e.g., MINN. STAT. ANN. § 473.851 ("[S]ince problems of urbanization and development transcend local governmental boundaries, there is a need for the adoption of coordinated plans . . . in order to protect the health, safety, and welfare of the residents of the metropolitan area . . ."); MINN. STAT. ANN. § 473.868(1) ("[I]t is in the public interest that, for certain portions of the buildable residential land, the official controls imposed on development by municipalities in the metropolitan area be required to permit the construction of modest cost housing by the private sector which could be afforded by a significant portion of the families in the metropolitan area.").

212. MINN. STAT. ANN. §§ 473.25, .251-.254 (West Supp. 1996).

213. *Id.* § 473.25.

214. MINN. STAT. ANN. § 473.123 established the Met Council as a political subdivision of the state of Minnesota. The Met Council has the same functions, rights, powers, duties, privileges, immunities, and limitations as those associated with housing and redevelopment authorities created for municipalities. Consisting of members appointed by the Governor and acting as a regional governmental body, the Met Council formulates policies and allocates funding in furtherance of regional planning and development goals. For example, it provides funding for and monitors the provision of transportation, sewage, and, in the past, housing services. See MINN. STAT. ANN. § 473.123 (West 1994).

215. *Id.* § 473.145. As early as 1979, the Met Council established numerical housing goals for each local unit of government based on the projected regional need of 33,835 subsidized units by 1990. LUKERMANN & KANE, *supra* note 79, at 4.

216. LUKERMANN & KANE, *supra* note 79, at 9-10.

devising and proposing the adoption of incentives and disincentives, some of which are discussed below, to compel compliance with established housing goals.²¹⁷

The Metropolitan Community Stability Act (MCSA), passed by the state legislature in 1994, would have provided a more effective mechanism for vindicating the regionalism principle than the MLCA had Governor Arne Carlson not vetoed it.²¹⁸ The MCSA would have authorized the use of both incentives and punitive measures to compel suburban municipalities to provide more affordable housing within their boundaries.²¹⁹ As discussed below, however, the MCSA, along with the MLCA, would need to be reformulated for a Fair Share policy to be truly effective in Minnesota. Nonetheless, the events surrounding the debate about the MCSA illustrate the potential of a regional strategy. A diverse coalition of Minnesotans, spanning racial, economic, and municipal lines, formed to advocate adoption of the legislation.²²⁰ These citizens mobilized because they recognized their collective interdependence, that their individual fate is closely linked to the fate of other residents in the region.²²¹ They also realized that regional stability ultimately hinges on an equitable provision and distribution of affordable housing and, by implication, the racial and economic integration of neighborhoods. Such interdependent thinking and its corresponding behavior directly contradict the prevailing view of people's motives and conduct—that narrow self-interest drives human affairs—and thus challenges the conventional wisdom regarding the appropriate character of public policy. Implementing policies premised on interconnectedness, like Fair Share laws, could encourage and reinforce community thinking, perhaps lead-

217. METROPOLITAN COUNCIL, OPENING DOORS TO AFFORDABLE/LIFE-CYCLE HOUSING: BASELINE DATA 104-107 (1995) (outlining proposals for ensuring municipal cooperation with regional housing objectives).

218. Governor Arne Carlson opposed the removal of barriers to the provision of low-income housing in affluent suburbs, likening it to social engineering. He also opposed the increased political potency of the Met Council under the MCSA. Dane Smith, *Carlson Opposes Plan to Cut Suburb-City Gap: Issue is Low-Income Housing in Affluent Areas*, STAR TRIB. (Minneapolis), Apr. 22, 1993, at B1. In other words, Governor Carlson opposed the MCSA primarily because of its potential to increase residential diversity.

219. The most significant measure would have transferred money from the tax on homestead values over \$150,000 into a metropolitan reinvestment fund that would be used to build more affordable housing. The MCSA also would have authorized the Met Council to set more forcefully affordable housing goals for Twin Cities suburbs and to withhold local government aid and sewer expansion funding from uncooperative suburbs. *Addressing the Issue: A Look at What Others Say Needs to Be Done*, STAR TRIB. (Minneapolis), Feb. 28, 1994, at A6.

220. Interview with Myron Orfield, Minnesota State Representative and author of the MCSA, in Minneapolis, Minn. (Jan. 6, 1995).

221. *Id.*

ing to future cooperation that would make government intervention unnecessary.²²²

If implemented, a regional Fair Share policy—in the context of a national effort—provides greater flexibility, political palatability, and comprehensiveness. Most importantly, this approach would help to create more substantively egalitarian and inclusive regions and, ultimately, a more democratic and humane nation. A regional Fair Share strategy would be in accordance with accepted legal doctrine and therefore could not be susceptible to legal challenge. The Twin Cities metropolitan area already has much of the institutional apparatus and potential to execute such a policy.

*B. Regional Fair Share Properly Conceived: A
Structurally Transformative Approach*

To secure substantive equality for all—and therefore economic and social stability in the United States—simultaneous racial and economic integration must be achieved.²²³ For true integration to occur, a regional Fair Share strategy must have several elements currently absent from existing Fair Share policies.²²⁴ These are as follows: (1) racial and low-income goals; (2) mandatory municipal participation; (3) even geographic distribution of affordable housing within each municipality; (4) affirmative inclusion of non-profit developers; (5) identification or establishment of a regional agency to execute the policy; and (6) an in-place strategy working in tandem with the mobility strategy.

222. A recent study shows the opposite is also true: accepting the self-interest model of human motives and behavior becomes a self-fulfilling prophecy in that those who accept this model subsequently begin to think and behave in a more narrowly self-interested fashion. Robert Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159, 159 (1993).

223. See RUSK, *supra* note 57, at 1-2; KARST, *supra* note 155, at 2-10; DEWEY, *supra* note 27, at 85-88.

224. At least in the short term, Fair Share measures must be implemented in conjunction with the development or expansion of transportation mechanisms, social services, and education and training programs. Such programs must be provided if there is to be adequate support and minimal isolation in central cities, remote suburbs, and rural areas. Rosenbaum, *supra* note 10, at 259-60, 265. In addition, a regional Fair Share strategy must be implemented with a sensitivity to the potential problems posed by certain communities remaining "too expensive, too racist, [or] too vulnerable to white [or middle-income] flight." *Id.* at 256. Moreover, regional governmental bodies akin to the Met Council would need to be created and maintained around the nation if this policy is to be fully effective. See *infra* notes 246-49 and accompanying text.

1. The Necessary Components of a Structurally Transformative Fair Share Policy

To avoid aiding only marginal middle-income or temporarily low-income residents, a regional approach should include concrete racial goals,²²⁵ low-income²²⁶ floor goals,²²⁷ or a combination of the two. The substance of these two goals would depend on various demographic factors, including the extent to which the demographic composition of a community differs from that of the region.²²⁸ Substantial incentives in the form of significant additional development or infrastructure-improvement funding should be linked to the achievement of a combined goal to encourage greater simultaneous racial and economic integration.²²⁹ Moreover, to ensure that the floor goals do not become ceilings, incentives should be increased as the racially and economically diverse housing supply increases. In this way, the policy goals of both the FHA—racial integration—and traditional Fair Share legislation—economic integration—can be meaningfully advanced.²³⁰

Unfortunately, the recently enacted MLCA and the recently vetoed MCSA contain no explicit racial goals and, therefore, cannot compel the substantial advancement, let alone full achievement, of

225. As the discussion accompanying notes 162-69 reveals, low-income central-city residents, who are disproportionately people of color, will not be significantly helped by Fair Share measures that do not have explicit racial goals. Moreover, the disparate impact of discrimination on people of color's opportunity to accumulate wealth warrants express racial goals to rectify past and ongoing inequities and inequalities. See *supra* notes 49-52 and accompanying text. For an illustration of the effectiveness of aggressive, race-conscious intervention in the housing market to end the cycle of deprivation and despair, see DeMarco & Galster, *supra* note 153.

226. This is commonly defined as 30% and 50% of median income. The calculation of the amount and nature of low-income housing need should reflect *actual need*. In other words, low-income housing should be made available to people at all gradations within the low-income bracket. This would minimize the likelihood that only people at the high end of the low-income bracket gain access to the new housing.

227. Whereas quotas mandate a *fixed outcome* and therefore raise constitutional issues, the goals proposed here merely encourage an *open process*. In any event, remedying the growing metropolitan crisis, by any reasonable account, amounts to a compelling governmental interest. See *generally supra* part I (discussing current problems in urban areas). Moreover, racial and economic integration of housing is an approach that is narrowly tailored to address this crisis. As the New Jersey experience illustrates, any policies that stop short of increasing racial and economic integration will not effectively remedy the crisis afflicting the nation. See *supra* notes 162-69 and accompanying text (discussing impact of New Jersey's Fair Share law).

228. Boger, *supra* note 120, at 1612-13.

229. Roisman & Tegeler, *supra* note 57, at 355.

230. See HERBERT M. FRANKLIN ET AL., IN-ZONING: GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 59-82 (1974). The federal government, probably through HUD, would facilitate this effort by acting as a clearinghouse for information about effective housing strategies. The federal government would also help to ensure maximum consistency nationwide by coordinating implementation and providing financial support.

racial integration in housing in the Twin Cities region. Many of the stresses on central-city communities, which consist disproportionately of people of color, will thus not be alleviated. In addition, the MLCA does not create meaningful low- and moderate-income objectives. A simple, but critical, fact nullifies what little in the statute could create useful housing goals: the MLCA *does not require participation* by any municipality.²³¹ Suburbs that do not wish to provide affordable housing can simply choose not to do so.²³² The only adverse consequence the MLCA imposes for such recalcitrance is ineligibility for incentive funding for that year.²³³ Wealthy suburbs, often the least integrated communities in a region, can more readily function without this additional funding than the financially strapped central cities. Low- and moderate-income housing will therefore become even more concentrated in the central cities. The MLCA further contributes to the concentration of affordable housing by allowing adjacent municipalities to provide such housing cooperatively in any way they choose so long as they meet combined goals.²³⁴ In the long run, the effect of the MLCA will be both to concentrate affordable housing and to isolate communities of color.²³⁵ This will create added pressures on the two urban cores and, eventually, the region as a whole.²³⁶ Thus the MLCA, as currently drafted, will accomplish even less than existing Fair Share policies.

In addition to explicit racial and low-income goals, a properly conceived Fair Share policy should require the provision of affordable housing within each municipality's boundaries, affirmative marketing in communities of color and low-income central-city neighborhoods, and counseling services for residents of these communities.²³⁷ As California's experience demonstrates, plans that

231. The statute provides for the *negotiation* between the Met Council and each municipality to establish housing goals "that are consistent with and promote the policies of the metropolitan council as provided in the adopted metropolitan development guide." MINN. STAT. ANN. § 473.254 (2) (West Supp. 1996).

232. *Id.* § 473.254 (1)(a) ("[A] municipality *may elect to participate* in the local housing incentive account program.") (emphasis added).

233. *Id.* § 473.254 (1)(b).

234. *Id.* § 473.254 (4)(b)(2).

235. As the New Jersey experience indicates, when suburban municipalities have the chance to shift their housing obligations to central cities, they do. *See supra* notes 162-69 and accompanying text (describing the impact of New Jersey's Fair Share legislation).

236. *See supra* notes 92-108 and accompanying text (discussing effects of central cities on surrounding areas).

237. These requirements proved successful when implemented in the past. *See DeMarco & Galster, supra* note 153, at 151-52.

rely mostly on incentives often do not work well.²³⁸ Whereas municipalities in California using mandatory set-asides have prompted the construction of substantial affordable housing, communities only using incentives, usually in the form of density bonuses, have not been able to compel significant construction.²³⁹ Because Minnesota's MLCA, like many current Fair Share strategies, relies on incentives,²⁴⁰ it will probably fail to both expand the availability of affordable housing, and to provide meaningful housing choices for people of color.

A truly effective Fair Share policy for the Twin Cities metropolitan area and other regions of the nation should also use a combination of scattered-site²⁴¹ and clustered units²⁴² to avoid the concentration of this housing and the accompanying isolation of residents; scattered-site housing should be used in most cases to preclude the isolation now taking hold in most central cities. Moderately clustered units could be used to encourage more of a sense of community; however, it would be better to limit the use of clustered units, given the disastrous consequences of clustering multi-family, low-income units in the past.²⁴³

Another important element of an effective Fair Share strategy is the inclusion of non-profit developers.²⁴⁴ These organizations

238. This is not to say that incentives can never work. For incentives to be effective, however, they must be strong. Moreover, to remove fully the vestiges of discriminatory housing practices—severe racial and economic segregation—a fundamental change in economic and social arrangements must occur. The use of incentives without also mandating affirmative action will typically fall short of achieving this fundamental change; the prospect of such change often will generate enough political resistance to overshadow the appeal of incentives. Incentives also *do not make a strong statement that can transform attitudes and cause a change in subsequent conduct*. In contrast, mandated action and, by implication, the use of punitive measures send a powerful signal to public and private actors that the adequate and equitable provision of affordable housing—and therefore the preservation of regional economic and social stability—are imperative.

239. MANDELKER & CUNNINGHAM, *supra* note 201, at 368.

240. See MINN. STAT. ANN. § 473.25 (a) (West Supp. 1996).

241. As the term suggests, scattered-site housing is affordable housing dispersed throughout a geographic area. *This type of single-family housing typically blends in with the surroundings; it looks like any other house on a given block.*

242. Generally speaking, clustered units refers to multi-family housing units, like apartment buildings, or several houses placed closely together, for example, on the same block.

243. See *supra* notes 12-16, 21-26, 41-52, 92-97 and accompanying text for a discussion of central-city problems.

244. In the Twin Cities metropolitan area, such nonprofits would include the Central Community Housing Trust (CCHT) and its suburban counterparts. CCHT is a nonprofit community development corporation. It acquires, improves, and preserves quality affordable housing for low- and moderate-income residents in a way that respects and responds to the needs of residents living in the Stevens Square, Loring Park, Downtown, and North Loop neighborhoods of Minneapolis. CENTRAL COMMUNITY HOUSING TRUST, BOARD OF DIRECTORS MANUAL § F at vi, § 0 at 2 (1995).

should be encouraged to more fully enter into the affordable housing construction market by providing sufficient incentives.²⁴⁵ By reducing reliance on for-profit private organizations, a regional strategy can better meet all types of affordable housing needs. For example, non-profit developers would be more likely to build an adequate number of units for large families, which private developers have not done because such units yield less profits. Involving these community-based development organizations also would help to ensure that both the central cities and the suburbs meet their affordable housing needs over the long term because these non-profits usually have stronger links to specific communities and, consequently, a larger stake in the long-term success of efforts to upgrade and maintain housing stock. Because the MLCA, like most current Fair Share approaches, relies heavily on the private sector and for-profit developers, it will be highly unlikely that it could elicit adequate affordable housing construction for the metropolitan area in the way that a properly conceived Fair Share plan would.

Another crucial component of an effective Fair Share policy is the identification or creation of a regional governmental agency²⁴⁶ to monitor and coordinate the implementation process.²⁴⁷ In the case of the Twin Cities region, the Met Council is well suited for this role.²⁴⁸ The Met Council, which ideally would become a popularly elected body to enhance its political legitimacy and potency, should be authorized by the state legislature to calculate housing needs and obligations for each community in the region. This calculation should be made by taking into account both the projected ultimate population and the current demographics so that present deficiencies can be addressed effectively.²⁴⁹

The last critical element of a properly designed Fair Share policy should be an in-place strategy²⁵⁰ operating in conjunction with

245. Funding for these incentives could come from, among other sources, the money currently allocated for the Minnesota Livable Communities Fund. See MINN. STAT. ANN. § 473.251 (West Supp. 1996).

246. This body would work in conjunction with other similar governmental authorities, all of which would be coordinated at the federal level.

247. The success of integration efforts in Shaker Heights, Ohio demonstrates the importance of adopting a regional strategy. See DeMarco & Galster, *supra* note 153, at 156-57; see also *America's Cities: Doomed to Burn?* THE ECONOMIST, May 9, 1992, at 21 (concluding that regional government can more readily address social problems).

248. MANDELKER & CUNNINGHAM, *supra* note 201, at 794.

249. Note, *supra* note 208, at 1652 (describing the possible methodology of an effective Fair Share-type policy).

250. This term refers to the strategy of moving resources and opportunities to people. Traditional examples of this approach include urban redevelopment and enterprise or empowerment zones. Although past attempts failed to improve opportunities and conditions significantly, a properly crafted in-place strategy that

the mobility strategy²⁵¹ so that meaningful opportunity can move to people and people can move to genuine opportunity. This in-place strategy, however, must not be confused with enterprise or empowerment zones, which consistently fail to revitalize decimated central-city neighborhoods.²⁵² Although the in-place strategy would move opportunity to people, as enterprise or empowerment zones theoretically seek to do, an in-place strategy in the context of a Fair Share policy differs because it would not simply focus on narrow economic development.²⁵³ Among other elements, an in-place strategy should upgrade services in low-income central-city neighborhoods to put them on a par with those in other parts of the surrounding region.²⁵⁴ In addition, the fiscal vitality of urban governmental bodies must be restored and strengthened so that these entities can provide the funding and resources necessary to improve and expand educational, cultural, and community institutions and activities.²⁵⁵ By ensuring the equitable provision of services and an adequate allocation of resources for institutional and human development, an in-place strategy could help to fashion the tools low-income central-city residents need for economic and social advancement in the Twin Cities metropolitan area and in other regions across the nation.²⁵⁶

2. The Implementation of a Structurally Transformative Fair Share Policy

To generate a fundamental change in social and economic arrangements—to foster racial and economic integration—Fair Share legislation must have the six crucial components discussed above,

complements a mobility strategy holds much more promise. See *supra* notes 197-99 and accompanying text (discussing how changing housing patterns make in-place strategies more feasible).

251. This term refers to the strategy of moving people to resources and opportunities; this approach continues to be the main feature of existing Fair Share policies. The Gautreaux program provides an example of a mobility program, albeit on a smaller scale than would be needed to be effective at a regional level over the long-term. For a discussion of the Gautreaux program, see *supra* notes 17-18, 36 and accompanying text.

252. See, e.g., Helen F. Ladd, *Spatially Targeted Economic Development Strategies: Do They Work?*, 1 CTRYScape 193, 208 (1994) (finding that supply-side incentives alone are ineffective at improving the circumstances for low-income central city residents and in generating net new jobs).

253. For a brief sketch of this approach, see *supra* notes 197-99 and accompanying text.

254. See John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1495, 1515-16 (1993) (arguing for the adoption of an in-place strategy to remedy the deprivation and distress of low-income communities of color).

255. *Id.* at 1516.

256. See *id.* at 1495.

the most important of which are concrete racial and low-income goals and the implementation of an in-place strategy in tandem with a mobility strategy. Even with these components, a regional Fair Share strategy will not be effective unless executed correctly. To compel compliance, this regional approach could use several mechanisms, all of which should be applied with rigor and integrity. The mechanisms outlined below should not be considered exhaustive or without limitations; rather, they should be seen as avenues for further exploration by analysts and policy-makers genuinely committed to addressing the escalating metropolitan crisis.

- (1) Because of their demonstrated success in the past, mandatory set-asides, density bonuses, and long-term development plans with a housing element should all be required of each municipality.²⁵⁷
- (2) Through authorization by, and coordination with, federal and state agencies, an independent regional body, such as the Met Council in the Twin Cities metropolitan area, should progressively withdraw the homeowner mortgage deduction and local property tax deduction from property owners if the municipality in which they live fails to establish or fulfill its Fair Share obligation. These monies, which would be withdrawn in ten percent increments per successive year of noncompliance, should be put into the regional pool discussed below.²⁵⁸
- (3) Through cooperation with federal and state officials, a regional governmental entity should deny uncooperative communities federal and state money for infrastructure, development, and housing purposes.²⁵⁹ By redirecting funds in this way, the regional agency would help to remedy existing market distortions caused by the creation and imposition of negative externalities by segregationist property owners and land-use authorities.²⁶⁰
- (4) The property tax system should be reformed to treat rental housing the same as owner-occupied housing.²⁶¹

257. See *supra* notes 145-46 and accompanying text (discussing the effective aspects of New Jersey's Fair Share policy).

258. Boger, *supra* note 120, at 1608-11 (explaining the elements of a proposed national Fair Share law).

259. Although the second and third mechanisms could be politically sensitive, they should be highly effective because they would transform market incentives and create new dollars for racially diverse and low-income housing by redirecting funds toward communities that affirmatively increase racial and economic integration.

260. See *supra* notes 147-52 and accompanying text.

261. In this way, the ownership and maintenance of multi-family housing would be less costly. Developers and current property owners could then pass on the lower

- (5) A builders' remedy should be created by streamlining the appeals and litigation process for developers.²⁶²
- (6) A regional funding pool, which would reward communities that substantially diversify their housing stock, should be created.²⁶³

Conclusion

David Rusk closes his incisive book, *Cities Without Suburbs*, with a series of rhetorical questions that should be carefully considered:

In an increasingly global economy, would we choose to sacrifice the talent and productivity of inner city residents and burden society with growing costs of dependency and social disruption?

In a capital-scarce society, would we choose to discard the tremendous investment in the inner cities?

In a world of fragile interdependence, would we choose to have the suburbs survive as independent and prosperous communities while the inner cities collapse at the metropolitan core?

In a world in which the technology of violence can touch anyone, would we choose to live in a garrison state where police power tries to seal off the have-nots from the haves?²⁶⁴

A regional Fair Share policy would go a long way toward preventing these already pernicious conditions from becoming a permanent reality. If designed and implemented as described above, regional Fair Share laws would provide an effective mechanism that helps to promote meaningful racial and economic integration and, therefore, economic and social stability. At a more basic but nonetheless cru-

costs to consumers in the form of lower rents. This would minimize the subsidy needed to make new or existing housing more affordable and make more effective use of existing housing in suburban municipalities.

262. This mechanism would transform market forces so that developers have a substantial incentive to build affordable housing. In the past, builders' remedies have been a potent means for producing more affordable housing in any given region. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 328-29 (1985).

263. LUKERMANN & KANE, *supra* note 79, at 34. As discussed earlier, this pool should also be used to reward those communities that achieve a greater degree of both racial and economic integration. Funding for the regional pool, and the administration of the Fair Share policy generally, could come from the issuance of fixed-rate, general obligation bonds. Regional governmental bodies, such as the Met Council, already issue such bonds to finance regular infrastructure improvements. Funds for the pool should also come from direct federal assistance, the withholdings from recalcitrants' mortgage and local property tax deductions, and money currently allocated for the existing metropolitan housing initiatives such as the MLCA in the Twin Cities region.

264. RUSK, *supra* note 57, at 126.

cial level, a properly conceived Fair Share policy would help to ensure that all residents of each region have a proverbial roof over their heads. Regional governmental bodies should take a leading role in executing this policy. Many such entities already implement and monitor development projects and infrastructure expansion. Moreover, some regional governmental bodies have even created a process for calculating numerical housing needs and obligations.

Without aggressive, structurally transformative action,²⁶⁵ Detroit, Los Angeles, New York City, Chicago, Philadelphia, St. Louis, Miami, Washington, D.C., and other devastated metropolitan areas will decline further. Moreover, the Twin Cities region and other currently prosperous areas will eventually go the way of the ravaged regions. This eventuality becomes readily apparent once one recognizes that housing continues to be closely connected to the most important economic and social institutions and resources that make up the opportunity structure in the United States. Housing—or place—therefore plays a crucial role in determining the quality of peoples' environment and the extent and variety of peoples' opportunities. As a consequence, if policy-makers and communities allow segregative housing patterns to persist, even currently stable regions will become increasingly polarized and basic housing needs will continue to go unmet. Central-city decay will accelerate, ultimately leading to regional decline. In short, metropolitan areas—and the United States in general—cannot afford, economically or otherwise, to delay changing geographic, economic, and social relations in a fundamental fashion.

265. To be truly effective and lasting, this action must be part of a comprehensive effort to fundamentally change all critical institutions and the distribution of resources that—collectively—shape individual and communal environments and opportunities. See generally Anthony Downs, *Urban Realities: Some Controversial Aspects of the Atlanta Region's Future*, 12 BROOKINGS REV. 26 (1994) (discussing the importance of devising a comprehensive land use plan that addresses transportation, infrastructure, and other regional issues, in addition to housing practices, as part of a uniform framework of goals and procedures that would be coordinated at the macro level). See also *supra* note 224 (describing the importance of a holistic approach, of which a Fair Share policy should be a part).