

COORDINATED ACTION ON SCHOOL AND HOUSING INTEGRATION: THE ROLE OF STATE GOVERNMENT

Megan Haberle *

Philip Tegeler **

ABSTRACT

In this essay, we assess the prospects for more coordinated government efforts to address housing and school segregation at the federal, state and local level. We conclude that multiple barriers to concerted action at the federal and local level, particularly to addressing racial and economic segregation across local boundaries, suggest a more central role for state governments than has previously been the case. State-level laws and programs can succeed as drivers of integration in a way that is distinct from either federal or local interventions, because of the state's direct control over the key policies that drive modern school and housing segregation.

INTRODUCTION

Two years into the reign of an administration hostile to civil rights, advocates are keeping an accounting of defensive wins and losses on the federal stage—court victories upholding the “rule of law,” and regulations suspended or withdrawn—and what these mean for our progress toward equality.¹ There is similar drama in

* Deputy Director of the Poverty & Race Research Action Council (“PRRAC”), a civil rights policy organization based in the District of Columbia. J.D. 2008, Columbia Law School.

** Executive Director of PRRAC. J.D., 1982, Columbia Law School.

The authors are grateful for the helpful input they received from Nestor Davidson, Olatunde Johnson, Genevieve Siegel-Hawley, and Elizabeth DeBray, and the support of the Ford Foundation, the Intercultural Development Research Association, and the National Education Association for PRRAC's recent work connecting housing and school integration policy.

1. See, e.g., Tracy Jan, *Hundreds of Thousands of Poor Americans Will Soon Be Able to Move to Better Areas, Thanks to This Judge*, WASH. POST (Dec. 28, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/12/28/hundreds-of-thousands-of-poor-americans-will-soon-be-able-to-move-to-better-areas-thanks-to-this-judge/>.

the efforts of state and local advocates and policy makers to defend and advance progressive interests within their own communities. These dynamics, emerging as they are in a time of heightened attention and flux in democratic norms and structures more broadly, have reinvigorated the conversations around federalism and the roles of federal, state, and local governments as either agents or villains of the civil rights movement. There is keen interest in notions of progressive federalism and the “blue laboratories” of democracy, in which localities and states concoct innovative and just policies, serving as the vanguard for the rest of the country.² While there are state and local acts of resistance carrying forth the momentum of federal policies from the Obama years,³ there are also losses for nearly all communities in the absence of consistent federal civil rights enforcement and standard-setting, positive guidance and technical assistance, and reforms to federal programs (which themselves still often reinforce institutional discrimination). Increased political polarization has thus cast into relief the longstanding tensions and synergies among these overlapping levels of government.

The role of the state presents particular opportunities and challenges for civil rights advocacy in the present time. The challenges stem from states’ frequent historical role in denying civil

washingtonpost.com/news/wonk/wp/2017/12/28/hundreds-of-thousands-of-poor-americans-will-soon-be-able-to-move-to-better-areas-thanks-to-this-judge [https://perma.cc/E356-YQGU]; Margot Sanger-Katz, *For the Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), <https://nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html> [https://perma.cc/34YB-75K8].

2. See Megan Haberle, *Stacking the Deck: The Regulatory Accountability Act’s Threat to Civil Rights*, AM. PROSPECT (Aug. 24, 2017), <https://prospect.org/article/stacking-deck-regulatory-accountability-act’s-threat-civil-rights> [https://perma.cc/J4KX-KSVJ]. See generally Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115 (2016) (describing the impact of state and local intervention in the area of civil rights and how these measures expand and innovate federal antidiscrimination law).

3. For example, the Trump Administration suspended key regulations implementing the Fair Housing Act, including the 2015 Affirmatively Furthering Fair Housing (“AFFH”) regulation, a key Obama-era achievement requiring that grant recipients take steps to redress segregation and discrimination. Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> [https://perma.cc/CBR4-904P]. Progressive localities such as New York, the District of Columbia, and other cities have committed to following the 2015 Affirmatively Furthering Fair Housing (“AFFH”) requirements despite the federal suspension.

rights, notably the proliferation of Jim Crow laws after the Civil War and, later, massive resistance to desegregation and other antidiscrimination measures during the 1960s and 1970s. In the North, primarily in the twentieth century, state governments were responsible for the development of metropolitan legal structures that augmented discriminatory federal policies and locked in racial and economic segregation for generations.⁴ More recently, conservative strategies of decentralization, which devolved power to state and local governments (for example, by block-granting federal funds), stalled progress toward economic and racial justice where it lacked state-level political support.⁵ And today, in addition to deliberate voter disenfranchisement, there is a rash of preemptive activity among “red” states reacting to the progressive initiatives of “blue” cities: states are passing legislation preempting local antidiscrimination protections, rent control, and other measures.⁶

Yet, as we will argue below, when it comes to the deeply entrenched problems of housing and school segregation, states may be the level of government best situated to lead the country toward a more integrated and inclusive society. Indeed, a small number of states have already put together parts of this agenda—including longstanding state overrides of local exclusionary zoning laws,⁷ school integration guidelines for local school districts,⁸

4. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at xii–xiii (2017); see also JENNIFER JELLISON HOLME & KARA S. FINNEGAN, *STRIVING IN COMMON: A REGIONAL EQUITY FRAMEWORK FOR URBAN SCHOOLS* 17–18 (2018).

5. See, e.g., Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 559 (1999) (detailing the decentralization of welfare benefits through the Temporary Assistance for Needy Families program and the impact such structures have on welfare recipients).

6. See, e.g., RICHARD BRIFFAULT ET AL., *THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND* 1, 5 (2017), https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf [<https://perma.cc/7AYS-SYDM>]; NICOLE DUPUIS ET AL., *CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS* 1 (2017), <http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf> [<https://perma.cc/EH7H-STYY>].

7. See Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 68–70 (2001); Florence W. Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts* (pts. 1 & 2), 24 CLEARINGHOUSE REV. 312, 343–52 (1990).

8. See, e.g., MASS. GEN. LAWS ch. 71, § 37D (2018); MINN. R. 3535 (2007).

targeted affordable housing investments in high-performing school districts,⁹ and state affirmatively furthering fair housing statutes.¹⁰

State-level laws and programs can succeed as drivers of integration in a way that is distinct from either federal or local interventions. The state is a unique leverage point at which patterns of segregation can be disrupted, because of its direct control over the key drivers of modern school and housing segregation—powers over local land use and zoning, local education policy, local tax structures, regional transportation policy, regional planning structures, infrastructure investment, and even over the permeability and legal consequences of local boundary lines.¹¹ States also play a major role in distribution of funding to local governments, school districts, and housing developers, and are uniquely positioned to encourage regional cooperation and inter-agency coordination.¹² Specifically with regard to housing and education policies, the state is exceptionally well situated to overcome state-created local fragmentation and resource hoarding that undergirds and sustains segregation. And it can do so without triggering the federalism concerns likely to be raised by any intensive federal intervention in what are understood to be the classically “local” domains of schools and land use.

Because these characteristics of state power and policy setting hold true for both housing and school policy, the state has the ability to address these spheres in tandem, and in a coordinated

9. See SARAH OPPENHEIMER, BUILDING OPPORTUNITY II: CIVIL RIGHTS BEST PRACTICE IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM (2015 UPDATE) 1–3 (2015).

10. See H.R. 5523, 1991 Leg., Jan. Sess. (Conn. 1999); see also S.A. 686, 2018 Leg., Reg. Sess. (Cal. 2018).

11. In our federal system, states have general power over the creation and boundaries of local government, along with local land use, housing, and taxation powers, and most states have retained that power in their state constitutions, choosing to delegate powers through state statutes. Some states, however, have delegated powers to localities through their state constitutions, which makes it much harder to take that power back. See Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 521 (2005). In the area of public education, however, state control over the form and powers of local school districts is universal. See Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1464 (2014).

12. See Lavea Brachman, *New State and Federal Policy Agendas: Realizing the Potential of America's Legacy Cities and Their Regions*, in REBUILDING AMERICA'S LEGACY CITIES: NEW DIRECTIONS FOR THE INDUSTRIAL HEARTLAND 265, 269–70, 280 (Alan Mallach ed., 2012).

way. This enables the state (potentially) to disrupt the mutually reinforcing patterns and policies that link these forms of segregation, and that make each so difficult to remedy effectively on its own. As we detail below, this nexus between housing and school segregation has long been acknowledged as a significant practical barrier to the success of integrative measures in either sphere alone. Early federal court cases, like *Swann v. Charlotte-Mecklenburg Board of Education* and *Keyes v. School District No. 1*,¹³ showed potential in addressing the nexus through decisions that acknowledged the mutual contributions of housing and school policies to segregation and took initial steps toward devising remedies that accounted for this dynamic.¹⁴ However, this potential failed to gain traction against a countervailing tide of conservative jurisprudence, from *Milliken v. Bradley* to *Freeman v. Pitts*.¹⁵ Left then in the hands of policy makers, the housing-schools connection has been rich fodder for research and scholarship around the drivers and consequences of segregation,¹⁶ but there have been a lack of meaningful reforms or initiatives that address this nexus in the significant and practical ways that have long been needed. As a result, the mutually reinforcing cycle continues. Taken individually, housing and school segregation each continue to seem both ineffable and intractable, despite promising gains in one sphere or the other.

13. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

14. See JOHN C. BRITAIN, STILL SEPARATE AND UNEQUAL: A PUBLIC HEARING ON THE STATE OF FAIR HOUSING IN AMERICA, TESTIMONY TO THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY (2008), https://www.prrac.org/projects/fair_housing_commission/boston/brittain.pdf [<https://perma.cc/4LTE-A74N>]; Drew S. Days, *The Current State of School Desegregation Law: Why Isn't Anybody Laughing?*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 159, 163 (John A. Powell et al. eds., 2001).

15. See *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992) (holding that a district court must only maintain control over a school system in the categories in which the school district has failed to abide by its court-ordered desegregation plan); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding that school systems are not responsible for desegregation across district lines unless it can be shown that they had deliberately engaged in a policy of segregation); GENEVIEVE SIEGEL-HAWLEY, WHEN THE FENCES COME DOWN: TWENTY-FIRST-CENTURY LESSONS FROM METROPOLITAN SCHOOL DESEGREGATION 44–47 (2016); see also Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 367–68 (2015) (describing how after *Milliken*, the Supreme Court “dismantled school desegregation plans”).

16. See, e.g., AMY STUART WELLS, DIVERSE HOUSING, DIVERSE SCHOOLING: HOW POLICY CAN STABILIZE RACIAL DEMOGRAPHIC CHANGE IN CITIES AND SUBURBS 5 (2015), <http://nepc.colorado.edu/publication/housing-school-nexus> [<https://perma.cc/LWE4-EYN5>].

This essay deals with state policy making, in particular, as an untapped arena for systemic change at the nexus of housing and school integration.¹⁷ We posit that there is significant unexplored potential at the state government level to improve both housing and school policies and to connect the two, especially because even progressive states have rarely taken significant action to do so. In a time when civil rights advocates are forging new connections and strategies in the face of federal retrenchment, it may be time to rethink the role of the state, without downplaying the accompanying political challenges.

I. RACIAL SEGREGATION AND THE CHALLENGE OF THE HOUSING-SCHOOLS NEXUS

As reflected in *Brown v. Board of Education* and other school integration cases, racial integration has been tied closely to interests in dignity, personal choice, and functioning democracy.¹⁸ These are precisely the values that racial segregation undermines. Even with the ending of de jure segregation, powerful institutions—federal, state, and local governments, acting in concert with private industry—created and perpetuated stark racial divisions, in ways that have created lasting patterns that carry over to the present day.¹⁹ Many American cities, especially post-industrial “legacy” cities in the North, are still deeply segregated along the lines created in that not-so-distant past.²⁰ In other cities, ripples of displacement and resegregation (or “mobile segregation”) reconstitute the same dynamic.²¹ The ongoing legacy of

17. This essay is primarily concerned with the potential for policy innovation at the state level. We also recognize the potential of litigation against the state—both under the Fair Housing Act and through state constitutions—to address the nexus between housing and school segregation. *See, e.g.*, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. ___, ___, 135 S. Ct. 2507, 2513 (2015); *Sheff v. O’Neill*, 678 A.2d 1267, 1270 (1996).

18. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 487–88, 493–94 (1954); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring) (“A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control.”).

19. *See* ROTHSTEIN, *supra* note 4, at vii–viii (arguing that previous federal and state laws have contributed to the existence of segregation today).

20. *See id.* at 13–14.

21. *See, e.g.*, ALEX SCHAFFRAN, *THE ROAD TO RESEGREGATION: NORTHERN CALIFORNIA AND THE FAILURE OF POLITICS* (2018) (describing the phenomenon of “mobile segregation”)

those institutional forces has been a form of intergenerational determinism,²² impeding choice and mobility and requiring deliberate policy efforts to disrupt.

The policies of integration are also centrally concerned with equality in access to resources. Segregation concentrates the effects of discrimination and disinvestment, while sequestering financial and social capital, in both neighborhoods and schools.²³ Segregation is also the mechanism for maintaining the physical and psychological distance that sustains such discrimination, allowing structural racism to continue unexamined among many white Americans.²⁴ These questions of access and distance lie at the core of the housing-schools nexus: following court-ordered school desegregation, residential segregation across fragmented local district boundaries became an increasingly important mechanism to preserve the whiteness of schools (as well as the income base for those schools to draw upon).²⁵ Court cases preventing school integration efforts from extending throughout metropolitan regions rewarded white sequestration in the suburbs, as did federal guidance for suburban school construction and siting during the same era.²⁶ Today, the residential neighborhood or town generally (though not inevitably) still is the platform for entry to particular schools, such that schools are a primary determinant of families' decisions about where to live.²⁷ The dual systems of segregation are especially pernicious because of the school's role, in turn, as the entryway to full and equal participation in society, in both its civic and economic institutions.

caused by displacement).

22. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, in *IN PURSUIT OF A DREAM DEFERRED*, *supra* note 14, at 229, 236.

23. *See, e.g., id.* at 237–39.

24. *See, e.g.,* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *GEO. L.J.* 1985, 2015 (2000) (noting that “the resulting socioeconomic jurisdictional segregation further reduces the capacity of citizens, over time, to empathize with anyone who can be characterized as ‘other’”); Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 *NW. J.L. & SOC. POL'Y* 1 (2006).

25. *See* WELLS, *supra* note 16, at 8, 10.

26. SIEGEL-HAWLEY, *supra* note 15, at 44–47.

27. Annette Lareau, *Schools, Housing, and the Reproduction of Inequality*, in *CHOOSING HOMES, CHOOSING SCHOOLS* 169–70 (Annette Lareau & Kimberly Goyette eds., 2014); WELLS, *supra* note 16, at 7.

The connection between housing and school segregation, and the extent of the societal damage that results, became an impetus for Congress in passing the Fair Housing Act in 1968.²⁸ Indeed, the Fair Housing Act was passed only four years after Title VI of the 1964 Civil Rights Act, the primary instrument of federal school desegregation in the South after *Brown v. Board of Education*. Because they create a mutually reinforcing cycle, however, both housing and school segregation have remained challenging to disrupt. As noted above, civil rights advocates made early progress in the federal courts, seeking to establish jurisprudence that would redress housing and school segregation in tandem and that drew upon the clear factual basis of their reciprocal nature.²⁹ However, hope in such judicial solutions was short-lived, curtailed by regressive trends in legal doctrine. Thus, the Supreme Court promisingly acknowledged, in its *Swann* opinion in 1971, the mutual influence of school and housing policies in “lock[ing] . . . the mold of separation of the races,”³⁰ and went on to confirm recognition, in its 1973 *Keyes* ruling, of this “reciprocal effect.”³¹ Yet in *Milliken*, just a year later, the Court ignored extensive testimony on the connection of school segregation to suburban white flight and residential segregation, attributing these living patterns instead to personal choice and individual acts of discrimination.³²

In addition to this retreat, the courts embarked on an ideological narrowing of antidiscrimination doctrine in ways that limited accountability across municipal lines and government entities. As

28. See, e.g., 134 CONG. REC. 19,711 (1988) (statement of Sen. Kennedy) (“Residential segregation is the primary obstacle to meaningful school integration.”); 114 CONG. REC. 2276 (1968) (statement of Sen. Mondale) (noting earlier testimony that “open housing is absolutely essential to the realistic achievement of such accepted goals as desegregated schools and equal opportunity,” and that “the soundest way to attack segregated education is to attack the segregated neighborhood”).

29. See *supra* note 13–14 and accompanying text.

30. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971); see also SIEGEL-HAWLEY, *supra* note 15, at 46 (“The location of schools may influence the patterns of residential development of a metropolitan area . . . and have important impact on the composition of inner-city neighborhoods . . . [New construction] may well promote segregated residential patterns which, when combined with ‘neighborhood zoning,’ further lock the school system into the mold of separation of the races.” (citation omitted)).

31. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 202 (1973).

32. *Milliken v. Bradley*, 418 U.S. 717, 725–26, 741–43 (1974).

Professor Michelle Adams has argued, the imposition of new, demanding causation requirements—which prevented relief except where the school district or another specific actor was itself found clearly at fault—derived from the courts’ skittishness about imposing desegregative remedies that would have too deeply overhauled school districts or metropolitan areas. This skittishness, however, was couched as a federalism concern over the sanctity of state control.³³ This explains *Milliken’s* trajectory, with the district court’s initial finding (that because of the evidence of the complex, regional causes of residential segregation, regional relief was appropriate)³⁴ cast aside by the Supreme Court out of a new reverence for boundary lines, framed as questions of causality and as constitutional solicitude for the state.³⁵ With this narrowing of remedies, the housing-schools connection lost its purchase in the courts, and advocates were left to contend with the regional nature of segregation in the absence of widespread regional solutions.³⁶

Education and housing policies, likewise, frequently not only fail to account for the influence of the other sphere, but often actively create segregative outcomes at the nexus.³⁷ For example, student enrollment policies, which are set by the state and determine whether students must enroll in their districts of residence, influence homebuyers seeking access to high-performing schools, sorting these families geographically by income and often race.³⁸ These effects are especially strong in highly fragmented

33. Michelle Adams, *Causation, Constitutional Principles, and the Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1173, 1175 (2002) (“In *Milliken*, the Supreme Court said that the core problem was federalism—for a federal court simply could not engage in a ‘complete restructuring of the laws [of a state] relating to school districts . . . it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial *cause* of interdistrict segregation.”).

34. *Bradley v. Milliken*, 345 F. Supp. 914, 916 (E.D. Mich. 1972).

35. *Milliken*, 418 U.S. at 752–53; see Adams, *supra* note 33, at 1175.

36. See Adams, *supra* note 33, at 1174.

37. Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 164, 164 (John Charles Boger & Gary Orfield eds., 2005); Ann Owens, *Racial Residential Segregation of School-Age Children and Adults: The Role of Schooling as a Segregating Force*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 63, 64 (2017).

38. Kimberle Goyette, *Setting the Context*, in CHOOSING HOMES, CHOOSING SCHOOLS, *supra* note 27, at 1–2, 8–9; David Liebowitz & Lindsay C. Page, *Residential Choice as*

metropolitan areas.³⁹ School district boundaries and school attendance boundaries, in addition, can perpetuate residential segregation, or exacerbate it by having a destabilizing effect, when diverse neighborhoods are disconnected from high-performing schools.⁴⁰ School siting decisions, as well, can contribute to residential and school segregation, in combination with other policies that limit access to high-performing schools.⁴¹ Education finance policies, which are designed at the state level, can create stark inequity among school districts based on local property tax revenues, again creating or reinforcing a geographic sorting effect.⁴²

Land use and other housing-related powers delegated to municipal governments by the state operate similarly to affect school composition. Municipal decisions about where (and whether) to allow, encourage, or prohibit various land uses, including the construction of affordable housing and other multifamily housing, are powerful determinants of community diversity, both economic and racial.⁴³ Local taxation, often dependent on local property values, provides particular incentives for exclusionary zoning, ensuring that upper middle class schools are both well-endowed and lacking many students with additional educational needs.⁴⁴ Local exclusion of public transportation can exacerbate the racial sepa-

School Choice, in YESTERDAY, TODAY, AND TOMORROW: SCHOOL DESEGREGATION AND RESEGREGATION IN CHARLOTTE 101, 117 (Roslyn A. Mickelson et al. eds., 2015); Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 178 (2002); Ann Owens, *Income Segregation Between School Districts and Inequality in Students' Achievement*, 9 SOC. EDUC. 1, 2–3 (2018) [hereinafter Owens, *Income Segregation*]; Ann Owens, *Inequality in Children's Contexts: Income Segregation of Households with and Without Children*, 81 AM. SOC. REV. 549, 550 (2016) [hereinafter Owens, *Inequality in Children's Contexts*]; see also Philip Tegeler & Michael Hilton, *Disrupting the Reciprocal Relationship Between Housing and School Segregation*, in A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 3–4 (2018).

39. See, e.g., WELLS, *supra* note 16, at 8; Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?*, 44 URB. AFF. REV. 182, 182 (2008); see also SIEGEL-HAWLEY, *supra* note 15, at 12; Tegeler & Hilton, *supra* note 38, at 5.

40. See Tegeler & Hilton, *supra* note 38, at 2, 5.

41. *Id.* at 2.

42. *Id.* at 7.

43. See Jennifer B. Ayscue & Gary Orfield, *School District Lines Stratify Educational Opportunity by Race and Poverty*, 7 RACE & SOC. PROBS., Mar. 2015, at 5–6; Tegeler & Hilton, *supra* note 38, at 8.

44. Tegeler & Hilton, *supra* note 38, at 7.

ration of metropolitan areas.⁴⁵ Even in towns with local housing authorities, residency preferences and local marketing can help to reinforce segregation in ways that are then mirrored in the local schools.

In addition to these policy structures, both housing and school segregation are reinforced through cycles of racially tinged perceptions about status, value, and quality—in neighborhoods as well as schools.⁴⁶ Conversely, successful integration measures can have lasting value in changing such attitudes, shaping residential preferences and other values around diversity and race.⁴⁷

II. THE LIMITS OF FEDERAL AND LOCAL GOVERNMENT POWER AND THE POTENTIAL OF THE STATES

In other areas of governance, progressive localities can take individual initiative in meaningful ways, more fluidly moving ahead of their more conservative neighbors to enact changes that benefit their citizens. But with regard to segregation, local boundary lines are deeply implicated, with local governments incentivized to maintain these divides and the containment of resources.⁴⁸ Voluntary regional efforts are understandably rare. The federal government, meanwhile, has historically been an important actor in challenging segregative practices among its funding recipients, through civil rights enforcement, and more recently, through funding-related planning requirements.⁴⁹ But federalism concerns, a combination of law and tradition, have stood in the way of deeper federal engagement with education, housing, and land use policies. Because of these inherent limita-

45. See Michael S. Barton & Joseph Gibbons, *A Stop Too Far: How Does Public Transportation Concentration Influence Neighborhood Median Income?*, 54 URB. STUD. 538, 551 (2017).

46. See WELLS, *supra* note 16, at 6; Allison Roda & Amy Stuart Wells, *School Choice Policies and Racial Segregation: Where White Parents' Good Intentions, Anxiety, and Privilege Collide*, 119 AM. J. EDUC. 261, 266 (2013).

47. Roslyn Arlin Mickelson, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence*, in FINDING COMMON GROUND: COORDINATING HOUSING AND EDUCATION POLICY TO PROMOTE INTEGRATION 5, 6 (Philip Tegeler ed., 2011).

48. Tegeler & Hilton, *supra* note 38, at 7.

49. See, e.g., 24 C.F.R. § 162 (2018); Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1312 (2014) (describing the role of the federal government in advancing school integration).

tions, we conclude that state governments are the most promising policy venue for progress on the intertwined problem of housing and school segregation.

A. *The Limits of Federal Power*

Historically, the federal government has done little to link its own housing and education programs, and even less to coordinate policy to promote school and housing integration. Noteworthy exceptions occurred in several school desegregation consent decrees from the 1970s, where the reciprocal relationship between housing and education was utilized as part of the remedy,⁵⁰ and in Justice Department enforcement efforts during the Carter Administration, when the Housing and Education Sections of the Civil Rights Division teamed up to attack school and housing segregation together, most notably in the *United States v. Yonkers Board of Education* case.⁵¹

The federal government's default federalism setting has been to defer to state and local prerogatives in housing and education.⁵² Many of the key drivers of segregation—school district boundary lines, school assignment policies, and local zoning laws—are beyond the reach of federal power, in the absence of a federal civil rights violation.⁵³ In the administration of federal

50. The regional school desegregation remedies in Louisville and Charlotte included creative housing and school integration incentives, like exemptions from busing for integrated neighborhoods and for families making integrative moves, and scattered site public housing siting to help desegregate schools in white neighborhoods; see GARY ORFIELD, TOWARD A STRATEGY FOR URBAN INTEGRATION: LESSONS IN SCHOOL AND HOUSING POLICY FROM TWELVE CITIES 67 (1981); SIEGEL-HAWLEY, *supra* note 15, at 65.

51. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987). See generally Michael H. Sussmann, *Discrimination: A Pervasive Concept*, in IN PURSUIT OF A DREAM DEFERRED, *supra* note 14, at 209.

52. Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL'Y 209, 212–13 (1994). The exception to this general rule was the period immediately following the passage of the Fair Housing Act. See *id.* at 211 n.9. See generally Nestor M. Davidson, *Co-operative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 2029–31 (2007).

53. Many federal policies do, however, entail the engagement of the federal government directly with local governments, rather than it going through the states as intermediaries. See Davidson, *supra* note 52, at 974 n.51. This was an increasing trend during the Obama years, including, for example, the use of levers such as the Affirmatively Furthering Fair Housing rule, discussed *infra*, and competitive Department of Education grants.

housing programs, there has long been a policy of deference to state and local policy on a number of fundamental issues. These issues include public housing authority jurisdiction, location of subsidized housing, and voluntary participation in federal housing programs,⁵⁴ with administrative responsibility spread out across over fifty state or regional housing finance agencies, almost as many state housing departments, thousands of local housing authorities, over 1000 county and local governments receiving federal housing funds, and tens of thousands of local governments that do not receive any federal funds at all.⁵⁵

Similarly, while the federal government has some leverage in K–12 education over states and local school districts through its Title I supplemental funding for schools and districts with high numbers of low income students, the planning process that Congress has asked of states and local districts through the Elementary and Secondary Education Act (now called the Every Student Succeeds Act—“ESSA”) is increasingly deferential to local priorities and needs.⁵⁶

During the Obama Administration, there were innovative efforts at the outset to connect housing and school policy, and to encourage state and local governments to think regionally, but it was not until late in the Administration that the Departments of

54. See Tegeler, *supra* note 52, at 213–14; see also Davidson, *supra* note 52, at 979. One major exception to the historical deference of the federal government to local prerogatives in housing policy was the Supreme Court’s decision in *Hills v. Gautreaux*, which held that the federal court’s remedial powers were not constrained by local boundaries, because of HUD’s sphere of activity throughout the entire regional housing market. 425 U.S. 284, 306 (1976). HUD itself has rarely taken the Court up on this broad announcement, however, preferring to defer to local jurisdictional arrangements.

55. See BARBARA SARD & DEBORAH THROPE, CONSOLIDATING RENTAL ASSISTANCE ADMINISTRATION WOULD INCREASE EFFICIENCY AND EXPAND OPPORTUNITY 1–3 (2016), <https://www.cbpp.org/research/housing/consolidating-rental-assistance-administration-would-increase-efficiency-and-expand> [<https://perma.cc/4HV-H226>]; *Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. CENSUS BUREAU, https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs [<https://perma.cc/B4ZF-5G7Y>] (last visited Feb. 1, 2019); *HFA Members*, NAT’L COUNCIL ST. HOUSE AGENCIES, <https://ncsha.org/membership/hfa-members> [<https://perma.cc/C77N-TZHV>] (last visited Feb. 1, 2019); *Community Development Block Grant Program—CDBG*, U.S. DEP’T OF HOUSING & URB. DEV., https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs [<https://perma.cc/U65K-UHWU>] (last visited Feb. 1, 2019).

56. See Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1861 (2017).

Housing and Urban Development (“HUD”) and Education began to work together on school and housing integration.⁵⁷

HUD and the Department of Education began to collaborate in 2009 on their parallel place-based reinvestment programs, including the “Choice Neighborhoods Initiative,” which focused on neighborhood-wide public housing redevelopment plans,⁵⁸ and “Promise Neighborhoods,” a similarly neighborhood based multi-service initiative based loosely on the Harlem Children’s Zone.⁵⁹ Unfortunately, this important collaboration, which eventually evolved into the “Promise Zones” initiative, did not anticipate any major demographic changes in the neighborhoods, and assumed that the children affected by the programs would remain in their current school.⁶⁰ Thus, this initial interdepartmental work did not directly advance school and housing integration.

Similarly, the Obama Administration’s signature regional planning program, the Sustainable Communities Initiative, showed great promise in promoting combined regional planning in housing and transportation policy, centered in a selected group of metropolitan planning organizations, but the program expressly avoided including school districts as part of the regional planning process.⁶¹ The Sustainable Communities Initiative did, however, include an innovative regional “Fair Housing Equity Assessment” process that was a forerunner of the Affirmatively Furthering Fair Housing (“AFFH”) rule, discussed below. The Sustainable Communities’ Equity Assessment required an analysis of whether “access to proficient” schools was distributed equally across the region and within communities of color, but since

57. See MICHAEL HILTON, FEDERAL SUPPORT FOR SCHOOL INTEGRATION: AN OBAMA ADMINISTRATION REVIEW 2 (2017).

58. See *Choice Neighborhoods*, HUD.GOV, <https://www.hud.gov/cn> [<https://perma.cc/CA7Y-GCJR>] (last visited Feb. 1, 2019) (discussing the Choice Neighborhoods program).

59. See *Promise Neighborhoods*, DEP’T EDUC., (Mar. 5, 2018) <https://www2.ed.gov/programs/promiseneighborhoods/index.html> [<https://perma.cc/RHP9-5ZS5>] (discussing the Promise Neighborhoods program); see also Maurice R. Dyson, *Promise Zones, Poverty, and the Future of Public Schools: Confronting the Challenges of Socioeconomic Integration & School Culture in High-Poverty Schools*, 2014 MICH. ST. L. REV. 711, 721–22.

60. See *Promise Zones Overview*, HUD EXCHANGE, <https://www.hudexchange.info/programs/promise-zones/promise-zones-overview/> [<https://perma.cc/V52V-5X78>] (last visited Feb. 1, 2019) (discussing the Promise Zones program).

61. See *Regional Planning Grants and the SCI*, HUD EXCHANGE, <https://www.hudexchange.info/programs/sci/> [<https://perma.cc/53UT-WJFY>] (last visited Feb. 1, 2019).

schools were not part of the planning process, there was little opportunity to engage in cross-sector planning.⁶²

The AFFH rule, issued in 2015, was the Obama Administration's major fair housing achievement, requiring that grant recipients undertake an analysis of local fair housing issues and commit to specific steps to redress segregation and other problems. It took a significant step forward by requiring jurisdictions to consider the relationship between housing and opportunity across multiple dimensions, including transportation, employment access, environmental health, and education.⁶³ The rule and its accompanying appendices, forms, and guidebooks, expressly acknowledge the reciprocal relationship between housing and schools, noting that the "geographic relationship of proficient schools to housing, and the policies that govern attendance, are important components of fair housing choice,"⁶⁴ and encourage education-related goals in the final Assessment of Fair Housing.⁶⁵ Like the ESSA planning process required of Department of Education grantees, the AFFH rule defers to state and local governments to identify appropriate goals and identify the steps they

62. See HUD EXCHANGE, ASSESSMENT OF FAIR HOUSING TOOL 3, 8 (2015), <https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool.pdf> [<https://perma.cc/V3BG-HBWW>] [hereinafter ASSESSMENT OF FAIR HOUSING TOOL] (discussing what criteria should be assessed in determining access to proficient schools); *Regional Fair Housing and Equity Assessment*, HUD EXCHANGE, <https://www.hudexchange.info/programs/sci/fhea/> [<https://perma.cc/BU7X-YQK5>] (last visited Feb. 1, 2019) (discussing the Regional Fair Housing and Equity Assessment implemented prior to the AFFH rule).

63. 24 C.F.R. §§ 5.162, 91.215, 92.207, 570.487, 574.603, 576.500, 903.6 (2018). This rule was temporarily suspended by the Trump Administration in 2018. See *Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants*, 83 Fed. Reg. 683 (Jan. 5, 2018) (withdrawn by *Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants*, 83 Fed. Reg. 23,928 (May 23, 2018) and replaced with *Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments*, 83 Fed. Reg. 23,922 (May 23, 2018)). Note that the authors are co-counsel for the plaintiffs in litigation challenging this suspension.

64. ASSESSMENT OF FAIR HOUSING TOOL, *supra* note 62, at 9.

65. U.S. DEP'T OF HOUS. & URBAN DEV., AFFH RULE GUIDEBOOK 68–69 (2015), <https://www.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf> [<https://perma.cc/MN8J-8KLD>] [hereinafter AFFH RULE GUIDEBOOK].

will take to implement them.⁶⁶ Like ESSA, it requires an equity-focused planning process, but avoids specific mandates.⁶⁷

Another limitation of the AFFH planning process is HUD's reluctance to require engagement of local school districts in the fair housing planning process. Thus, the section of the Assessment of Fair Housing that examines the relation of school policies to fair housing is potentially limited to housing planners (although the rule encourages outreach to multiple stakeholders).⁶⁸ Partly in response to this longstanding disconnect, in 2016, the Secretaries of Housing, Education, and Transportation issued a joint letter to state and local governments urging housing, education, and transportation planners to work collaboratively, to promote housing and school integration across agency lines, and to work together to affirmatively further fair housing.⁶⁹ The joint letter was accompanied by a HUD research brief illustrating ways that housing and education agencies might coordinate their activities.⁷⁰

After the 2016 election, we will never know how far these exhortations for cross agency planning might have been taken if they had been allowed to continue—perhaps accompanied by federal competitive grant incentives and spending conditions.⁷¹ But

66. *Id.*; see also *Every Student Succeeds Act (ESSA)*, U.S. DEP'T EDUC., <https://www.ed.gov/essa> [<https://perma.cc/DT4B-KXQM>] (last visited Feb. 1, 2019).

67. See 24 C.F.R. § 5.150 (2018); *U.S. Secretary of Education Betsy DeVos Announces Release of Updated ESSA Consolidated State Plan Template*, U.S. DEP'T EDUC. (Mar. 13, 2017), <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-announces-release-updated-essa-consolidated-state-plan-template> [<https://perma.cc/87XN-JZ3C>].

68. Arguably, HUD does have the authority to invite local school districts to participate, at least through its responsibility to coordinate the advancement of fair housing with other federal departments, but this avenue has never been pursued, in spite of at least one Executive Order requiring it. Exec. Order No. 12892, 59 Fed. Reg. 2939–2940 (Jan. 17, 1994); see NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* 9 (2008), https://www.prrac.org/projects/fair_housing_commission/The_Future_of_Fair_Housing.pdf [<https://perma.cc/24ZG-FP2B>].

69. U.S. DEP'T OF HOUS. & URBAN DEV. ET AL., *JOINT LETTER TO STATE AND LOCAL LEADERS* (2016), https://prrac.org/pdf/Joint_Letter_on_Diverse_Schools_and_Communities_AFFH.pdf [<https://perma.cc/3HWV-QHS8>].

70. U.S. DEP'T OF HOUS. & URBAN DEV., *BREAKING DOWN BARRIERS: HOUSING, NEIGHBORHOODS, AND SCHOOLS OF OPPORTUNITY* 13–25 (2016), https://prrac.org/pdf/HUD_housing-schools_report_May_2016.pdf [<https://perma.cc/X9DW-TMTK>].

71. For example, in December 2016, Education Secretary John King announced the new “Opening Doors, Expanding Opportunities” grant competition, which offered millions of dollars of planning grants for up to twenty school districts to promote socioeconomic in-

the self-imposed limits of federal power are apparent in the joint letter itself, which focuses on distinctly state and local domains like “school attendance boundaries,” “open enrollment or lottery schools,” “school site planning,” “land use . . . planning,” and “public transportation routes,” without any hint of the federal government’s potential role in these areas.⁷² Thus, the power that the housing and education secretaries choose to exercise, and their AFFH and ESSA planning requirements, remain largely hortatory when it comes to the fundamental building blocks of housing and school segregation.

B. *The Limits of Local Power*

Because most school segregation today operates across school district lines,⁷³ interdistrict policies are often necessary to achieve school integration. It is difficult for a single district to address interdistrict segregation without the voluntary cooperation of adjacent districts, and even where such cooperation might be forthcoming, there are often significant state law barriers to the interdistrict movement of students.⁷⁴ Further, the intense and self-perpetuating cycle of schools and real estate, driven by perceived school quality (and exacerbated by online school rating websites),⁷⁵ drives up housing prices, separates families by

tegration in schools. See Applications for New Awards; Opening Doors, Expanding Opportunities, 81 Fed. Reg. 90,343 (Dec. 14, 2016). The program was cancelled by the new Secretary of Education, Betsy DeVos, in March 2017. See Emma Brown, *Trump’s Education Department Nixes Obama-Era Grant Program for School Diversity*, WASH. POST (Mar. 29, 2017), <https://www.washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity> [<https://perma.cc/75Q6-CM3H>].

72. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 70.

73. SIEGEL-HAWLEY, *supra* note 15, at 18.

74. See Orrick, Sutcliffe & Herrington LLP, *An Analysis of State Laws and Policies that Facilitate or Inhibit the Use of Interdistrict School Integration Programs* (Jan. 1, 2019) (unpublished research report) (on file with author). For example, in Connecticut, prior to the *Sheff v. O’Neill* decision in 1996, students were *required* to attend public schools in the district where they resided. 678 A.2d 1267, 1273 (Conn. 1996).

75. Sharique Hasan & Anuj Kumar, *Digitization and Divergence: Online School Ratings and Segregation in America 2–3* (Oct. 12, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3265316> [<https://perma.cc/XNP3-L2Qs>]; cf. Jack Schneider et al., *The Mis(measure) of Schools: How Data Affect Stakeholder Knowledge and Perceptions of Quality*, 120 TCHRS. C. REC., no. 6, 2018, at 1–3, https://www.holycross.edu/sites/default/files/educ/mismeasure_of_schools.pdf [<https://perma.cc/83CL-YLD3>].

wealth and income,⁷⁶ divides communities by fiscal capacity and need, and makes it even harder to imagine meaningful cooperation across town and school district lines. Racial and economic segregation across districts is higher in more jurisdictionally fragmented metropolitan areas, and thus harder to address through primarily local actions.⁷⁷ As educational researchers have increasingly come to understand, it is these state-created boundaries themselves that are a key driver of school and housing segregation.⁷⁸

For districts with larger numbers of low-income students, the continuous cycle of declining housing prices and decreased tax base relative to the market, greater student needs and educational costs, lower test scores, and lower perceived school quality all conspire to divide regions by race, income, and school performance.⁷⁹ State school finance equalization efforts have some positive effects on this cycle, but the impact is limited.⁸⁰ Higher income jurisdictions have an economic interest in perpetuating these interdistrict divisions through exclusionary zoning and

76. Lareau, *supra* note 27, at 169–72, 180, 197–98; WELLS, *supra* note 16, at 5, 7–14 (finding that “prices for similar homes in similar neighborhoods on different sides . . . of school district boundary lines were negatively correlated to school district racial/ethnic composition,” causing a reduction in home values in districts with more black and Hispanic students and thus resulting in lower property tax revenue and leading to the mutually reinforcing housing-school nexus in highly segregated communities); *see* Holme, *supra* note 38, at 178, 192, 199–202 (finding that parents drew conclusions about school quality based on where other “high-status” parents sent their children rather than any data about the curriculum, quality of the teachers, or other objective measure of whether a school is “good.”); Owens, *Income Segregation*, *supra* note 38, at 5, 17–18 (arguing that the widening income gap combined with persisting racial inequality contributes to an achievement gap between black and white students because income segregation leads to additional resources for affluent white families); Owens, *Inequality in Children’s Contexts*, *supra* note 38, at 550–52, 566–67 (suggesting that severing the link between location of one’s residence and school attendance could lead to a reduction in the capitalization of school quality into real estate value and therefore facilitate neighborhood income integration).

77. Ayscue & Orfield, *supra* note 43, at 6–9, 17.

78. WELLS, *supra* note 16, at 5, 12–17; Bischoff, *supra* note 39, at 182–84, 205–08; *see also* SIEGEL-HAWLEY, *supra* note 15, at 44–45; Tegeler & Hilton, *supra* note 38, at 437–38, 441.

79. Some of the same patterns can be seen within large, wealthier districts with high degrees of income inequality.

80. *See* Rajasri Chakrabarti & Joydeep Roy, *Housing Markets and Residential Segregation: Impacts of the Michigan School Finance Reform on Inter- and Intra-District Sorting*, 122 J. PUB. ECON. 110, 110, 127–28 (2015) (noting the continuing significant gap between the highest spending and the lowest spending school districts).

avoidance of voluntary affordable housing opportunities, while lower-income jurisdictions are similarly compelled to perpetuate these divisions by seeking more low-income housing investments to support the needs of their residents. Even where a central city might want to give its residents access to higher performing schools, its jurisdiction (or “area of operation”) may be limited by state law to the city boundary, and it is likely prohibited from building housing beyond that boundary. Similarly, city families with federal Housing Choice Vouchers may have difficulty moving beyond city lines where the surrounding higher income school districts have their own housing authorities and “portability” procedures must be followed.

As we will discuss below, other scholars who have examined the challenge of coordinated regional planning to promote housing and school integration have focused on the context of “federated regionalism,” which combines local control over local administrative issues with regional control of policies that have a regional impact—like housing, transportation, and education.⁸¹ This approach acknowledges not only the value of local government structures in program administration, but also the political difficulty that would undermine any wholesale efforts to consolidate and dissolve longstanding local political structures. But the likelihood of local jurisdictions and school districts voluntarily ceding power to a regional authority without state legislative intervention is remote.

C. *The Potential of State Power*

State authority to promote housing and school integration, meanwhile, is broad but rarely wielded to its full extent. States are situated to voluntarily remedy, or entirely reimagine, many of the policies described above that tend to drive segregation in both areas. This power stems from the state’s position in our federal structure, in which the Tenth Amendment’s grant of broad state

81. See HOLME & FINNEGAN, *supra* note 4, at 96–114; john a. powell, *Addressing Regional Dilemmas for Minority Communities*, in REFLECTIONS ON REGIONALISM 218, 220–22, 224 (Bruce Katz ed., 2000); SIEGEL-HAWLEY, *supra* note 15, at 34–35; see also Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1118–20, 1164–66 (1996).

authority, and its delimitation of federal authority, has taken shape in light of long-standing (but ever-evolving) notions of certain domains as inherently “local.”⁸² For the states, this means substantial control over housing, land use, and school policies. Although state powers are partially delimited and guided by federal law, including civil rights laws, federal agencies, like the courts, show extensive respect for the state’s fundamental authority to create and oversee its own policies in these areas.⁸³ Localities, meanwhile, derive their authority from that of the state.⁸⁴

Local authority over land use, housing policy, taxation and finance, and education, as well as boundary drawing, fundamentally reckons back to the state as a political structure, with the state able to adjust or condition local activity in these areas (subject to the state constitutional limitations it has set out for itself). In the sphere of housing and land use policies, states have largely delegated to localities the authority to make zoning decisions, including the power to enact single-family zones, multifamily housing limitations, and other exclusionary devices that result in income sorting and often have a segregative effect.⁸⁵ Further, states have an additional grant of authority through their power and influence as administrators and distributors of federal funding, as well as their own funding. For example, states subsidize affordable housing, and help determine its location, through their competitive allocation of Low-Income Housing Tax Credits to developers.⁸⁶ They also receive and disburse federal block grant funding from HUD to spend on housing as well as other needs subject to the requirement that they affirmatively further fair housing, and how states fulfill that requirement is left largely to their discretion.⁸⁷

82. See Richard Briffault, *Localism and Regionalism*, 48 U. BUFF. L. REV. 1, 26 (2000); Wilson, *supra* note 11, at 1441.

83. Ayscue & Orfield, *supra* note 43, at 9 (“Unless there is a violation of the federal constitution and laws, school districting is a power of state governments.”).

84. Briffault, *supra* note 82, at 1129–31; Wilson, *supra* note 11, at 1426.

85. See Wilson, *supra* note 11, at 1426, 1429–33.

86. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 3 (2014), <https://www.occ.gov/topics/community-affairs/publications/insights/pub-insights-mar-2014.pdf> [<https://perma.cc/UFF4-W6A7>].

87. 24 C.F.R. § 5.150 (2018) (“[The] process established by this rule allows for a flexi-

In the field of public education, state governments have total responsibility and control over local systems of education—even in states that have long ago delegated most responsibilities to the local school districts.⁸⁸ Almost every state includes an affirmative commitment, or right, to public education in the state constitution—and indeed adoption of these state constitutional provisions was a condition of ratifying the Fourteenth Amendment and re-admission to the Union after the Civil War.⁸⁹ Typical state education statutes regulate virtually every aspect of local education, set standards for measuring student achievement, and disburse state education funding to supplement or replace local funding.⁹⁰ Just as numerous state supreme courts have pointed to the state government as the final authority over local education, so too have the federal courts recognized the central role of the state.⁹¹

An important aspect of state power in these areas lies in the ability to require, incentivize, or support regional collaborations, either through legislative requirements or fund distribution. Even where state governments may be unwilling or politically unable to overhaul local boundary lines in order to fully remediate local fragmentation, they can still promote regionalist governance structures and planning entities.⁹² Along similar lines, states may require or promote collaborations between local or regional agencies responsible for housing and education policies, and can force greater “elasticity” and “permeability”⁹³ across jurisdictional boundaries for both school districts and local housing agencies.

ble approach that permits program participants to consider a variety of available strategies to meet a wide range of local needs and housing market conditions consistent with the duty to affirmatively further fair housing with limited programmatic resources.”).

88. See Wilson, *supra* note 11, at 1441–42.

89. See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 742–43, 768 (2018).

90. See, e.g., CONN. GEN. STAT. § 10-4 (2018) (state oversight of P–12 education); *id.* § 10-14n (requirements for mastery examinations in public schools); *id.* § 10-16 (minimum number of school days); *id.* § 10-16b (required classes); *id.* 10-223a (graduation requirements); *id.* § 10-262h to -262i (procedures for allocating and distributing state equalization aid grants). See generally CONN. STATE BD. OF EDUC., CONNECTICUT EDUCATION LAWS, at iii–iv (2015), https://cca-ct.org/wp-content/uploads/2015/10/ed_laws_2015.pdf [<https://perma.cc/HZP5-4LUR>].

91. See Wilson, *supra* note 11, at 1142–43 & nn.147–51.

92. See, e.g., Brachman, *supra* note 12, at 283–84.

93. See, e.g., SIEGEL-HAWLEY, *supra* note 15, at 140–43.

III. EXERCISING STATE POWER TO PROMOTE HOUSING AND SCHOOL INTEGRATION

As a threshold matter, we acknowledge that the potential power of state government to address school and housing segregation is very different from the power that a state government may be willing to exercise. In fact, one paradox of state power to effectuate school and housing integration is that whatever reforms the state has the power to implement it can also take away.

Patterns of segregation tend to become self-perpetuating after they are initially created, and political and economic expectations adapt to the segregated status quo.⁹⁴ This is especially the case where gerrymandered, suburban-dominated legislatures feel threatened by interdistrict integration. For example, after the Memphis school district's merger with the surrounding Shelby County district (a power granted by state law), the legislature did an about face, revoking the merger and breaking a formerly unitary county district into separate, segregated fragments.⁹⁵ And the innovative, comprehensive Omaha "Learning Community," which showed huge initial promise to establish interdistrict school finance, administration, and racial and economic integration,⁹⁶ had its core school integration goals cut back by the state legislature less than five years after its creation by the state.⁹⁷

These examples of negative political backlash underscore the need to both build and sustain the political will to support integrative policy efforts at the state level. Political will to address segregation can come from several sources, including civil rights litigation against state governments⁹⁸ or other disruptive change,⁹⁹ large federal funding incentives,¹⁰⁰ and effective region-

94. Ford, *supra* note 22, at 230.

95. SIEGEL-HAWLEY, *supra* note 15, at 11–12.

96. SUSAN EATON, ONE NATION INDIVISIBLE, UPSTREAM PEOPLE: CAN NEBRASKA SHOW A SEPARATE, UNEQUAL NATION A BETTER WAY? 2 (2013), <http://www.onenationindivisible.org/wp-content/uploads/2013/01/ONIstoryNo.8-omahaV6.pdf> [<https://perma.cc/6YX2-4Q AQ>].

97. *Id.* at 3.

98. *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1270–71 (Conn. 1996).

99. For example, the sudden city takeover of suburban school districts in Omaha provided the catalyst for the innovative Omaha Learning Community. HOLME & FINNEGAN, *supra* note 4, at 89–93.

al political coalitions between cities and older, more diverse suburban jurisdictions.¹⁰¹ But it fundamentally must include communities of color that have been historically relocated, segregated, and disinvested, and who in some cities may be facing new waves of displacement and resegregation.

Assuming the underlying political will exists to “striv[e] in common”¹⁰² toward a more inclusive and integrated metropolitan community, what could state governments uniquely accomplish to promote housing and school integration? These solutions should entail robust, parallel efforts to address both housing and school segregation through the use of state power, in order to break past the cycle of mutual reinforcement between these spheres. They also should include policies that take deliberate steps to connect these policy areas, and that build a culture of awareness about their connections among policy makers and the public. While some of these issues can be addressed within the separate domains of housing and education, they are best addressed in a concerted and combined regional context.

To address interdistrict school segregation, an important first step would be to reduce the power of school district boundaries to separate children and housing markets. States with policies (such as those described above) that currently reinforce income and racial sorting among localities and school districts should revise their policies to promote integration. In states where enrollment across school district lines is already allowed, “reworking these plans to look more like interdistrict desegregation programs” would be a valuable step—providing free student transportation for lower-income families, holding districts that send students to other districts partially harmless for the loss of student funding, and promoting moves that would increase socioeconomic diversity

100. For example, during the Obama Administration, the Race to the Top program incentivized major changes in state behavior, including unpopular removal of caps on new charter school development and implementation of unpopular teacher evaluation systems. See Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL. 136, 137, 143, 152 (2012); Joanne Weiss, *Competing Principles*, STAN. SOC. INNOVATION REV. 57, 57–59 (2015).

101. SHERYLL CASHIN, *THE FAILURE OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 304–09 (2004); Orfield, *supra* note 15, at 450–61.

102. HOLME & FINNEGAN, *supra* note 4, at 115.

in receiving school districts.¹⁰³ Indeed, these are small steps when compared to the full extent of state power to merge or consolidate districts, or redraw school district lines altogether.

To address the problem of intradistrict segregation within school districts, state rules for racial and economic balance across schools could largely eliminate the effect school zones have on residential segregation. One innovative approach might be to use a formula recently popularized by Vox, based on research by Professor Meredith Richards and then-graduate student Tomas Monarrez, that compares the degree of neighborhood segregation with the degree of segregation generated by school assignment zones—a formula that could be applied in a regulatory fashion to maximize school integration within geographically modest parameters.¹⁰⁴ Other, more tested approaches include voluntary cross-district transfer programs, intradistrict magnet schools, controlled choice programs, and other steps to loosen the constraints of the traditional school assignment zone.¹⁰⁵ It is especially important for state governments that value integration to adopt state laws prohibiting secession of new school districts from larger districts, where there is a harmful racial impact or segregative effect.

Interdistrict housing segregation, similarly, can be attacked through state law reforms. More states could adopt fair share legislation requiring each municipality in a region to provide a fair proportion of the region's affordable housing need, with accompanying power for developers to overcome unreasonable local zoning barriers.¹⁰⁶ A number of state governments are now supporting regional housing mobility programs,¹⁰⁷ which by design help fami-

103. SIEGEL-HAWLEY, *supra* note 15, at 146.

104. Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RES. J. 1119, 1149–50 (2014); Tomas Monarrez, *Attendance Boundary Policy and the Segregation of Public Schools in the United States* (May 4, 2018) (unpublished Ph.D. dissertation, U.C. Berkeley); see also Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does*, VOX (Aug. 27, 2018, 8:46 AM), <https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map> [<https://perma.cc/EM2F-S35B>].

105. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 70, at 1–2.

106. See, e.g., New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-311 (West 2008).

107. POVERTY & RACE RESEARCH ACTION COUNCIL, HOUSING MOBILITY PROGRAMS IN THE U.S. 1–18 (2018), <https://prrac.org/pdf/mobilityprogramsus2018.pdf> [<https://perma.cc/>].

lies with children access lower-poverty school districts,¹⁰⁸ and Connecticut even has a state law requiring housing mobility programs.¹⁰⁹ Several state housing finance agencies are focusing on high-performing schools as a competitive siting criterion for allocation of Low Income Housing Tax Credits.¹¹⁰ Acquisition of existing multifamily housing in high opportunity areas is another strategy gaining currency among public housing authorities and nonprofit housing developers.¹¹¹ In California, recently passed legislation amended the existing Housing Element Law (which already required towns to undertake development to address regional affordable housing needs) to institute a new requirement that public agencies of the state, including municipalities, the state itself, and all state agencies, take steps to affirmatively further fair housing.¹¹² This includes the requirement that municipalities complete a fair housing assessment and commit to goals and strategies to further fair housing, such as the construction of affordable housing in areas of opportunity (including proximity to high-performing schools).¹¹³

As noted earlier, a growing number of states are placing limits on exclusionary zoning, including, for example, passing legislation in Massachusetts, New Jersey (passed in response to a lawsuit), Oregon, Connecticut, California, and Florida.¹¹⁴ County or regional initiatives such as the inclusionary ordinance passed by Montgomery County, Maryland, can serve as a models for statewide inclusionary zoning legislation in other states.¹¹⁵

696K-KLKX] (describing a number of state supported housing programs).

108. See Stefanie DeLuca & Peter Rosenblatt, *Increasing Access to High Performing Schools in an Assisted Housing Voucher Program*, in FINDING COMMON GROUND, *supra* note 47, at 35.

109. CONN. GEN. STAT. § 8-348 (2017).

110. OPPENHEIMER, *supra* note 9, at 7.

111. See PETER KYE ET AL., DEVELOPING OPPORTUNITY: INNOVATIVE METHODS FOR STRATEGIC HOUSING ACQUISITION 1–2 (2018), https://prrac.org/pdf/prrac_nht_housing_acquisitions_report.pdf [<https://perma.cc/TMA4-V8J9>].

112. See S.A. 686, 2018 Leg., Reg. Sess. (Cal. 2018).

113. *Id.*

114. N.J. STAT. ANN. § 52.27D-301–329.9 (West 2019); CAL. PLANNING AND LAND USE CODE § 65580 (West 2018); CONN. GEN. STAT. § 8-30g (2018 Supp.); FLA. STAT. § 163.3161-3215 (2019 Supp.); OR. REV. STAT. § 197.303–.320 (2017); MASS. GEN. LAWS ch. 40B, §§ 20–23 (2016).

115. See MONTGOMERY, MD., CODE § 25A-5 (2018); see also Roisman, *supra* note 7, at 71.

States could also deploy other, less conventional uses of state power to break the stranglehold of local school district lines and municipal boundaries on affordable housing development. This could include new competitive grants¹¹⁶ or the conditioning of existing state education, transportation, and infrastructure grants on the development of new affordable housing in low poverty areas.¹¹⁷ Alternatively, states could use eminent domain to acquire underused or vacant parcels of land for housing in high opportunity areas¹¹⁸ (including areas facing imminent gentrification pressure), expand jurisdictional boundaries of public housing authorities to permit regional public housing redevelopment and Housing Choice Voucher administration outside the 1950s-era “area of operation” defined by state law,¹¹⁹ and (taking a cue from New York State’s Urban Development Corporation in the 1970s),¹²⁰ direct state development of public housing in high opportunity areas.

These types of reforms require some kind of coordinated regional structure. As we have noted above, there is a growing consensus that equitable “Federated Regionalism”—combining regional control with local administration—is the best path politically to achieve regional cooperation and integration in housing and schools. The basic design of federated regionalism

116. See, e.g., American Housing and Economic Mobility Act of 2018, S. 3503, 115th Cong. § 101(c)(3) (2018); N.Y. STATE INTEGRATION PROJECT, 2018 TITLE I SCHOOL IMPROVEMENT SECTION 1003, at 1 (2018), <http://www.p12.nysed.gov/funding/2018-title-1-nysip-plc/2018-title-1-nysip-plc.pdf> [<https://perma.cc/ZDX9-37CJ>].

117. See H.R. 5045, 2018 Gen. Assemb., Feb. Sess. (Conn. 2018); Mark Pazniokas, *Connecticut House Weakens, Then Passes Affordable Housing Bill*, CT MIRROR (Apr. 24, 2018), <https://ctmirror.org/2018/04/24/connecticut-house-weakens-passes-affordable-housing-bill/> [<https://perma.cc/FQ8M-DEMB>] (explaining that the Connecticut House voted to strip the bill of provisions allowing for state discretion to withhold aid from noncompliant municipalities).

118. Thomas Silverstein, *Decommodifying Housing Without Reproducing American Apartheid*, SHELTERFORCE (Dec. 7, 2018), <https://shelterforce.org/2018/12/07/decommodifyng-housing-without-reproducing-american-apartheid/> [<https://perma.cc/K4QD-D2LR>].

119. See, e.g., S. 752, 2017 Gen. Assemb., Jan. Sess. (Conn. 2017); Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL’Y 209, 236 (1994) (concluding that regionalizing public housing agencies’ gatekeeping functions will enhance prospects for regional desegregation).

120. See Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 342 (2001).

requires state oversight, to adjust the existing legal power relationships of local governments vis-à-vis a new regional entity.¹²¹ Professors Jennifer Holme and Kara Finnegan, for example, describe “five core pillars” of a regional equity framework that include: tax-base sharing; place based policies funded by regional resources; mobility policies that cross school district lines; regional governance; and cross-sector connections with housing, transportation, and health agencies.¹²² Professor Genevieve Siegel-Hawley argues for a similar concept of “Educational Regionalism,”¹²³ and Professor Erika Wilson describes a system of “Equitable Federated Regionalism” in the education context, with key elements including a broad definition of the region encompassed; provisions ensuring the permeability of school district boundaries; adoption of regional diversity goals that all districts must meet; and a regional cost-sharing plan.¹²⁴ Almost by definition, these types of comprehensive regional cooperation and power sharing require state enabling legislation and oversight.

What would the mechanics of such a regional system look like? A number of strong ideas have been generated here in Richmond, Virginia, in one of the first deliberate efforts to bring housing and school administrators together to coordinate their policies in service of integration.¹²⁵ The interim report of this joint planning effort identifies ten short and long term housing policies, five short term and three long term education policies, and eleven combined housing and education strategies.¹²⁶

In our view, successful implementation of a unified housing and school integration effort demands even bolder action by the state governments. This could start with appointment of a stand-

121. HOLME & FINNEGAN, *supra* note 4, at 125.

122. *Id.* at 97–113.

123. SIEGEL-HAWLEY, *supra* note 15, at 133, 137.

124. Wilson, *supra* note 11, at 1468–73, 1478.

125. See PHILIP TEGELER & MICAH HERSKIND, COORDINATION OF COMMUNITY SYSTEMS AND INSTITUTIONS TO PROMOTE HOUSING AND SCHOOL INTEGRATION 2–4 (2018), https://prrac.org/pdf/housing_education_report_november2018.pdf [<https://perma.cc/9JK2-5ZWE>].

126. GENEVIEVE SIEGEL-HAWLEY ET AL., CONFRONTING SCHOOL AND HOUSING SEGREGATION IN THE RICHMOND REGION: CAN WE LEARN AND LIVE TOGETHER? 31–33 (2017), <https://scholarship.richmond.edu/spcs-faculty-publications/14> [<https://perma.cc/SC6W-Z96F>].

ing state commission on housing and school integration tasked with close monitoring of racial and economic segregation trends in communities and schools. On a regional level, meaningful progress would require the empowerment by the state of regional planning authorities in each major metropolitan area, with delegated power over both housing and education, and with fair representation and racial equity at their core.¹²⁷ The powers of such regional authorities would include the monitoring of state-mandated inclusionary zoning and fair share affordable housing goals,¹²⁸ review over local land use decisions that would restrict affordable housing, and other policies that affect housing segregation, such as subsidized housing siting and Housing Choice Voucher administration. The regional authority would also be empowered to review and approve local school boundary changes, monitor local school choice programs; and exercise approval power over any proposals to build, expand, or close local schools, to ensure that every decision has an integrative interdistrict effect.¹²⁹

Ideally, the regional authority would also be given the power to directly administer interdistrict education programs, like regional agencies in New York and Connecticut,¹³⁰ including the development of new interdistrict magnet schools. The regional authority should also play some role in the siting of new affordable housing developments through funding support, oversight of local zoning decisions, or both. Local housing and education leaders would serve together on the regional board, and set measurable regional

127. See DAVID RUSK, BUILDING SUSTAINABLE, INCLUSIVE COMMUNITIES: HOW AMERICA CAN PURSUE SMART GROWTH AND REUNITE OUR METROPOLITAN COMMUNITIES 3, 9, 19 (2010), <https://prrac.org/pdf/SustainableInclusiveCommunities.pdf> [<https://perma.cc/L6CE-TCXP>].

128. See NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 436 (N.J. 1983).

129. See, e.g., Philip Tegeler, *Predicting School Diversity Impacts of State and Local Education Policy: The Role of Title VI*, in SCHOOL INTEGRATION MATTERS: RESEARCH-BASED STRATEGIES TO ADVANCE EQUITY 145, 146, 151 (Erika Frankenberg et al. eds., 2016).

130. New York state has developed the BOCES system for interdistrict programs. *BOCES Fact Sheet*, N.Y. ST. SCH. BOARD ASS'N, <https://www.nyssba.org/about-nyssba/boces-fact-sheet/> [<https://perma.cc/82US-9ETU>] (last visited Feb. 1, 2019); Connecticut has developed the Regional Education Service Centers for interdistrict programs. *RESC Alliance*, ACES, <https://www.aces.org/our-agency/about-us/resc-alliance> [<https://perma.cc/57YF-TBKB>] (last visited Feb. 1, 2019).

goals for both housing and school integration in the region. Public housing agencies in the region would be required to work together to align their public housing redevelopment and Housing Choice Voucher administration with magnet school siting and regional school integration goals,¹³¹ and the state housing finance agency would be required to follow suit. Planning structures at the regional level can still promote the democratic values associated with localism, such as robust public participation, while achieving more equitable outcomes.¹³² States could enact legislation to incentivize (through the distribution of finances), or even require, such regional, cross-issue collaboration and planning structures.¹³³

CONCLUSION

Strong leadership will be needed to counter our country's increasing trend of racial and economic separation. This essay has argued that the greatest potential for addressing housing and school segregation is at the state government level, where most of the interlocking segregative structures reside. As our country's continuing housing affordability crisis propels housing to the political front page over the next several years,¹³⁴ now is the time to

131. One variant of this idea builds on the federal government's efforts to connect the Choice Neighborhoods public housing redevelopment program with the Promise Neighborhoods intensive neighborhood education initiative. See Philip Tegeler & Susan Eaton, *School Diversity and Public Housing Redevelopment*, in FINDING COMMON GROUND, *supra* note 47, at 61, 64, 66, <https://prrac.org/pdf/HousingEducationReport-October2011.pdf> [<https://perma.cc/CVF9-A4AP>]. We know that well-designed magnet schools can attract students from across a wide range of socioeconomic and racial backgrounds, and that a significant number of white, middle class families are willing to send their children to high quality themed magnets, even in areas near public housing developments. Indeed, in Hartford, Connecticut, two of the state's most successful regional magnet elementary schools are located directly adjacent to, respectively, a federal public housing redevelopment, and a state public housing redevelopment.

132. See Briffault, *supra* note 82, at 21–22; Wilson, *supra* note 11, at 1470, 1474–75 (describing possible governance structures by which equitable federated regionalism enables cities to join regional collaborations, but retain equitable political power).

133. Wilson, *supra* note 11, at 1470.

134. At the end of 2018, three of the Senate's leading potential Democratic presidential candidates had introduced three separate, and ambitious, housing bills promising massive spending increases, greater tenant protections, and stronger fair housing protections. American Housing and Economic Mobility Act of 2018, S. 3503, 115th Cong. (2018); Housing, Opportunity, Mobility, and Equity Act of 2018, S. 3342, 115th Cong. (2018); Rent Re-

adopt innovative state civil rights strategies to accompany the housing and educational needs that will accompany a rapidly growing and increasingly economically unequal population. If we value diverse and unified communities, we cannot afford to simply replicate and intensify the legal structures of the past.