# Housing Integration: Moving Forward (Without Stepping Back)

**Author :** Andrea Boyack

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Kristen Barnes, *The Pieces of Housing Integration*, 70 **Case W. Res. L. Rev.** 717 (2020).

The Fair Housing Act is now 52 years old but housing segregation persists. Historically, the government itself supported and entrenched our reality of "two societies, one black, one white—separate and unequal."[1] Recognizing the vast and long-lasting harms caused by housing segregation and inequality, Congress passed The Fair Housing Act in 1968. The Act required government instrumentalities and partners act "in a manner affirmatively to further" fair housing (Section 8(d)). Government institutions and instrumentalities have not so acted, and inequitable and unfair housing continues, impacting all metrics of racial inequality.[2]

Professor Kristen Barnes's article, *The Pieces of Housing Integration*, addresses head on the government's failures to fulfil the mission of the Fair Housing Act. She adds an important voice and perspective to existing Fair Housing scholarship.

Professor Barnes's article specifically responds to some of the conclusions and solutions articulated in the important book on the subject, *Moving Toward Integration*, by Richard H. Sander, Yana Kucheva, and Jonathan Zazloff.[3] The authors of *Moving Toward Integration* adopt a cautiously optimistic approach to the future of fair housing, concluding that "structural segregation" is "relatively low" and that recent Supreme Court jurisprudence clears the way for disparate impact litigation to "potentially address structural segregation."[4]

Barnes applauds Sander, et al. for their exhaustive study and multi-faceted proposal to improve housing equities, but gently removes the authors' somewhat rose-colored glasses regarding, for example, the promise of disparate impact liability under the Fair Housing Act. Barnes notes that, historically, government actors have erected or even shored up barriers to fair housing more often than they have dismantled them.

Furthermore, Barnes shows how government relationships with two other key types of actors in the housing sector—namely financial institutions and real estate developers—have more often encouraged rather than discouraged residential segregation.

Right now, the country is poised to reverse course on the Trump Administration's four-year mission to dismantle HUD's 2015 directive to local governments that they fulfil the mandate of the Fair Housing Act (that they act affirmatively to furthering fair housing). As we attempt to move forward toward integration, it is imperative that we attend to Barnes' cautions regarding both the tragic flaws of current disparate impact jurisprudence, and the unholy alliance of local governments, developers, and banks in the realm of housing.

The authors of *Moving to Integration*, along with many other legal scholars, have cast the 2015 Supreme Court opinion of *Tx Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 in a hopeful light. In the *Inclusive Communities* opinion, the Court upheld the use of disparate impact theory under the Fair Housing Act, but it established a framework for disparate impact litigation that, according to Barnes, undercut the goals of the Act and made it highly unlikely that disparate impact liability under the Fair Housing Act would serve as a robust tool to combat housing discrimination.

Although Sander, et al. suggest that disparate impact liability and the threat of disparate impact litigation can "pressure individual suburbs to cooperate" in achieving the long-deferred Fair Housing dream of integration, Barnes explains that

the *Inclusive Communities* decision caused disparate-impact liability to be "stripped of its power and effectively neutralized so that the Fair Housing Act is prevented from performing the integrative work it was intended to do."[5]

In other words, although *Inclusive Communities* did not literally destroy disparate impact liability, it rendered this tool vastly less effective than it otherwise could have been. For example, Barnes concludes that the Court established an "unduly onerous" high bar for a plaintiff's prima facie case of a racially discriminatory impact, requiring them to show a clear relationship between a specific governmental policy and an adverse impact.

Second, the government can fairly easily escape liability even if such a robust causal connection is shown, simply by articulating a valid state interest served by the policy in question. Barnes carefully deconstructs the reasoning of *Inclusive Communities* to show that its analogy to employer-employee relationships is faulty. Then, she explains that the framework articulated makes it extremely likely that disparate impact claims will fail.

Furthermore, even though Sander, et al. predict that frequently municipalities will not be able to articulate an important goal served by a policy creating a discriminatory impact, Barnes makes a compelling case for her conclusion that the business-necessity defense approach simply involves stating "a valid interest" served by the suspect policy—which municipalities should be easily able to do. In fact, a sufficient public purpose that could justify an otherwise-discriminatory policy may include "a community's quality of life," which is not only an amorphous concept but may itself be quasi-racist trope.

Barnes makes the important point that watered-down protection of disparate impact liability under the *Inclusive Communities* framework offers merely a pretense of protection from housing discrimination and is insufficient to achieve the residential housing integration that is so desperately needed. Even more importantly, she explains how disparate impact liability could and should be better framed in order to be effective for its purposes. Barnes cuts through politicized rhetoric about the rights of local governments to housing self-determination and states a conveniently ignored truth about the Fair Housing Act: "Contrary to the Supreme Court's assertion that the 'FHA is not an instrument to force housing authorities to reorder their priorities,' the FHA is intended to accomplish exactly that in the name of racial equality."

Barnes also approaches, with a healthy degree of skepticism, the suggestion by Sander et al. that creative new policies (such as mobility grants) could improve residential segregation. Any such policies must be framed against the uncomfortable truth that for decades and decades, all levels of the government—from local to federal, from legislatures to courts—have prioritized profit over integration both in their housing laws and policies and in their relationship with banks and developers.

Barnes suggests that governments need to be more proactive in their relationships with both financial institutions and real estate developers—a point that is not often emphasized in legal literature, but which is of paramount importance. Barnes asserts that "cities often do not ask for enough on behalf of their constituents." As a former counsel to a national real estate developer, I agree. Developers will find a way to better achieve public purposes of integration and affordability if they are affirmatively required to do so, particularly in places where housing demands are strong.

As for financial institutions, Barnes points out that fair lending is still absent in Black neighborhoods, and predatory lending and its associated harms continue to plague households, neighborhoods, and society as a whole. Barnes explains that settlements from litigation relating to the Foreclosure Crisis recognized—and monetized—some public harms caused by predatory lending (the "racial surtax"), but points out that cities have not necessarily applied the compensation resulting from predatory lending harms to ameliorate the harms perpetuated.

*The Pieces of Housing Integration* is a concise, powerful article. Barnes adds a critically important voice to the hundreds of pages of empirical scholarship examining Fair Housing. She also explains how to fix a few of the most essential legal tools that could—if tweaked—make moving toward integration possible.

Residential housing must be integrated in order for our society, our economy, and our government to become healthy and sustainable. For fifty years, government agencies and instrumentalities have taken one step forward and one or two steps back in their journey toward integration. In order for us to actually move toward integration, explains Barnes, we must do more than come up with new programs and hope that future disparate impact litigation will be successful.

1. Report of the National Advisory Commission on Civil Disorders, Summary of Report.
2. Including Black-white gaps in homeownership, income, wealth, test scores, mortality rates, and incarceration. Residential segregation enabled and exacerbated the Foreclosure and Financial Crises of 2008 and seems to be a significant factor contributing to the disparate spread and morbidity of Covid-19.
3. Richard H. Sander, Yana Kucheva & Jonathan Zazloff, **Moving Toward Integration** (2018).
4. *Id.* at 424, 439, 442.
5. *Id.* at 444, 720.

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