

# Fragmenting Local Governance and Fracturing America’s Suburbs: An Analysis of Municipal Incorporations and Segregative Effect Liability Under the Fair Housing Act

Jenna Raden\*

I.	INTRODUCTION.....	2
II.	A BRIEF HISTORY OF MUNICIPAL INCORPORATIONS.....	7
III.	MUNICIPAL INCORPORATIONS TODAY .....	9
	A. <i>Atlanta’s Cityhood Movement</i> .....	9
	B. <i>St. George, Louisiana, Incorporation</i> .....	12
	1. First Incorporation Attempt.....	14
	2. Second Incorporation Attempt .....	17
IV.	MUNICIPAL INCORPORATION UNDER THE FAIR HOUSING ACT .....	19
	A. <i>The Making and Purpose of the Fair Housing Act</i> .....	19
	B. <i>Discriminatory Effect Liability</i> .....	21
	C. <i>Analysis of Discriminatory Municipal Incorporations</i> .....	25
	1. Challenges to Discriminatory Incorporations Are Consistent with the Fair Housing Act’s Purpose and Goals .....	26
	2. Standing to Challenge Discriminatory Incorporations .....	28
	3. Anticipatory Equitable Remedies Available.....	32
	4. Segregative Effect Liability for Discriminatory Incorporations .....	34
	a. Plaintiff’s Prima Facie Case.....	36
	b. Defendant’s Legitimate Interest.....	40

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c. Plaintiff’s Less Discriminatory Practice.....	42
V. CONCLUSIONS AND RECOMMENDATIONS .....	43

*Many are distrustful of their leaders, and believe that their voices are never heard. Many seek only to satisfy their private work—wants; to satisfy their private interests. But this is the great danger America faces—that we will cease to be one nation and become instead a collection of interest groups: city against suburb, region against region, individual against individual; each seeking to satisfy private wants. If that happens, who then will speak for America? Who then will speak for the common good?*

—Barbara Jordan<sup>1</sup>

## I. INTRODUCTION

Vikki Consiglio did not want to see another Bojangle’s or Waffle House in her community; she wanted a Cheesecake Factory.<sup>2</sup> So she and her neighboring colleagues began a campaign to form their own city, which would reflect their discerning taste, through the process of municipal incorporation.<sup>3</sup> If Consiglio’s country club neighborhood could incorporate into its own city, they could control decisions about land use, zoning, and enforcement—they could decide what would be a part of their community and what would not.<sup>4</sup> Their goal was to become an isolated community, apart from their lower income neighbors, in order to achieve a higher average median income and, of course, attract a coveted Cheesecake Factory.<sup>5</sup> Consiglio asked, “What’s wrong with wanting better? . . . What’s wrong with being able to say I want to control what goes on around me?”<sup>6</sup>

Consiglio is not alone in her desire to define her community and its character. Self-determination is a fundamental American ideal.<sup>7</sup> As a result, new cities (or towns and villages) are always forming.

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1. Rep. Barbara Charline Jordan, Keynote Address at the 1976 Democratic National Convention (July 12, 1976) (transcript available at <https://www.americanrhetoric.com/speeches/barbarajordan1976dnc.html>).

2. Brentin Mock, *The Strangest Form of White Flight*, CITYLAB (Nov. 5, 2018), <https://www.citylab.com/equity/2018/11/eagles-landing-cityhood-vote-atlanta-stockbridge/571990/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900).

Municipal incorporation, or the formation of a new city, often occurs in suburban or exurban areas where unincorporated lands receive municipal services from a county government structure.<sup>8</sup> Once a community receives a grant of power from its state, a municipal corporation is formed with all the trappings of city responsibility: local governance, health, safety, well-being, and municipal services for the city's citizens.<sup>9</sup> The tax base from the residents of the new city is extracted from the county government to which it once belonged, and those resources are kept within the new city limits to fund their own services.<sup>10</sup> So what happens when a new city's boundary lines are drawn on racial and economic dividing lines or have a discriminatory effect on minority or low-income communities? What legal protections are available to prevent entrenchment of segregation and inequity?

Scholars consistently find that "primary motivations for incorporation include[] racial exclusion and tax avoidance."<sup>11</sup> It is certainly unlawful for a city to intentionally discriminate and exclude people of color when drawing municipal boundary lines.<sup>12</sup> But discriminatory intent, as required to seek relief under the Equal Protection Clause of the Fourteenth Amendment,<sup>13</sup> is more difficult to root out today.<sup>14</sup> When a discrimination challenge is pitted against a popular referendum and legitimate goals of self-determination, courts

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8. Russell M. Smith & Leora Waldner, *Why Majority-Minority Cities Form: Non-White Municipal Incorporation in the United States, 1990-2010*, 39 URB. GEOGRAPHY 149, 149 (2018). For example, Metairie, Louisiana, and a large majority of the New Orleans metro area is unincorporated. See *Cities & Towns*, JEFFERSON PARISH SHERIFF'S OFF., <https://www.jpso.com/344/Cities-Towns> (last visited Sept. 11, 2019).

9. Leora Waldner & Russel M. Smith, *The Great Defection: How New City Clusters Form to Escape County Governance*, 39 PUB. ADMIN. Q. 170 (2015).

10. *Id.*

11. Smith & Waldner, *supra* note 8, at 151.

12. In *Gomillion v. Lightfoot*, city boundaries were redrawn to exclude African Americans; thus, the Court held the new boundaries could be found violative of the Fifteenth Amendment. 346 U.S. 339, 346 (1960). "But it does seem clear to me that . . . [these boundaries are] an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment . . ." *Id.* at 349 (Whittaker, J., concurring).

13. U.S. CONST. amend. XIV, § 1; *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

14. Overt racism is more socially stigmatized than in the past (although certainly still exists); additionally, well-resourced incorporation campaigns employ legal counsel who undoubtedly advise a campaign on impermissible messaging. It seems unlikely that a successful incorporation campaign would provide direct evidence of discriminatory intent from the pulpit. However, if an incorporation campaign did advertise discriminatory intentions against any protected class, or such intent could be proven through circumstantial evidence, states or courts should not hesitate to invalidate the incorporation—such incorporation efforts would clearly be in violation of the Fourteenth Amendment.

have been reticent to invalidate pernicious incorporation efforts.<sup>15</sup> Thus, discriminatory incorporation efforts prevail.

The history of municipal incorporation is steeped in racism. As de jure segregation and racial discrimination were outlawed, white communities attempted to insulate themselves from integration with city boundaries and established their own ordinances or engendered hostility to maintain the homogeneity and “character” of their spaces.<sup>16</sup> Today, wealthy white neighborhoods are still the most common communities to incorporate.<sup>17</sup> When wealthy communities extract their economic resources and tax base from a governing county, there is a detrimental effect on the excluded populations, which are often lower-income communities of color.<sup>18</sup> The extraction of those resources results in a reduction of municipal services such as fire and police protection, sanitation, and road maintenance in the unincorporated areas left behind.<sup>19</sup> School funding for accompanying districts may be reduced if the new city forms a new school district, while well-funded schools lay across the new boundary line.<sup>20</sup> Tax-base extraction and exclusion from the new city results in increased economic stratification

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15. See, e.g., *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 416-17 (2d Cir. 1995); see also *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199 (2003) (upholding referendum on exclusionary zoning ordinance).

16. Thomas B. Harvey, *Debtors' Prisons and Discriminatory Policing: The New Tools of Racial Segregation*, NYU FURMAN CTR.: DREAM REVISITED (Sept. 2016), <http://furmancenter.org/research/iri/essay/debtors-prisons-and-discriminatory-policing-the-new-tools-of-racial-segrega>.

17. Smith & Waldner, *supra* note 8, at 149. Smith & Waldner examine a recent phenomena of minority-majority city incorporations. *Id.* But they find that even these incorporations are born in reaction to racism, which continues to reveal the role institutional racism plays in municipal incorporations. *Id.* at 150-60.

18. *Id.* at 150-60; see Harvey, *supra* note 16; Yonsu Kim & Tim A. Bruckner, *Political Fragmentation and Widening Disparities in African-American and White Mortality, 1972-1988*, 2 SSM-POPULATION HEALTH 399, 403 (2016) (associated with increased mortality); James H. Lewis & David K. Hamilton, *Race and Regionalism: The Structure of Local Government and Racial Disparity*, 47 URB. AFF. REV. 349 (2011) (associated with health disparities).

19. Smith & Waldner, *supra* note 8. Additionally, “[b]y creating multiple local governments in a region, [municipal incorporations] can lead to metropolitan fragmentation—which can in turn result in service duplication, sprawl, and challenges to regional coordination.” *Id.* at 151 (citations omitted).

20. See EDBUILD, *FRACTURED: THE ACCELERATING BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS 1* (2019 update), <https://edbuild.org/content/fractured/fractured-full-report.pdf> (“A change in any given border, therefore, affects the pools of money available to schools on either side of the line, exacerbating the disparities in wealth and opportunity that are only growing in America.”). A desire for an independent school district, itself, can be a motivation for incorporation. See discussion *infra* Part III.B (St. George incorporation campaign).

often along racial lines. Whether exclusion is intentional or arises out of a desire for a Cheesecake Factory, the effects on excluded communities can be deleterious and enduring.

Discriminatory municipal incorporations entrench segregation, exacerbate inequality, and create barriers to housing, education, and essential municipal services affecting daily life.<sup>21</sup> Disinvestment in communities of color, white flight, and line drawing around racially homogenous communities are familiar foes.<sup>22</sup> These practices were some of the factors that led the Kerner Commission to warn that the United States was creating “two societies . . . separate and unequal.”<sup>23</sup> Congress’s response to the stark inequity was Title VIII of the Civil Rights Act of 1968, The Fair Housing Act (FHA).<sup>24</sup> The FHA aims to provide for fair housing in the United States, end discriminatory housing practices, and attain integrated living.<sup>25</sup> Discriminatory effect claims, regardless of intent, are available under the FHA, contrary to claims under the Equal Protection Clause.<sup>26</sup> One such claim, disparate impact, was affirmed by the United States Supreme Court in 2015, firming ground for recent FHA discriminatory effect claims.<sup>27</sup> The FHA has been used to invalidate discriminatory zoning ordinances immediately enacted by newly incorporated cities to control the character of their cities and who may be a part of them, but could the FHA provide additional protection and prevent discriminatory incorporations from forming at the outset?

As the fringes of America’s cities fragment along race and class lines, Congress’s goal of integration under the FHA is subverted, but can the FHA stop it? This Comment queries whether the FHA can provide protection to invalidate or block discriminatory municipal incorporations that perpetuate segregation and disproportionately burden minority and low-income communities. Though we as a society have broadly reached the conclusion that we should not tolerate segregation, courts have not yet addressed segregative municipal

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21. See Smith & Waldner, *supra* note 8, at 151.

22. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

23. *Id.*

24. Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2018).

25. *Id.* § 3601; see, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (finding that the purpose of the FHA is to achieve integrated housing patterns).

26. U.S. CONST. amend. XIV, § 1; *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2535 (2015); see also 24 C.F.R. § 100.500 (2018) (HUD Discriminatory Effect Regulation).

27. *Inclusive Cmty.*, 135 S. Ct. at 2525.

incorporations under the FHA, the primary legal tool to prevent further segregation in residential living patterns. Part II of this Comment offers a brief background of municipal incorporations in the United States. Part III examines current incorporation movements in the South. Part IV analyzes a novel challenge to municipal incorporation under the FHA. Specifically, the analysis focuses on the viability of the less travelled path of a segregative effect theory of liability. It is crucial to determine potential avenues of relief for those harmed by discriminatory incorporations, but it is just as worthy to understand where remedies are lacking in order to create realistic solutions for hazards affecting the way we organize our communities. Given that municipal incorporations have evaded legal challenge, and assuming an FHA challenge to discriminatory formation of our communities would face difficulties, Part V supplies additional recommendations and conclusions for the mechanism of incorporation that continues to shape our communities. Is municipal incorporation a blank check for government-sanctioned discrimination so long as the invidious motivation is not overt? Will we let discriminatory incorporations continue to unravel the gains society has made since the FHA was enacted?

Although municipal incorporations have occurred since our nation's founding, the historically white suburbs are currently undergoing changes, which make this Comment particularly timely. Gentrification and a dearth of affordable housing in urban areas have caused minority and low-income populations to flock to the suburbs, changing the demographics of America's suburbs.<sup>28</sup> Amidst these migratory patterns, or perhaps as a result of them, some suburban communities are forming their own cities in an effort to guard their resources and secure local control.<sup>29</sup> Additionally, the Supreme Court's recent affirmation of discriminatory effect claims under the FHA lays firmer groundwork for potential challenges.<sup>30</sup> Municipal incorporations are hyper-localized, democratic, and protracted processes; thus, they may not spark the same urgency as blatant civil rights violations, but municipal incorporations will affect millions of Americans this decade, and the effects will be long-lasting once

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28. See ELIZABETH KNEEBONE & EMILY GARR, BROOKINGS, *THE SUBURBANIZATION OF POVERTY: TRENDS IN METROPOLITAN AMERICA, 2000 TO 2008*, at 4 (Jan. 2010).

29. See Agustin Leon-Moreta, *Municipal Incorporation: Socioeconomic and Policy Factors of Influence*, 47 *STAT. & LOC. GOV'T REV.* 255, 256 (2015).

30. *Inclusive Cmty.*, 135 S. Ct. at 2507.

boundary lines become permanent and tax dollars are siphoned from communities. But the process of incorporation also pokes at a provocative question: who gets to determine how we organize our communities and what values do our municipal boundaries represent?

## II. A BRIEF HISTORY OF MUNICIPAL INCORPORATIONS

Municipal incorporation is the legal mechanism by which an unincorporated geographic area breaks away from a county governance structure and formally becomes its own city, village, or town, responsible for self-governance and provision of municipal services.<sup>31</sup> Incorporations are self-organized by the residents of the area who propose self-determined boundary lines of their desired city usually with little oversight.<sup>32</sup> Upon compliance with state incorporation process laws,<sup>33</sup> the state confers a grant of power to new municipalities to establish their own government.<sup>34</sup>

Municipal incorporation is not a new phenomenon. Self-organized incorporation, rather than cityhood designation by the state, has always been a part of the formation of communities in the United States.<sup>35</sup> But, as more overt tools of racial segregation were prohibited in the 1950s, clustering<sup>36</sup> of incorporations and fragmentation of suburban America increased.<sup>37</sup> As the suburbs were constructed, and *Brown v. Board of Education's* school desegregation mandate

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31. Other political processes of line drawing also implicate housing rights, including special districts and homeownership associations. Additionally, annexation is a reverse process by which a city adopts unincorporated areas of land, expanding its borders. This complementary process of line drawing can also have deleterious disparate impacts on low-income communities and communities of color. See Daniel T. Lichter et al., *Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns*, 72 RURAL SOC. 47 (2007). These processes are beyond the scope of this Comment.

32. Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 19 (1990).

33. *Id.* at 74, 79. Although each state governs the process by which municipalities can form, generally requirements include a minimum number of proposed occupants, a petition signed by specified percentage of the proposed residents, and a majority referendum (for those living inside the proposed incorporated area).

34. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”).

35. Amasa M. Eaton, *The Origin of Municipal Incorporation in England and in the United States*, 25 ANN. REP. A.B.A. 292 (1902) (explaining that municipal incorporations are rooted in English law and continued in the United States).

36. Waldner & Smith, *supra* note 9, at 151.

37. Harvey, *supra* note 16 (“Local incorporation, like legally enforced segregation, restrictive covenants, and redlining, emerged as another ‘peculiar institution’ that functioned to sustain and further entrench racial separation in St. Louis.”).

threatened community homogeneity,<sup>38</sup> whites were eager to assert political control and enact exclusionary measures to thwart integration.<sup>39</sup> Resulting municipal incorporations influenced the makeup of urban areas as we know them today.

For example, St. Louis, Missouri's suburbs and the Ferguson uprising were heavily influenced by the severe fracturing of suburbs through excessive incorporations.<sup>40</sup> Between the 1940s and 1960s, St. Louis County's municipalities "exploded" from thirty-five to ninety-five.<sup>41</sup> "As black families moved out from the city and slowly infiltrated white towns, new white developments would spring up further out still, incorporate, and zone to keep the black population at bay."<sup>42</sup> St. Louis County remains highly segregated and garnered national scrutiny for overreliance on citation revenue streams to fund the separate municipal service schemes across the county.<sup>43</sup> After the Missouri legislature capped the amount of revenue a city can earn from fines and fees, some municipalities dissolved and returned to county governance, a process continuing for some municipalities today.<sup>44</sup> "[T]he region's fragmented governmental structure has perpetuated St. Louis's historical separation of white from black, wealth from poverty, and opportunity from joblessness."<sup>45</sup> St. Louis County's history is not a unique story.

The rhetoric surrounding incorporation has modernized from a desire for a white homogenous community to lofty invocations of an American ideal of democratic self-determination and a right to localized government of one's community. Municipal incorporations steadily persist whether for exclusionary or legitimate purposes.

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38. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

39. Harvey, *supra* note 16.

40. *Id.*

41. *Id.*

42. Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014, 12:30 PM), [https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/?utm\\_term=.fb99b523c6b9](https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/?utm_term=.fb99b523c6b9).

43. Stephen Deere et al., *DOJ Finds Ferguson Targeted African-Americans, Used Courts Mainly to Increase Revenue*, ST. LOUIS POST-DISPATCH (Mar. 5, 2015), [https://www.stltoday.com/news/local/crime-and-courts/doj-finds-ferguson-targeted-african-americans-used-courts-mainly-to/article\\_d561d303-1fe5-56b7-b4ca-3a5cc9a75c82.html](https://www.stltoday.com/news/local/crime-and-courts/doj-finds-ferguson-targeted-african-americans-used-courts-mainly-to/article_d561d303-1fe5-56b7-b4ca-3a5cc9a75c82.html).

44. Leah Thorsen, *And Then There Were 88: A Village in St. Louis County Dissolves, and Others Ponder Path Forward*, ST. LOUIS POST-DISPATCH (June 25, 2018), [https://www.stltoday.com/news/local/govt-and-politics/and-then-there-were-a-village-in-st-louis-county/article\\_5864c0fa-59aa-5f3e-a338-3c9eb01d6945.html](https://www.stltoday.com/news/local/govt-and-politics/and-then-there-were-a-village-in-st-louis-county/article_5864c0fa-59aa-5f3e-a338-3c9eb01d6945.html).

45. Harvey, *supra* note 16.

### III. MUNICIPAL INCORPORATIONS TODAY

#### A. *Atlanta's Cityhood Movement*

The suburbs of Atlanta, Georgia, are currently undergoing a “cityhood movement.”<sup>46</sup> Twelve new cities have incorporated in the region since 2005, mostly wealthy white enclaves, beginning with Sandy Springs.<sup>47</sup> Sandy Springs first declared an interest in municipalizing and breaking away from Fulton County governance in 1965 when Atlanta leadership expressed interest in annexing the neighborhood into the city of Atlanta.<sup>48</sup> Sandy Springs “promised to ‘build up a city separate from Atlanta and your Negroes and forbid any Negroes to buy, or own, or live within our limits.’ Atlanta’s annexation plans had ‘forced this on us,’ they wrote, ‘and we will fight to the finish.’”<sup>49</sup> After decades of tension with majority-black county leadership, Sandy Springs’ path to incorporation opened in 2004 when Republicans gained control over Georgia state government for the first time since Reconstruction and amended municipal incorporation rules to make incorporation easier and no longer require county approval.<sup>50</sup> Without hesitation, Sandy Springs incorporated in 2005 with overwhelming voter support.<sup>51</sup> Although the messaging by proponents

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46. Brentin Mock, *Atlanta: A Tale of New Cities*, CITYLAB (Mar. 10, 2018), <https://www.citylab.com/equity/2018/03/tale-of-new-cities/555263/>.

47. Brentin Mock, *Why the Vote to Secede from a Black City Failed in Georgia*, CITYLAB (Nov. 9, 2018), <https://www.citylab.com/equity/2018/11/eagles-landing-vote-secede-stockbridge-georgia/575371/>; Sam Rosen, *Atlanta's Controversial 'Cityhood' Movement*, ATLANTIC (Apr. 26, 2017), <https://www.theatlantic.com/business/archive/2017/04/the-border-battles-of-atlanta/523884/>.

48. Rosen, *supra* note 47.

49. *Id.* (quoting KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 247-48 (2005)).

50. *Id.*; see Mock, *supra* note 46. Sandy Springs incorporation architect, Oliver Porter, rejects racial motivation for incorporation and instead cites a desire for less multiunit zoning relying on the perception that “apartment-dwellers are not as devoted to the community” as homeowners for their lack of property tax contribution and his perception of tendency for crime to occur in apartment buildings. Rosen, *supra* note 47. However, these overtures regarding multifamily zoning and criminality have direct racial implications. *Id.* Because race and class in the area are linked, any effort to zone multifamily units will disproportionately affect low-income communities and communities of color. See Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?agreed=1>.

51. *City History and Culture*, SANDY SPRINGS GA., <http://www.sandyspringsga.gov/government/city-history-and-culture> (last visited Sept. 11, 2019). Ninety-four percent of the new Sandy Springs voted in favor of incorporation. *Id.* Sandy Springs then became the first large U.S. city to outsource all municipal services and has become the model for modern incorporation efforts, as cited by other incorporation efforts. *Id.* However, Sandy Springs,

of the incorporation changed by 2005 to emphasize local control of taxes and zoning decisions, rather than the originally declared racial motivations, Sandy Springs does not distance itself from its long road to incorporation and frequently cites its long held and continuous desire to incorporate.<sup>52</sup> After Sandy Springs incorporated, other wealthy, white neighborhoods fell like dominoes, incorporating to insulate themselves from county control, citing fear of rising taxes or defense against annexation as reasons for incorporation.<sup>53</sup> Removing the wealthier contingent of the tax base in each of these counties is disastrous for the remaining county population and “exacerbate[s] racial inequality in an area that was found . . . to be one of the nation’s worst for economic upward mobility.”<sup>54</sup> With each incorporation, Atlanta’s metro region more deeply fractures along race and class lines.<sup>55</sup>

Some proponents of new municipalities are taking bold measures in their incorporation plans, like Vikki Consiglio. During the 2018 election, Consiglio’s community, Eagle’s Landing, made an unprecedented move to de-annex commercial portions of their neighboring city, Stockbridge, and adopt those portions into their new proposed city plan.<sup>56</sup> Eagle’s Landing is an affluent, majority-white country club community that proposed cityhood after Stockbridge ushered in an all-black City Council and black mayor.<sup>57</sup> The former mayor of Stockbridge acknowledged that a lack of white representation

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itself, has largely jettisoned its public-private model in favor of a more traditional public employee model as a cost-saving measure. See *City History and Culture: Public Private Partnership*, SANDY SPRINGS GA., <http://www.sandyspringsga.gov/government/city-history-and-culture/public-private-partnership> (last visited Oct. 28, 2019).

52. *City History and Culture*, *supra* note 51; *City History and Culture: Public Private Partnership*, *supra* note 51.

53. The very unincorporated areas that are disadvantaged by recent clustered incorporations are now joining the cityhood movement in effort to capture control of any remaining unincorporated commercial areas in an arms race for tax base. Rosen, *supra* note 47 (“So it really becomes this war between communities for resources, for a tax base.”). Recently, two majority-black municipalities incorporated. *Id.* But such incorporations continue to disadvantage the communities left out of cityhood, who cannot afford the expense of a cityhood campaign, bolsters the rhetoric of the cityhood architects desiring local control, and further entrenches segregation. *Id.*

54. *Id.* (“In 2012, Fulton County’s manager calculated that the cityhood movement had cost the county \$38 million per year.”).

55. Mark Niese, *New Cities Could Further Split Atlanta Region*, ATLANTA J.-CONST. (Feb. 21, 2015), <https://www.ajc.com/news/local-govt--politics/new-cities-could-further-split-atlanta-region/zyP5X5R3PyvQa5BZ8SOsNO/>.

56. Mock, *supra* note 2.

57. *Id.*

in government was an impetus for proposed incorporation, although, the incorporation proponents cited their desire for a Cheesecake Factory.<sup>58</sup> Eagle's Landing's proposal would have claimed half of Stockbridge's total assessed property value and decreased Stockbridge's revenues by nearly half, leaving a significantly poorer city behind without taking on any of their debts.<sup>59</sup> Ultimately, the incorporation measure failed.<sup>60</sup> But it provided an alarming preview into how devastating an incorporation could be on preexisting municipalities and the danger inherent in prohibiting neighboring cities like Stockbridge to vote in a process that would have financially crippled them.<sup>61</sup> Moody's declared that Eagle's Landing's incorporation would have a "credit negative" effect for all Georgia cities if the proposed incorporation passed because, if such an unprecedented attempt at land grabbing from an established neighboring city were permitted,<sup>62</sup> it would have a destabilizing financial effect for all Georgia cities (any of which could be next).<sup>63</sup>

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58. See *id.*; Rashad Richey—Full Interview with Lee Stuart, WOAK-AM RADIO, at 10:03-11:04 (Feb. 23, 2018), <https://waok.radio.com/media/audio-channel/rashad-richey-full-interview-lee-stuart>; discussion *supra* Part I.

59. Mock, *supra* note 2.

60. Mock, *supra* note 47.

61. *Id.* Because of Georgia's incorporation policies, Stockbridge never had input as to whether the vote would go forward or in the referendum itself—only those within the proposed city limits of Eagle's Landing were able to vote. The Georgia Supreme Court declined to stop the vote. Leon Stafford, *Georgia Supreme Court Declines to Halt Eagle's Landing Cityhood Vote*, ATLANTA J.-CONST. (Oct. 15, 2018), <https://www.ajc.com/news/local-govt-politics/georgia-supreme-court-declines-halt-eagle-landing-cityhood-vote/FtmENYUfzG3VLLrHvkhXK/>.

62. Whether a new municipality could annex a portion of an already existing city, without residents of that city voting on the measure, is still an open question until or unless another incorporation campaign attempts it or the state prohibits it. See Jenny Jarvie, *After a Suburban Secession Movement Is Defeated in Georgia, a Community Takes Stock*, L.A. TIMES (Nov. 9, 2018, 3:00 AM), <https://www.latimes.com/nation/la-na-georgia-suburb-20181109-story.html>.

63. Mock, *supra* note 2. If Eagle's Landing incorporation was successful, Moody's anticipated:

the potential for a trend of new-cities-eating-old-cities to metastasize, which would affect the ability of all [Georgia] cities to honor outstanding debt obligations. The S&P Global Ratings followed up with a report that its institutional framework "profile could weaken for cities based on our views of weakened predictability and, potentially, system support should similar [incorporations] become more frequent without considerations for overall operations and liabilities."

*Id.*

B. *St. George, Louisiana, Incorporation*

In October of 2019, the St. George neighborhood of East Baton Rouge Parish in Louisiana had more success at the polls than Eagle's Landing and is now undergoing the final steps of incorporation after winning a popular referendum to establish a new city. St. George proponents cite the Sandy Springs, Georgia, incorporation as an inspirational model,<sup>64</sup> and like Atlanta's divided suburbs, the Baton Rouge area is also starkly segregated along racial lines.<sup>65</sup> East Baton Rouge Parish and the city of Baton Rouge is a consolidated city-parish governance structure with one mayor-president and one metropolitan area council.<sup>66</sup> This city-parish unification allows for greater regional planning and economic development in the unincorporated areas of the parish.<sup>67</sup> Notably, many development projects have improved the southeast quadrant—the area of St. George. However, St. George is now breaking away from this governance structure to form their own city.<sup>68</sup> Prior to the incorporation campaign, St. George attempted to create its own school district, dissatisfied with the East Baton Rouge School District.<sup>69</sup> Attempts at establishing a new school district were twice unsuccessful in the state legislature, at least in part because there was no existing city to affiliate with the school district.<sup>70</sup> Organizers were not deterred. St. George shifted strategy and refocused their

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64. Terry L. Jones, *Here's Why St. George's Effort in Baton Rouge Will Happen, Leaders of a Similar Project Say*, ADVOCATE (Feb. 10, 2019, 6:17 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_1edd239e-2afa-11e9-ac4c-8bf177e0e1a2.html](https://www.theadvocate.com/baton_rouge/news/article_1edd239e-2afa-11e9-ac4c-8bf177e0e1a2.html); FAQ's, SIGN ST. GEORGE: FOR A BETTER BATON ROUGE, <http://www.stgeorgelouisiana.com/about/faqs> (last visited Sept. 11, 2019).

65. See James Bennett, *In Baton Rouge, the Fight for a New School District Shows Segregation Isn't in the Past*, ABC, <https://www.abc.net.au/news/2018-12-01/baton-rouge-schools-new-segregation/10566428> (last updated Dec. 21, 2018, 8:56 PM).

66. *City-Parish Consolidation*, CITY BATON ROUGE, PARISH EAST BATON ROUGE, <https://www.brla.gov/846/City-Parish-Consolidation> (last visited Sept. 11, 2019).

67. However, the St. George incorporation has sparked debate over dismantling the consolidated structure. Terry L. Jones, *St. George Vote Revives Chatter of Dismantling Consolidated Government in East Baton Rouge*, ADVOCATE (Oct. 19, 2019, 6:14 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_e3f2dff0-f031-11e9-bd90-5fcc670feb01.html](https://www.theadvocate.com/baton_rouge/news/article_e3f2dff0-f031-11e9-bd90-5fcc670feb01.html).

68. FAQ's, *supra* note 64.

69. *Id.*

70. Sheila V Kumar, *Baton Rouge Breakaway School District Dies After Long Battle in Louisiana Legislature*, TIMES-PICAYUNE (June 5, 2013, 10:45 PM), [https://www.nola.com/politics/2013/06/baton\\_rouge\\_breakaway\\_school\\_d\\_2.html](https://www.nola.com/politics/2013/06/baton_rouge_breakaway_school_d_2.html); Diana Samuels, *St. George, La.: One Group's Quest for a New City Could Determine the Fate of Metropolitan Baton Rouge*, TIMES-PICAYUNE (Nov. 19, 2013, 10:05 PM), [https://www.nola.com/news/baton-rouge/2013/11/st\\_george\\_la\\_baton\\_rouge.html](https://www.nola.com/news/baton-rouge/2013/11/st_george_la_baton_rouge.html) (proposed school district did not achieve the required two-thirds vote on the Louisiana House floor).

efforts on municipal incorporation to achieve the ultimate goal of an independent school district.<sup>71</sup>

A neighboring city, Central, recently traveled the same path from municipal incorporation to independent school district. Central incorporated in 2005, breaking away from the East Baton Rouge Parish government, and created its own school district two years later, which is now lauded as one of the best in Louisiana.<sup>72</sup> State Senator Mack “Bodi” White, a vocal opponent of federally mandated busing and its effects on the parish school system, helped Central establish their school district and also backs St. George’s efforts.<sup>73</sup> Central’s incorporation, although less contested than St. George’s incorporation, was litigated in state court. Plaintiffs raised the issue of discrimination in a challenge to the constitutionality of Louisiana’s incorporation statutes, but the court upheld the state statutes and incorporation efforts prevailed.<sup>74</sup> Central’s incorporation and subsequent independent school

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71. *FAQ’s*, *supra* note 64.

72. *About*, CENT. COMMUNITY SCH. SYS., <https://www.centralcss.org/about> (last visited Sept. 11, 2019).

73. *Frontline: Separate and Unequal* (PBS television broadcast July 15, 2014), <https://www.pbs.org/wgbh/frontline/film/separate-and-unequal/transcript/>. Senator Bodi is a long-time opponent of federally mandated busing:

East Baton Rouge Parish was probably the best public school system in the ‘60s and early ‘70s . . . . The federal government, through their actions, I think the forced busing—it just destroyed the school system. . . . Do you think that you have to bus children all over, bus children long distances so you can say you sit in a seat next to someone diverse, different from yourself? The Justice Department, you know, they achieved their goal. Who can say we’re not desegregated? We have an African-American president. We have an African-American mayor here in Baton Rouge, with a majority white in the parish. We’ve been through all that. We need to let us go back and rebuild our schools now.

*Id.* (remarks of Senator Bodi). Rep. Patricia Haynes Smith was an opponent of St. George’s school district efforts:

The proponents of the [St. George proposed] school district don’t like to hear this, but it’s totally going to be segregation. When you look at the children who will be removed from the East Baton Rouge Parish school system, children who are going to go into this new St. George, the majority of children are white, and the majority of children that will be removed from St. George will be black.

*Id.* (remarks of Rep. Smith). This Comment does not attempt to wade into the quagmire of Baton Rouge’s history with school desegregation (which was one of the longest battles in the nation) and forced busing (which was federally mandated from 1981 to 1996), but inasmuch as the racial implications overlap between school desegregation and municipal incorporation, it is important to note the history. *Id.*

74. *Devall v. Starns*, 2006-2155 (La. App. 1 Cir. 3/21/07); 960 So. 2d 75, 78, 84, *writ denied*, 2007-1224 (La. 6/22/07); 959 So. 2d 513. In part, plaintiffs challenged the constitutionality of Louisiana’s incorporation statutes on the grounds that the statutes were so broad and lacked state guidance or oversight and, alternatively, that the statutes were unconstitutional as applied:

district has become a touchstone for St. George's own efforts.<sup>75</sup> However, St. George is a geographically larger area than Central, and incorporation will have greater economic implications for the parish than Central's incorporation.<sup>76</sup>

### 1. First Incorporation Attempt

Similar to Eagle's Landing's incorporation campaign, St. George drew their first proposed boundaries broad and bold. Their proposed city boundaries encompassed the Mall of Louisiana and other commercial areas in the unincorporated land of East Baton Rouge Parish, which provides the parish with critical sales taxes.<sup>77</sup> What the proposed map did not include was a race or class makeup similar to that of the parish. Poor and majority-black unincorporated areas were left out of the proposed city of St. George. The Baton Rouge Area Chamber and Baton Rouge Area Foundation commissioned a study (LSU Study) of the proposed St. George, which found: "The new incorporation will be approximately 70 percent white, 23 percent

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because those statutes were used to facilitate racial discrimination and to patently deprive blacks of their right of equal protection, due process, and the right to vote because of their race. Citing voting statistics on voter composition inside and outside the area for proposed incorporation, plaintiffs urged that the proposed area of incorporation was intentionally drawn to systematically exclude blacks from inclusion in the proposed city and to deny them the right to vote on the incorporation issue. . . .

[E]leven precincts bordering on the proposed City of Central had a ratio of 74.9% black voters to 22.1% white voters, while the voter composition within the 21 voting precincts of the proposed city was 95.7% white and 4.3% black.

*Id.* at 78, 80. The court did not find the plaintiffs' claim of discrimination persuasive. *Id.* at 83. This is perhaps because Central's chairperson "attested that prior to drawing the boundaries, the incorporators obtained input from minorities, who chose not to be included in the city limits." *Id.* at 81. This theme of self-selection repeats throughout municipal incorporations.

75. Samuels, *supra* note 70.

76. Jones, *supra* note 64. More significant economic damage is predicted when St. George is finally incorporated; when Central incorporated, county revenue was net positive with reduction in land and population. Additionally, St. George's current proposal includes 86,000 residents, while Central, a more rural community, had 25,000 at the time of incorporation. *Id.*

77. *St. George Map: Get Detailed View of Adjusted Boundaries of Proposed New City*, ADVOCATE (Mar. 5, 2018, 12:42 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_007a441e-20a5-11e8-8370-5f14c49d3ca3.html](https://www.theadvocate.com/baton_rouge/news/article_007a441e-20a5-11e8-8370-5f14c49d3ca3.html).

Dissimilar from Eagle's Landing, the commercial areas were not located within the bounds of *another* city. However, after St. George's first failed incorporation attempt, Baton Rouge annexed some of the critical commercial areas. Steve Hardy, *Metro Council Annexes More Land into Baton Rouge, Wrangles with Firefighting, Policing Concerns*, ADVOCATE (June 28, 2017, 9:22 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_6e073eb0-5c42-11e7-9533-c73675139280.html](https://www.theadvocate.com/baton_rouge/news/article_6e073eb0-5c42-11e7-9533-c73675139280.html).

Black, and 4 percent Asian, compared to the City of Baton Rouge which is a majority-minority city with a population that is 55 percent Black, 40 percent White, and 3 percent Asian.”<sup>78</sup>

St. George organizers dispute racial motivations and contentions that the incorporation is “white flight,” and instead St. George proponents have declared their actions to be “middle-class and upper-middle-class flight.”<sup>79</sup> St. George acknowledges the disparity in class between their new city and the excluded areas; the disparity is unabashedly cited as a principal reason for seeking incorporation and an independent school district.<sup>80</sup> By St. George’s own estimates, they provide “two-thirds of the revenue to the East Baton Rouge Parish government.”<sup>81</sup> In the new city of St. George, the average household income will be \$30,000 higher than Baton Rouge.<sup>82</sup> Indeed, the LSU Study found that St. George “would be one of the wealthiest cities in

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78. JAMES RICHARDSON ET AL., ON THE POSSIBILITY OF A NEW CITY IN EAST BATON ROUGE PARISH 4 (Oct. 2013).

79. Diana Samuels, *St. George Incorporation Portrayed As ‘Secession’ in National Media*, TIMES-PICAYUNE (Dec. 3, 2013, 9:50 PM), [https://www.nola.com/news/baton-rouge/2013/12/st\\_george\\_incorporation\\_portra.html](https://www.nola.com/news/baton-rouge/2013/12/st_george_incorporation_portra.html) (comments of Senator Bodi White at a press event for St. George). Albert Samuels, an associate professor of political science at Southern University stated:

[Y]ou have a separation that is both based on race and class, and this would really perpetuate that . . . Some of these supporters of this effort to incorporate St. George and create a school district, they have the temerity to say with a straight face that this has nothing to do with race. But they’re acting as if the previous 50 or 60 years of history in this town have absolutely no consequence for where we stand now.

Samuels, *supra* note 70. Class is often a proxy for race in public discourse. Such language could give rise to a discriminatory intent claim under the FHA or Fourteenth Amendment. *See* *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016) (finding that statements about class and “character” were indicative of racial animus). Discriminatory intent claims, though critically important, are outside the purview of this Comment.

80. Samuels, *supra* note 79.

81. *FAQ’s*, *supra* note 64.

82. RICHARDSON ET AL., *supra* note 78, at 5; Samuels, *supra* note 79. The media backlash from the report’s findings was swift. *See* Shadee Ashtari, *Richer White People in Greater Baton Rouge Seek to Secede from Poorer Black Neighbors*, HUFFPOST (Dec. 3, 2013, 5:49 PM), [https://www.huffingtonpost.com/2013/12/03/baton-rouge-secession\\_n\\_4373865.html](https://www.huffingtonpost.com/2013/12/03/baton-rouge-secession_n_4373865.html); Breanna Edwards, *White, Wealthy South Baton Rouge Wants to Secede from Poor, Black Northern Areas*, ROOT (Dec. 2, 2013, 12:48 PM), <https://www.theroot.com/white-wealthy-south-baton-rouge-wants-to-secede-from-p-1790899150>; Scott Kaufman, *Affluent, White Residents of South Baton Rouge Propose Seceding from City’s Poor, Black Northern Areas*, RAW STORY (Dec. 1, 2013), <https://www.rawstory.com/2013/12/affluent-white-residents-of-south-baton-rouge-propose-seceding-from-citys-poor-black-northern-areas/>.

Many media outlets noted the influx of 200,000 displaced New Orleans residents after Katrina, who were largely African American and who largely settled in the northern part of the county, as a potential aggravating factor for the incorporation movement. *See* Ashtari, *supra*.

the state.”<sup>83</sup> The economic impact of a wealthy part of the parish extracting their tax dollars will have deleterious effects on the excluded residents at a time when poverty is stark and increasing in the Baton Rouge metro area.<sup>84</sup>

The LSU Study also found that schools would be harmed by a significant decrease in funding for students,<sup>85</sup> a reduction that will inevitably lead to deepening inequality.<sup>86</sup> The current public schools in the St. George area are some of the most successful public schools in the East Baton Rouge school district.<sup>87</sup> Students outside of St. George could lose access to those schools if the ultimate goal of a St. George independent school district is realized.<sup>88</sup> “What remains of the East Baton Rouge Parish School System would have a higher population of poor, black, and at-risk students,”<sup>89</sup> adding St. George to the current national wave of school resegregation.<sup>90</sup>

St. George’s first attempt at incorporation concluded in 2015 when proponents failed to get the referendum on the ballot.<sup>91</sup> The organizers were forced to wait two years for their next attempt.

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83. RICHARDSON ET AL., *supra* note 78, at 5.

84. See Steven Ward, *Report: Poverty High in Baton Rouge*, *ADVOCATE* (Nov. 3, 2011, 2:52 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_494060fd-745e-563c-a5d3-d9d229f5234e.html](https://www.theadvocate.com/baton_rouge/news/article_494060fd-745e-563c-a5d3-d9d229f5234e.html).

Some of those effects were outlined in the LSU Study:

[C]reating the new municipality would: Take \$85 million, or 30 percent, from the East Baton Rouge Parish General Fund. . . . Create risk for increased taxes to make up for lost revenues. Lead to significant reductions in public services, particularly police protection. . . . Destabilize and jeopardize the unified plan of government. . . . Threaten economic development and job creation efforts. . . . Cut funding for the [East Baton Rouge Parish school district] even more than the breakaway district proposed in 2012 and 2013. . . .

Press Release, Baton Rouge Area Chamber & Baton Rouge Area Found., BRAC and BRAF Release Report on Impacts of Proposed New Municipality in East Baton Rouge Parish 1-2 (Dec. 1, 2013), [https://brac.org/wp-content/uploads/BRAC\\_White\\_Paper\\_New\\_City\\_EBR2.pdf](https://brac.org/wp-content/uploads/BRAC_White_Paper_New_City_EBR2.pdf) (estimating a loss of \$53 million after accounting for population reduction due to incorporation). Indeed, there is already question over whether the city-parish governance structure should be maintained after St. George’s incorporation. Jones, *supra* note 67.

85. Jones, *supra* note 67; Press Release, *supra* note 84.

86. See *EDBUILD*, *supra* note 20, at 3.

87. Samuels, *supra* note 70.

88. *Id.*

89. *Id.*

90. *EDBUILD*, *supra* note 20, at 4.

91. Andrea Gallo, *St. George Budget Reveals how New City Would Be Funded, Amount of Revenue Baton Rouge Would Lose*, *ADVOCATE* (Mar. 5, 2018, 11:30 AM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_326901f4-2091-11e8-ac91-e3f622cb6c4b.html](https://www.theadvocate.com/baton_rouge/news/article_326901f4-2091-11e8-ac91-e3f622cb6c4b.html). St. George proponents fell seventy-one signatures short of the twenty-five percent of proposed St. George residents required to place the question of incorporation on the ballot. *Id.*

## 2. Second Incorporation Attempt

St. George proponents have been successful thus far in their second incorporation attempt. In October 2019, fifty-four percent of St. George residents voted to incorporate the second version of the city.<sup>92</sup> At the time of publication, St. George awaits an official grant of state power to become Louisiana's fifth largest city and is defending litigation attempting to defeat the incorporation.<sup>93</sup>

The second map of St. George differs from the original. In the two-year waiting period after the first attempt, the city of Baton Rouge annexed the critical commercial areas that St. George originally attempted to integrate into their proposed city, including the Mall of Louisiana.<sup>94</sup> Additionally, St. George organizers scaled back portions of the north and significant notches appear in the new borders.<sup>95</sup> The new boundaries exclude low-income, majority-black apartment complexes on the fringes of St. George's boundaries.<sup>96</sup> St. George organizers stated that those excluded areas had less petition signatures in support of its first incorporation attempt, which led to their removal from the second map.<sup>97</sup> Regardless of the motivation, the result is a whiter, wealthier version of St. George.<sup>98</sup>

A new economic study of the second incorporation plan reiterated many of the LSU Study's concerns, but found that an incorporation of St. George "would have a significant negative impact resulting in an estimated reduction of [\$48.3 million] in general fund revenues" and East Baton Rouge Parish "would be required to reduce services and expenditures by 45%."<sup>99</sup> It also raised questions about the financial

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92. Terry L. Jones, *Can Legal Fight to Block St. George Succeed Where Battle over Central Failed?*, *ADVOCATE* (Oct. 26, 2019, 6:02 PM), [https://www.theadvocate.com/baton-rouge/news/article\\_9b5d7a10-f753-11e9-b27a-5f3123130180.html](https://www.theadvocate.com/baton-rouge/news/article_9b5d7a10-f753-11e9-b27a-5f3123130180.html).

93. *Id.*

94. Hardy, *supra* note 77. Baton Rouge did not explicitly cite St. George's incorporation efforts as a reason for annexation, but the timing seems illuminating.

95. For a comparison of maps, see *supra* note 77.

96. Jones, *supra* note 92.

97. *See id.* This is a similar self-selection refrain to Central's defense to claims of discrimination in their incorporation proceedings. *See supra* notes 65-74.

98. Adam Harris, *The New Secession*, *ATLANTIC* (May 20, 2019), <https://www.theatlantic.com/education/archive/2019/05/resegregation-baton-rouge-public-schools/589381/>.

99. RICHARD CPAS, *CONSOL. GOV'T CITY OF BATON ROUGE—PARISH OF E. BATON ROUGE, FINANCIAL IMPACT ANALYSIS OF THE PROPOSED INCORPORATION OF THE CITY OF ST. GEORGE 4, 6-7* (Sept. 17, 2018) (emphasis omitted); *see also* Press Release, Baton Rouge Mayor's Office, *City-Parish Releases Study on Projected Impact of City St. George Incorporation* (May 8, 2019), <https://www.brla.gov/CivicAlerts.aspx?AID=315> ("[E]very City-Parish department and agency would need to be cut by a minimum of 18% across the board. If we protect public safety from the cuts—our police and fire fighters—the budgets for

obligations that St. George would leave unresolved on East Baton Rouge Parish's books.<sup>100</sup>

After a highly contested campaign, the popular referendum passed.<sup>101</sup> But St. George's neighbors, who will experience the reduction in services from St. George's incorporation and likely a deepening inequality in schools and municipal services, did not get to vote.<sup>102</sup> Baton Rouge Parish and St. George are engaged in litigation while some unhappy residents and businesses within the St. George footprint are seeking annexation into Baton Rouge.<sup>103</sup> Opponents to the incorporation may be better positioned to challenge St. George than opponents were for Central's incorporation due to the lengthy history of incorporation efforts, record of statements, and the statistical studies finding a deleterious impact.<sup>104</sup>

Incorporation efforts, like those in East Baton Rouge Parish and Atlanta's cityhood movement, raise questions about how society organizes communities, who has the power to decide, and whether restrictions or safeguards should be imposed on those wishing to protect their private interests over a common good. If municipal incorporations perpetuate segregation and racial inequality, can the Fair Housing Act provide relief to the neighbors excluded?

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all remaining City-Parish departments and agencies would need to be reduced by a minimum of 45%.")

100. RICHARD CPAS, *supra* note 99, at 4. The debt concern was echoed by the Governor when he vetoed a St. George transition bill because "the bill . . . limit[ed] the responsibility of St. George for liabilities and other bonded indebtedness for services that have been provided to the residents of the St. George area for decades." Terry L. Jones, *In Veto Letter, St. George Transition Bill Deemed 'Unnecessary' by Gov. Edwards*, ADVOCATE (June 21, 2019, 5:10 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_a33f4f1a-9470-11e9-91c1-8b59abff6bef.html](https://www.theadvocate.com/baton_rouge/news/article_a33f4f1a-9470-11e9-91c1-8b59abff6bef.html).

101. *See* Jones, *supra* note 92.

102. This was not for lack of trying. The mayor of East Baton Rouge Parish, who opposes the St. George incorporation, introduced legislation to permit all residents of the Parish to vote in the incorporation referendum; however, the legislation failed and was criticized for "chang[ing] the rules at the end of the game" and was ultimately shelved. Will Sentell, *All in East Baton Rouge Won't Get to Vote on St. George Effort After Bill Fails in Legislature*, ADVOCATE (May 9, 2019, 12:15 PM), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_c63d8b44-71bb-11e9-876c-0b456c18ce15.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_c63d8b44-71bb-11e9-876c-0b456c18ce15.html).

103. Timothy Boone, *First Business Has Requested Annexation into Baton Rouge and Out of St. George*, ADVOCATE (Oct. 21, 2019, 6:08 PM), [https://www.theadvocate.com/baton\\_rouge/news/business/article\\_f2c00efe-f446-11e9-bf59-63d7be6438b6.html](https://www.theadvocate.com/baton_rouge/news/business/article_f2c00efe-f446-11e9-bf59-63d7be6438b6.html).

104. Jones, *supra* note 92.

## IV. MUNICIPAL INCORPORATION UNDER THE FAIR HOUSING ACT

A. *The Making and Purpose of the Fair Housing Act*

The Fair Housing Act was signed into law in April 1968 against the backdrop of a segregated and racially divided America.<sup>105</sup> President Lyndon B. Johnson's National Advisory Commission on Civil Disorders (commonly known as the Kerner Commission), analyzed the causes of the 1967 summer race riots and, in February 1968, concluded the nation was "moving toward two societies, one black, one white—separate and unequal."<sup>106</sup> The Kerner Commission Report candidly captured the racial inequities causing violent unrest.<sup>107</sup> Racially discriminatory policies and practices including restrictive covenants, redlining, disinvestment in African-American neighborhoods, and white flight created the poverty and segregation that characterized the urban ghettos of that era. Such manufactured inequities have compounded over generations and still persist today.<sup>108</sup>

In April of 1968, Martin Luther King, Jr. was assassinated and grieving Americans in over 100 cities rioted.<sup>109</sup> In response to this political pressure, Congress ended the filibustering on a new housing civil rights bill and, seven days after King's death, President Johnson

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105. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 1:1 (2017). The FHA is a bi-partisan effort of Walter Mondale, a Democrat senator from Minnesota, and Edward Brooke, a Republican senator from Massachusetts. *Id.*

106. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 22, at 1.

107. *Id.* ("What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.").

108. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). Justice Kennedy summarized:

Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities; steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs.

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2515 (2015) (citations omitted).

109. MASSEY & DENTON, *supra* note 108, at 194.

signed the Fair Housing Act.<sup>110</sup> The FHA calls for “fair housing throughout the United States” and prohibits discrimination on the basis of race, color, national origin, religion, sex, disability, and familial status.<sup>111</sup> Congress made clear that, beyond the prohibition of individual discrimination in housing, the FHA’s aim is “truly integrated and balanced living patterns” for the benefit of “the whole community.”<sup>112</sup> Congress and FHA jurisprudence have repeatedly ratified this goal.<sup>113</sup>

The United States Supreme Court first affirmed the FHA’s integration goal, and provided statutory construction guidance, in the cornerstone case *Trafficante v. Metropolitan Life Insurance*.<sup>114</sup> The Court established four interpretive principles: (1) integration is an important goal of the FHA, (2) the FHA is to be broadly construed, (3) Title VII provides interpretive guidance, and (4) “great weight” should be given to the interpretation of the U.S. Department of Housing and Urban Development (HUD), as the agency primarily responsible for implementation and administration of the FHA.<sup>115</sup> In 2015, the Court’s ruling in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project (Inclusive Communities)* again renewed the legitimacy of the FHA’s integration goals and demonstrated that “local policy discretion is not absolute, but must yield to the integration aims of the FHA.”<sup>116</sup>

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110. *Id.*

111. 42 U.S.C. § 3601 (2018). The FHA was later amended to include sex, disability, and familial status as protected classes. H.R. REP. NO. 100-711, at 3 (1988). The FHA is constitutionally grounded in the Thirteenth and Fourteenth Amendments. SCHWEMM, *supra* note 105, § 6:1-6:2; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-40 (1968) (outlawing racial discrimination in housing under the Civil Rights Act of 1866 and paving the way for the FHA); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) (“[T]he statute was enacted as an aid to enforcement of the Thirteenth Amendment.”).

112. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 2706, 3422 (1968) (Senators Mondale and Javits in Senate congressional hearings on the FHA)).

113. *Inclusive Cmty.*, 135 S. Ct. at 2525-26 (“The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”); H.R. REP. NO. 100-711 (making clear that twenty years of the FHA had not accomplished its goal of integration and that housing remains deeply segregated, thus, enacting stricter enforcement mechanisms).

114. 409 U.S. 205.

115. 42 U.S.C. § 3608(a); *Trafficante*, 409 U.S. at 210; SCHWEMM, *supra* note 105, § 7:2.

116. Stacy Seichshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 GEO. MASON L. REV. 663, 664 (2017).

Since its enactment, the FHA has consistently been invoked to combat instances of intentional discrimination but has also been used to challenge state, municipal, and private decisions that impose barriers to fair housing that disproportionately affect protected classes or perpetuate segregation. Like Title VII's mandate for equality in employment opportunities, the FHA mandates equality in housing opportunities and seeks the "removal of artificial, arbitrary, and unnecessary barriers" to those goals.<sup>117</sup> Thus, the FHA has been used to invalidate exclusionary zoning ordinances, enable low-income housing projects, and achieve equality in municipal services, as well as combat instances of intentional discrimination in housing.<sup>118</sup> Such barriers to fair housing perpetuate the inequities identified by the Kerner Commission and prevent the integrated living patterns called for by the FHA. Though fifty years have passed since the enactment of the FHA and some gains have been made, segregation persists in nearly every American city.<sup>119</sup>

### B. *Discriminatory Effect Liability*

HUD, as the administrative agency of the FHA, provides regulations interpreting the statute that reinforce the integration mandate under the FHA.<sup>120</sup> In 2013, HUD issued a regulation for discriminatory effect claims that were already recognized in courts across the country.<sup>121</sup> The HUD regulations state that liability under the

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117. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII); *Inclusive Cmty.*, 135 S. Ct. at 2522 (FHA).

118. SCHWEMM, *supra* note 105.

119. Aaron Williams & Armand Emamdjomeh, *America Is More Diverse than Ever—but Still Segregated*, WASH. POST, [https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/?utm\\_term=.0e20eca7083b](https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/?utm_term=.0e20eca7083b) (last updated May 10, 2018); Joseph P. Williams, *Segregation's Legacy*, U.S. NEWS & WORLD REP. (Apr. 20, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act>. Discrimination in housing persists. See MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xi, xiii (2013), [https://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf) (HUD's most recent study of national housing discrimination, noting this report "probably understate[s] the total level of discrimination that occurs"); MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS, at iii (2002), <https://www.huduser.gov/portal/Publications/PDF/aotbe.pdf>.

120. See 24 C.F.R. pts. 100, 103, 115, 180 (2018). HUD regulations were not issued until 1989, after Congress's mandate in the 1988 FHA Amendments. SCHWEMM, *supra* note 105, § 7:5.

121. 24 C.F.R. § 100.500. In August 2019, HUD issued a proposed amendment to the disparate impact standard. 84 Fed. Reg. 42,854 (proposed Aug. 19, 2019) (comment period

FHA may be established, even if there is no discriminatory intent, where a practice “actually or predictably results in” (1) disparate impact; or (2) “creates, increases, reinforces, or perpetuates segregated housing patterns because of [protected status].”<sup>122</sup> Each effect claim is a fact intensive inquiry, and the threshold may vary on the circumstances—there is no specified threshold for establishing effect,<sup>123</sup> although, some courts have held that the discriminatory effects must be “significant.”<sup>124</sup>

HUD’s current regulation sets forth a burden shifting framework that first requires the plaintiff to prove the practices “cause[] or predictably will cause a discriminatory effect,” then shifts to the defendant to prove the practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,” and finally, the plaintiff then has the opportunity to prove the interest “could . . . be served by another practice [with] a less discriminatory effect.”<sup>125</sup>

Disparate impact liability, the first type of effect claim under the FHA, was recognized in the 2015 landmark case *Inclusive Communities*, following nine United States Courts of Appeal.<sup>126</sup> In

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closed Oct. 18, 2019). The proposed amended rule guts the discriminatory effect regulation. It abandons the burden shifting framework used in the FHA and other civil rights claims in favor of burdening plaintiff with a crippling *prima-facie* five-part standard, before a plaintiff can even get to discovery of information about alleged discriminatory policies. Additionally, the proposed rule offers new affirmative defenses for defendants using third-party algorithms. All forms of the word “segregation” have been removed entirely from the proposed rule. Civil rights advocates decry the proposed rule as a dismantling of civil rights laws and believe the new standard may be near impossible for a plaintiff to meet. See Kriston Capps, *How HUD Could Dismantle a Pillar of Civil Rights Law*, CITYLAB (Aug. 16, 2019), <https://www.citylab.com/equity/2019/08/fair-housing-act-hud-disparate-impact-discrimination-lenders/595972/>.

However, at the time of publication, the rule established in 2013 still controls (and all further references to the regulation in this Comment refer to the 2013 regulation). Moreover, nine Courts of Appeal and the Supreme Court have recognized discriminatory effect claims without relying on HUD’s rule and at least three circuits explicitly recognize separate segregative effect claims. See *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988); *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 503 (9th Cir. 2016).

122. 24 C.F.R. § 100.500(a).

123. 78 Fed. Reg. at 11,466 (Feb. 15, 2013).

124. See SCHWEMM, *supra* note 105, § 10:6.

125. 24 C.F.R. § 100.500(b)(1)(i); see also *supra* note 121 (regarding HUD’s proposed amended regulation).

126. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (recognizing disparate impact claims under FHA §§ 3604(a) (unlawful to make housing unavailable to a protected class) and 3605 (prohibiting discrimination in residential real estate related transactions)).

Dallas, Texas, low-income housing tax credits were concentrated in predominantly black inner-city areas and too few were issued in white suburban neighborhoods; such administration disproportionately affected African Americans and perpetuated patterns of segregation.<sup>127</sup> In a five-to-four opinion the Court endorsed the FHA's integration mandate: "Much progress remains to be made in our Nation's continuing struggle against racial isolation. . . . The FHA must play an important part in avoiding the Kerner Commission's grim prophecy" of two nations, separate and unequal.<sup>128</sup>

Justice Kennedy stated that targeting "unlawful practices includ[ing] zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. . . . reside[s] at the heartland of disparate-impact liability."<sup>129</sup> But the Court also carved out safeguards to ensure that the focus of effect claims was the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. . . . [T]he FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."<sup>130</sup> Therefore, plaintiffs must (1) identify a policy demonstrating an effect on a protected class, (2) the policy must cause the effect (the "robust causality" requirement),<sup>131</sup> and (3) the policy, cause, and effect must be pled as part of plaintiffs' prima facie case.<sup>132</sup> Although the Court only analyzed disparate impact claims in *Inclusive Communities*, the Court's safeguards and interpretive guidance are informative and likely applicable to segregative effect claims.

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127. *Id.* at 2514.

128. *Id.* at 2525.

129. *Id.* at 2521-22.

130. *Id.* at 2522 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

131. *Id.* at 2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)) ("[R]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."). Also warning against the dangers of encouraging racial quotas. *Id.*

A recent United States Court of Appeals for the Fifth Circuit decision created discord among the Courts of Appeal for the interpretation of this safeguard after *Inclusive Communities*. See *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 903-05 (5th Cir. 2019); *Reyes v. Waples Mobile Home Park Ltd.*, 903 F.3d 415, 429 (4th Cir. 2018); *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1111 (8th Cir. 2017); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016). *But see Lincoln Prop. Co.*, 920 F.3d at 921 (Davis, J., dissenting) ("[A] segregative-effect claim does not require the plaintiff to prove that the challenged policy caused the initial segregation, but that the policy will perpetuate it.").

132. *Inclusive Cmty.*, 135 S. Ct. at 2514; see also *supra* note 121 (regarding HUD's proposed amended regulation).

Segregative effect claims are the second type of effect claim recognized by courts under the FHA, but they were not directly addressed in *Inclusive Communities*. However, nothing in the opinion contradicts the viability of this second claim, and Justice Kennedy's interpretive guidance for disparate impact claims—the legislative history and Congress's ratification of appellate court interpretations via the 1988 Amendments—likewise support cognizability of segregative effect claims.<sup>133</sup> Moreover, the Court obliquely acknowledged this claim's existence and favorably cited two segregative effect cases.<sup>134</sup> Although the Court has not yet directly addressed segregative effect claims, under HUD's controlling regulation and appellate court precedent, this second effect claim is equally viable, albeit less travelled.<sup>135</sup>

Neither discriminatory effect theory has been used to directly challenge a municipal incorporation, but effects claims have been used to strike down exclusionary zoning ordinances enacted immediately following an incorporation. In fact, the first disparate impact case under the FHA squarely addressed an ordinance enacted immediately following a discriminatory incorporation.<sup>136</sup> In *United States v. City of Black Jack*, an effort to build low-to-moderate income housing in the unincorporated suburbs of St. Louis was thwarted when the community resisted the plan by incorporating into a city and immediately enacting an exclusionary zoning ordinance to prohibit multifamily housing.<sup>137</sup> The United States Court of Appeals for the Eighth Circuit examined the “ultimate effect” and the “historical context” and found the city's “action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process [of segregation].”<sup>138</sup>

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133. *Inclusive Cmty.*, 135 S. Ct. at 2522.

134. *Id.* at 2533 (noting that the FHA does not “force housing authorities to reorder their priorities,” but it does aim “to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects *or perpetuating segregation*” (emphasis added)); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

135. See Seicshnaydre, *supra* note 116, at 681-682; see also *supra* note 121 (regarding HUD's proposed amended regulation).

136. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

137. *Id.* at 1186.

138. *Id.* Before enjoining the ordinance, the court exhorted, “clever men may easily conceal their motivations, but more importantly, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.” *Id.* at 1185.

Segregative effect claims strike at the heart of the FHA's integration goal.<sup>139</sup> Senator Walter Mondale, an architect of the FHA, spoke directly in congressional hearings that the intention of the law was to undo the effects of past governmental discrimination and a municipality's exclusion of African Americans contravenes those aims.<sup>140</sup> Indeed, most segregative effect claims are challenges to municipal decisions.<sup>141</sup>

### C. *Analysis of Discriminatory Municipal Incorporations*

The legal mechanism of municipal incorporation has been utilized for decades to insulate wealthy white communities and their resources. However, courts have never directly addressed incorporation challenges under the Fair Housing Act.<sup>142</sup> The following analysis seeks

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139. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). See HUD's comments on segregative effect theory:

[T]he elimination of segregation is central to why the Fair Housing Act was enacted . . . to "achieve racial integration for the benefit of all people in the United States." . . . Recognizing liability for actions that impermissibly create, increase, reinforce, or perpetuate segregated housing patterns directly addresses the purpose of the Act to replace segregated neighborhoods with "truly integrated and balanced living patterns." For example, the perpetuation of segregation theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all-white communities and thus has aided attempts to promote integration.

Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,469-70 (Feb. 15, 2013).

140. See 114 CONG. REC. 2698-2703, 2277 (1968).

141. Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 714-15 (2017).

142. There have been "near misses." Twin lawsuits (government and private action) challenged a municipal incorporation in New York, which was formed with the intent to exclude Orthodox Jews on the basis of religion. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 416 (2d Cir. 1995). However, a series of procedural hurdles permitted the Second Circuit to sidestep the issue of incorporation. *Id.* The district court denied a preliminary injunction at the outset of the case but concluded, "should discriminatory intent be found at the root of [the municipal] incorporation after a full trial of the issues, the incorporation could be declared null and void. Any adverse impact resulting from the election could be quickly nullified." *LeBlanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1252 (S.D.N.Y. 1991). In the government action, the district court held plaintiffs sufficiently pleaded claims, establishing injury, standing, redressability, and ripeness, and found the case ready for judicial intervention. *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261, 271 (S.D.N.Y. 1991) ("In light of the plaintiffs' claims that the incorporation itself is adversely impacting their [rights] . . . hardship would continue to accrue to the plaintiffs were this court to withhold its consideration.").

After a seven-week trial in the private action, a jury found the municipality violated the FHA. *LeBlanc-Sternberg*, 67 F.3d at 435. However, in considering the government injunction, after the trial in the private action, the challenge to the incorporation itself had been dropped and the court only addressed enjoinder of zoning ordinances. *Id.* On appeal, the Second

to determine whether the FHA is an effective mechanism for challenging discriminatory municipal incorporations.

### 1. Challenges to Discriminatory Incorporations Are Consistent with the Fair Housing Act's Purpose and Goals

The Fair Housing Act's stated purpose is to "provide . . . for fair housing throughout the United States,"<sup>143</sup> a policy that "Congress considered to be of the highest priority."<sup>144</sup> The FHA maintains a dual purpose of prohibiting discrimination in housing and replacing segregated neighborhoods with "truly integrated and balanced living patterns."<sup>145</sup> The Court explicitly "acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."<sup>146</sup>

Municipal incorporations do not contrast with the FHA's aims *per se*, but depending on the effect of the incorporated city boundaries and the circumstances giving rise to the incorporation campaign, an incorporation may directly subvert the intention of the FHA. Indeed, the modern history of incorporation and its augmented use in white flight should prompt further inquiry. Incorporations secured power to

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Circuit sidestepped the issue, finding that although the court erred in failing to issue equitable relief, liability issues were collaterally estopped by the jury trial on the private action. *Id.* at 416-17. The Second Circuit did not assess whether the incorporation itself, as challenged by the government, violated the FHA. *Id.* This case demonstrates how complex, costly, and burdensome municipal incorporation may be but also reveals the possibility of such a claim. The district court found standing and adequately pleaded claims, and the Second Circuit affirmed the appropriateness of equitable relief. *See also* Jones v. Deutsch, 715 F. Supp. 1237, 1239-40 (S.D.N.Y. 1989) (finding FHA claim not justiciable where the petition to incorporate had been denied and there was no path to incorporation currently pending).

*City of Black Jack* is also illuminating. 508 F.2d 1179 (8th Cir. 1974). In one of the first disparate impact cases under the FHA, the Eighth Circuit invalidated a zoning ordinance enacted subsequent to a municipal incorporation. *Id.* Although the incorporation was not directly challenged, the court looked to the circumstances and the history of the incorporation itself to find a violation of the FHA in ruling on the ordinance. *Id.* at 1182-83.

143. 42 U.S.C. § 3601 (2018).

144. *Trafficante*, 409 U.S. at 211 (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)).

145. *Id.* at 211 (quoting Senator Mondale, sponsor of the FHA) (citing 114 CONG. REC. 2706, 3422 (1968)); *see also* H.R. Res. 1095, 110th Cong., 154 CONG. REC. H2280 (daily ed., Apr. 15, 2008) ("[T]he intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States." (quoting House of Representatives commemorating the fortieth anniversary of the FHA)); 78 Fed. Reg. 32, 11,461 (Feb. 15, 2013).

146. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525-26 (2015). The constitutional grounding of the FHA is in the Thirteenth Amendment ("badges and incidents of slavery") and Fourteenth Amendment. SCHWEMM, *supra* note 105, § 6:1-6:2 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968)).

control land use decisions at a time when other racially discriminatory mechanisms were outlawed (including racially restrictive covenants, segregated schools, and Jim Crow laws), as an attempt for white populations to forestall integration efforts.<sup>147</sup> Though proponents of incorporations today do not generally convey the overt racial animus that characterized incorporations of the twentieth century, “[racial animus] still exists alongside a more muted but still unmistakable form of racial hostility,” and the effects may be no less deleterious.<sup>148</sup> Additionally, where boundaries are drawn along race or class lines, incorporation may reinforce or perpetuate segregation and deepen inequality. Or where the in-groups and out-groups are composed of substantially disproportionate racial makeups, the incorporation may conflict with the FHA’s purpose. The very act of drawing boundary lines between groups of people, where one group will gain a grant of state power for land use control, local governance, and provisions of services, should prompt scrutiny under the FHA.<sup>149</sup>

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147. “[U]rban historian Kenneth Jackson asserts that the single most significant motivation for suburban incorporations in the twentieth century was racial and class aversion.” Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1389 (1997).

148. *Id.* at 1390.

149. Local government is not immune from liability under the FHA. Municipalities and local government have long been challenged for discriminatory housing practices under the FHA. SCHWEMM, *supra* note 105, § 12B:5; *see, e.g.*, *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). During the congressional hearings for the FHA, Senator Mondale recognized that the suburbs’ refusal to accept low-income housing was a factor contributing to segregation, and he indicated that the FHA was intended “to undo the effects of these past State and Federal unconstitutionally discriminatory actions.” 114 CONG. REC. 2277, 2698-2703 (1968); SCHWEMM, *supra* note 105, § 12B:5. “[T]he most outrageous deprivations of equal rights are those perpetrated by the state itself. . . . We are unwilling to believe that the legislators who voted for [the FHA] intended to exempt the most serious offenses from its coverage.” *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974 (quoting *Mayers v. Ridley*, 465 F.2d 630, 635 (D.C. Cir. 1972)) (en banc) (J. Skelly Wright, J., concurring)). Indeed, *Inclusive Communities* stands for the proposition that even local discretion can be challenged. 135 S. Ct. 2507 (2015); Seicshnaydre, *supra* note 116, at 665. Moreover, federal courts have repeatedly rejected abstention arguments under the FHA. SCHWEMM, *supra* note 105, § 12B:5. Eleventh Amendment sovereign immunity does not apply to municipalities. *Id.* Even so, a putative plaintiff could conceivably complain against a state official, for example the Secretary of State who signs off on the incorporation, for equitable relief under the *Ex Parte Young* doctrine. *Id.* In the alternate, a plaintiff may also be able to seek relief under state fair housing laws (which are outside the scope of this Comment).

## 2. Standing to Challenge Discriminatory Incorporations

Any resident of the county from which a discriminatory municipality secedes should have a justiciable claim under the FHA (regardless of whether they are able to vote on the incorporation). FHA statutory standing is conferred on an “[a]ggrieved person” who has “been injured by a discriminatory housing practice; or . . . believes [they] will be injured” and whose harms fall within the statute’s zone of interest.<sup>150</sup> The FHA’s language is intentionally “broad and inclusive.”<sup>151</sup> Thus, the Supreme Court has held that the injury required for claims under the FHA is the Article III minimum of “injury in fact,”<sup>152</sup> so long as the injury is traceable to defendant’s conduct and redressable.<sup>153</sup>

Injury has been broadly construed since the FHA’s inception. In *Trafficante v. Metropolitan Life Insurance*, the Supreme Court held that the noneconomic injury of deprivation of “the social and professional benefits of living in an integrated society” was sufficient for standing.<sup>154</sup> Barriers to fair housing and policies exacerbating or perpetuating segregation are the chief harms to be prevented by the FHA. Moreover, resulting harms from perpetuation of racially segregated communities are injuries sufficient to confer standing, including “[a] significant reduction in property values [that] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.”<sup>155</sup> In *Gladstone Realtors v. Village of Bellwood*, the Supreme Court held that the sales practice of steering had begun to “rob [the neighborhood]

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150. 42 U.S.C. § 3602(i) (2018); *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014)) (city qualified as an “aggrieved person”). “Person” is not limited to a natural person. See 42 U.S.C. § 3602(d). A “whole community” may be aggrieved. See *Trafficante*, 409 U.S. at 211 (quoting 114 CONG. REC. 2706 (1968)) (Senator Javits statements in his support of the FHA).

151. *Trafficante*, 409 U.S. at 209.

152. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)) (“a distinct and palpable injury” as a result of the defendant’s conduct). There is a further yet-to-be-defined proximate cause limitation to standing under the FHA. See *Bank of America*, 137 S. Ct. at 1306. However, because this analysis later addresses the more rigorous robust causality requirement under the *Inclusive Communities*, see discussion *infra* Part IV.C.4, the proximate cause analysis is omitted here.

153. See discussion *infra* Part IV.C.3 for discussion on redressability.

154. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111-12 (1979); *Trafficante*, 409 U.S. at 208.

155. *Gladstone*, 441 U.S. at 110-11. Such injury is explicitly within the FHA’s zone of interests. *Bank of Am. Corp.*, 137 S. Ct. at 1305.

of its racial balance and stability,” and thus, the neighborhood had standing to sue.<sup>156</sup>

Under the FHA’s broad statutory standing interpretation, any resident of the county-governance structure from which the municipality is attempting to secede should have standing where they can plead injury, regardless of the resident’s race or whether the resident lives inside or outside the incorporating area or whether they voted on incorporation. Although the claims and injuries could be different, each member of the county may be an aggrieved person under the FHA, as they may be deprived of the benefits of integrated living. The putative plaintiff does not need to be a member of a protected class.<sup>157</sup> Anyone may sue who is “genuinely injured by conduct that violates someone’s . . . rights [under the FHA].”<sup>158</sup>

The injuries of a discriminatory municipal incorporation are vast and numerous. Discriminatory incorporations deprive residents of the benefits of integrated living, affect the racial balance and stability of an area, and can be financially crippling to the county government.<sup>159</sup> The entire function of incorporation is to extract the area’s tax base from the county-structure to insulate those funds, thereby reducing the county’s available tax base and its ability to provide services.<sup>160</sup>

For example, two economic studies found that the proposed St. George incorporation in Louisiana will extract such a significant amount of funds that it will force reduction of municipal services,<sup>161</sup>

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156. *Gladstone*, 441 U.S. at 111. “[T]here can be no question about the importance’ to a community of ‘promoting stable, racially integrated housing.’” *Id.* (quoting *Linmark Assocs. v. Willingboro Twp.*, 431 U.S. 85, 94, 97 (1977)). But there may be some question as to how far this racial balance and stability extends and whether injury from the deprivation of integrated living on the other side of a county would be sufficient. Such limitations are likely to be fact intensive depending upon the challenged practice, injury claim, and resulting harm. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982) (injury claimed for entire metropolitan area of Richmond, Virginia, however, the Court expressed concern over causality and encouraged plaintiff to identify neighborhoods directly affected by steering practices); *Gladstone*, 441 U.S. at 113 n.25, 114 (noting the neighborhood was twelve block by thirteen block area and claim could proceed because of the “relatively compact” nature of the neighborhood; however, the Court reserved the question of whether persons outside of the targeted area of discrimination could have standing to sue); *Bank of Am. Corp.*, 137 S. Ct. at 1305 (finding injury to entire city sufficient for standing under FHA, but remanded for determination on proximate cause). *But see* *S. Suburban Hous. Ctr. v. Santefort Real Estate, Inc.*, 658 F. Supp. 1450, 1456-57 (N.D. Ill. 1987), *aff’d in part, rev’d in part*, 857 F.2d 1476 (7th Cir. 1988) (denying standing for injury claimed over a 220-square-mile suburban area).

157. *Trafficante*, 409 U.S. at 208.

158. *Gladstone*, 441 U.S. at 103 n.9 (emphasis omitted).

159. *Id.* at 110-11; see *Trafficante*, 409 U.S. at 208.

160. See *Gladstone*, 441 U.S. at 113; *Bank of Am. Corp.*, 137 S. Ct. at 1305.

161. See RICHARD CPAS, *supra* note 99, at 4; RICHARDSON ET AL., *supra* note 78, at 24.

potentially as much as forty-five percent, to the residents remaining in the parish and could destabilize the county government.<sup>162</sup> Indeed, there is already discussion of dismantling the city-parish government structure only days after the incorporation passed.<sup>163</sup> Similarly, the failed Eagle's Landing incorporation in Georgia could have crippled Stockbridge, by extracting a significant portion of the wealthy tax base and annexing part of Stockbridge's commercial sector that provided essential revenue.<sup>164</sup> Moody's declared that Eagle's Landing had the potential to financially destabilize all of Georgia's cities.<sup>165</sup>

The loss of a critical tax base has ramifications for the population left outside of the incorporated area, including diminution of municipal services, reduction of resources, further segregation of public schools, and even diminished health and life outcomes.<sup>166</sup> If the new municipality is wealthier than the areas left behind, the incorporation is an exercise of what some scholars refer to as "opportunity hoarding."<sup>167</sup> Insulating a wealthy community's resources further entrenches economic inequities and more deeply stratifies communities. Disinvestment in a community based on boundary lines is reminiscent of unlawful redlining. When the municipal boundary line is drawn separating a majority-black population from a majority-white population and inequities result, then the mechanism of incorporation perpetuates the very outcomes the Kerner Commission warned of: "two societies, one black, one white—separate and unequal."<sup>168</sup>

A new city defending their incorporation may claim a textual argument that the act of incorporation is not a "housing practice" under the FHA but rather is a mechanism to recognize the political will for self-governance, which is neither a housing practice nor the cause of already-existing patterns of segregation.<sup>169</sup> Should a court find this argument compelling and find municipal incorporations outside the

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162. RICHARD CPAS, *supra* note 99, at 4.

163. Jones, *supra* note 67.

164. See Mock, *supra* note 2.

165. *Id.*

166. See David Leonhardt, *In Climbing Income Ladder, Location Matters*, N.Y. TIMES (July 22, 2013), [https://www.nytimes.com/2013/07/22/business/in-climbing-income-ladder-location-matters.html?\\_r=1&](https://www.nytimes.com/2013/07/22/business/in-climbing-income-ladder-location-matters.html?_r=1&).

167. Charles Tilly, *Changing Forms of Inequality*, 21 SOC. THEORY 31, 34 (2003).

168. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 22; see also Milliken v. Bradley, 418 U.S. 717, 815 (1974) (Marshall, J., dissenting) ("[I]t may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.").

169. Smith & Waldner, *supra* note 8, at 151.

purview of the FHA, it would be fatal to challenges against discriminatory incorporations under the Act. But such a narrow interpretation of the FHA should be rejected. The FHA is to be interpreted broadly to remove barriers to fair housing and integration.<sup>170</sup> It has been used to invalidate banking practices, insurance practices, and land use ordinances that impact housing.<sup>171</sup> It has been used to overrule local discretion in land use and housing decisions and even prosecute hate crimes.<sup>172</sup>

Incorporation admittedly affects more than just housing, but that is precisely the point. Incorporation implicates all of the trappings associated with place, including housing choice—housing and place are inextricably linked.

Residence in a municipality . . . involves more than simply the location of one's domicile; it also involves the right to act as a citizen, to influence the character and direction of a jurisdiction or association through the exercise of the franchise, and to share in public resources. "Housing, after all, is much more than shelter . . . ."<sup>173</sup>

When one chooses a home, they are choosing a community: the schools, transportation, access to jobs, even the political body providing municipal services.<sup>174</sup>

The FHA was intended to influence the way we organize our communities; a purpose that has been repeatedly affirmed.<sup>175</sup> Municipalities that draw boundary lines to perpetuate segregated living patterns subvert the aims of the FHA. Boundary lines drawn to create

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170. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

171. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

172. *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261, 271-72 (S.D.N.Y. 1991).

173. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1847 (1994) (quoting Rachel G. Bratt, Chester Hartman & Ann Meyerson, *Editors' Introduction to CRITICAL PERSPECTIVES ON HOUSING*, at xi, xviii (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds., Temple Univ. Press 1986)).

174. *Id.*

175. See *Trafficante*, 409 U.S. at 211 (stating FHA's purpose is to achieve integrated housing patterns); *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (quoting *Mayers v. Ridley*, 465 F.2d 630, 635 (D.C. Cir. 1972)) (en banc) (J. Skelly Wright, J., concurring) (finding state action not exempt from liability under the FHA because "the most outrageous deprivations of equal rights are those perpetrated by the state itself"); 114 CONG. REC. 2277, 2698-2703 (1968) (discussing how Senator Mondale recognized prevention of low-income housing as a factor contributing to segregation and indicating that the FHA was intended "to undo the effects of these past State and Federal unconstitutionally discriminatory actions"); 78 Fed. Reg. 11,460, 11,469-70 (Feb. 15, 2013) ("Recognizing liability for actions that impermissibly create, increase, reinforce, or perpetuate segregated housing patterns directly addresses the purpose of the Act . . .").

a more white community than its neighboring districts, to effect exclusion from a greater community along racial lines, or other protected status, cuts to the heart of the FHA's integration purpose, whether or not there is an explicit denial of house keys.<sup>176</sup> At least one district court has agreed. In *Leblanc-Sternberg v. Fletcher*, a district court held an incorporation challenge was sufficiently pleaded under the FHA and maintained the action.<sup>177</sup>

### 3. Anticipatory Equitable Remedies Available

A claim for anticipatory harm by a discriminatory municipal incorporation is redressable under the FHA. The FHA expressly covers harm by a claimant who "will be injured by a discriminatory housing practice that is about to occur."<sup>178</sup> The law does not require the discriminatory action to occur before a complaint may be filed.<sup>179</sup> Section 3613(c) provides that a court "may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary

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176. See 42 U.S.C. § 3604(b) (2012) (unlawful to change the terms and conditions of housing based on protected status).

177. *LeBlanc-Sternberg*, 781 F. Supp. at 271 (religious discrimination). Although a jury ultimately found the incorporation was discriminatory and violated the FHA, the court skirted the incorporation issue and instead issued an injunction regarding a discriminatory zoning ordinance, as ordered by the Second Circuit. See *supra* note 142.

178. 42 U.S.C. § 3602(i)(2). The timing of the FHA challenge to incorporation is critical but not necessarily prohibitive. Given the immense undertaking of an FHA action and the preparation of statistical and expert proof likely necessary, the timing of an incorporation challenge may be a hurdle to judicial intervention. Although anticipatory relief is permitted, an action filed too soon may not be ripe. In *Jones v. Deutsch*, a district court was confronted with a discriminatory neighborhood campaign to secede, but their petition had been denied by the town supervisor. 715 F. Supp. 1237, 1239 (S.D.N.Y. 1989). Although the plaintiffs filed suit in an attempt to prevent future secession efforts, the court dismissed the action because there was no pending threat of secession. *Id.* Note, however, that this case was primarily challenged under the Fourteenth and Fifteenth Amendments, and therefore state action was required to attach liability and subject matter jurisdiction to the incorporation campaign (but state action is not required in an FHA action). *Id.* at 1241 n. 3-5. The court noted that the housing claims were speculative at a time when the incorporation petition had been denied and may never be approved but went on to say "the real debate on ripeness rests on the soundness of the gerrymander/voting rights claims. As to those claims, we do not think such a generous standing allowance [under the FHA] can be engrafted." *Id.* at 1246. This case highlights the FHA's more generous standing grounds than other constitutional challenges, as well as a court's reticence to enter into local governance processes before incorporation is possible.

However, an incorporation that has been approved by both referendum and a state grant of power may cause judicial reticence to intervene and fashion equitable remedy, as discussed in this subpart. However, a race to incorporation does not sanction any discriminatory intent after the fact, and therefore the act of completing the incorporation should not render a proper case moot. But a court may find a path forward without voiding the incorporation. See *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 416 (2d Cir. 1995); *supra* note 142.

179. 54 Fed. Reg. 3232, 3238 (Jan. 23, 1989).

restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).”<sup>180</sup> When contemplating equitable relief in civil rights cases, a federal court has “not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”<sup>181</sup> In fair housing cases, the FHA’s purposes and goals must guide the court in fashioning relief.<sup>182</sup>

Moreover, dismantling existing municipal structures is distinct from preventing a new formation found to be discriminatory. *LeBlanc-Sternberg* demonstrates one lower court’s potential willingness to issue equitable relief, invalidating an incorporation, stating that “should discriminatory intent be found at the root of [the] incorporation after a full trial of the issues, the incorporation could be declared null and

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180. 42 U.S.C. § 3613(c)(1). Equitable relief for actions prosecuted by attorneys general are covered by § 3614: a court “may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this subchapter as is necessary to assure the full enjoyment of the rights granted by this subchapter.” *Id.* § 3614(d)(1)(A).

181. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *see also LeBlanc-Sternberg*, 67 F.3d at 434 (finding injunction under the FHA appropriate and remanding for district court to fashion equitable relief where an exclusionary zoning ordinance was enacted subsequent to a discriminatory incorporation); *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979) (fashioning equitable relief for the exclusionary zoning ordinance enacted following a discriminatory municipal incorporation).

However, the “remedial powers of the federal courts to restructure the operation of local and state governmental entities. . . . is not plenary.” *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976). The court must “tailor ‘the scope of the remedy’ to fit ‘the nature and extent of the constitutional violation.’” *Gautreaux*, 425 U.S. at 294 (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). In *Milliken v. Bradley*, the Supreme Court overturned an order to consolidate segregated school districts in Detroit where no constitutional violation was found for the neighboring school districts, which were subject to the order. 418 U.S. 717, 752-53. The limitations demonstrate the Court’s reticence to intervene in local government affairs to undraw existing boundary lines. But, where there is unlawful action, depending on the extent, a court may be permitted to do so. “[T]he Supreme Court has not required that the ‘least restrictive means of implementation’ be adopted but has ‘. . . recognized that the choice of remedies to redress racial discrimination is ‘a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.’” *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987) (quoting *United States v. Paradise*, 480 U.S. 149, 184 (1987)).

182. *Park View*, 605 F.2d at 1036 (first quoting 114 CONG. REC. 2706, 3422 (1968); and then quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972)) (reiterating Senator Mondale’s statement that the FHA’s goals are to replace urban ghettos “by truly integrated and balanced living patterns” and “that Congress considered [this goal] to be of the highest priority”); *see also United States v. City of Parma*, 504 F. Supp. 913, 917 (N.D. Ohio 1980), *aff’d in part, rev’d in part on other grounds*, 661 F.2d 562 (6th Cir. 1981) (finding that the FHA should “be construed generously so as to ensure the prompt and effective elimination of all traces of discrimination within the housing field”).

void.”<sup>183</sup> Timing of prospective relief may be crucial for both justiciability and remedy.<sup>184</sup> Presumably, a court would be more inclined to enjoin the formation of an incorporation prior to popular referendum and the grant of state power, rather than void an incorporation after formation.<sup>185</sup> Injunction, rather than invalidation, avoids overturning the full force of political will.<sup>186</sup> Thus, putative plaintiffs should seek preliminary injunction if possible,<sup>187</sup> for instance after an incorporation petition is approved by the state, but prior to a referendum. Ultimately, the ideal remedy would be permanent injunction on a formation of discriminatory boundaries with substantive findings of fact and law including reasons why the incorporation as drawn was violative of the FHA, in an attempt to prevent future incorporation efforts with minute changes in boundary lines (as most state laws do not limit incorporation attempts).

#### 4. Segregative Effect Liability for Discriminatory Incorporations<sup>188</sup>

Incorporations that anticipate a discriminatory effect on a protected class, through perpetuation of segregation, should be found unlawful under the FHA.<sup>189</sup> Congress’s goal of integration under the

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183. *Leblanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1252 (S.D.N.Y. 1991).

184. *Id.* at 1250; *see supra* note 178.

185. *Leblanc-Sternberg*, 763 F. Supp. at 1250, *see supra* note 178.

186. *Leblanc-Sternberg*, 763 F. Supp. at 1249.

187. The “irreparable harm” factor of a preliminary injunction proved to be a challenge for plaintiffs in *LeBlanc*. However, the town had already been incorporated at that time and the injunction sought only to prevent election of officials, which the court found caused no additional harm. *See supra* note 142. However, the determinative factor for preliminary injunctions in fair housing cases is whether the plaintiff is likely to prevail on the merits. *See SCHWEMM, supra* note 105, § 25:15. Realistically, this means parties must be prepared to have a full-blown hearing on the merits. *Id.*

188. Theories of liability may be concurrently plead under the FHA, and prospective plaintiffs challenging discriminatory municipal incorporations should pursue all available claims, including disparate impact, disparate treatment, Fourteenth Amendment Equal Protection claims, as well as segregative effect. This Comment focuses on the segregative effect claim and does not endeavor to analyze all available theories of liability. Additionally, while this Comment contemplates suit against the incorporating organization, state incorporation statutes may also be challenged where suspect. *See, e.g., Murray v. Kaple*, 66 F. Supp. 2d 745, 746 (D.S.C. 1999); *Devall v. Starns*, 2006-2155 (La. App. 1 Cir. 3/21/07); 960 So. 2d 75, 78, 84, *writ denied*, 2007-1224 (La. 6/22/07); 959 So. 2d 513.

189. *See* 24 C.F.R. § 100.500 (2018); *see also* *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 503 (9th Cir. 2016) (recognizing segregative effect theory); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988) (finding “the segregative impact on the entire community resulting from the refusal to rezone create a strong prima facie showing of discriminatory effect”); *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (invalidating an ordinance enacted after a discriminatory incorporation).

FHA is enforced through HUD's discriminatory effect regulation, which provides for segregative effect liability.<sup>190</sup> Under the regulation, two elements constitute a segregative effect claim: (1) segregated housing patterns based on protected status, and (2) a challenged practice that "creates, increases, reinforces, or perpetuates" the segregated patterns.<sup>191</sup> Each element must be supported by statistical evidence, but the data does not need to be sophisticated.<sup>192</sup> The standard for segregative effect is not well developed; while few courts have held the effect should be significant, most courts do not require a threshold standard, and claims have succeeded even where the effect is relatively small.<sup>193</sup>

Because the two FHA discriminatory effect claims are closely related, a segregative effect analysis should be guided by the safeguards and purpose of its sister claim: disparate impact, under *Inclusive Communities*.<sup>194</sup> Thus, a putative plaintiff should plead as part of a prima facie case: (1) a policy (2) that "creates, increases, reinforces, or perpetuates"<sup>195</sup> (3) a statistically demonstrated segregative effect.<sup>196</sup> Then, following the HUD burden-shifting standard, if the plaintiff is successful in establishing a prima facie case, the defendant must prove the policy was "necessary to achieve . . . legitimate, non-discriminatory interests," and finally, the plaintiff must prove another practice with a less discriminatory effect could be used.<sup>197</sup>

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190. 78 Fed. Reg. 11,460, 11,469-70 (Feb. 15, 2013).

191. 24 C.F.R. § 100.500(a); *see also supra* note 121 (regarding HUD's proposed amended regulation).

192. Schwemm, *supra* note 141, at 738-39.

193. *Id.* at 742.

194. 135 S. Ct. 2507, 2515 (2015).

195. 24 C.F.R. § 100.500(a); *see also supra* note 121 (regarding HUD's proposed amended regulation). This element should be guided with Justice Kennedy's "robust causality" safeguard in mind. Discriminatory effect claims are so closely related that analyses between disparate impact claims and segregative effect claims are sometimes combined and conflated, but one notable difference between segregative effect and disparate impact claims is this causation requirement. *See Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 921 (5th Cir. 2019) (Davis, J., dissenting) ("[A] segregative-effect claim does not require the plaintiff to prove that the challenged policy caused the initial segregation, but that the policy will perpetuate it.").

196. *Inclusive Cmty.*, 135 S. Ct. at 2515.

197. 24 C.F.R. § 100.500(b)(i); *see discussion infra* Part IV.C.4.a; *see also supra* note 121 (regarding HUD's proposed amended regulation and a new burden-shifting standard).

a. Plaintiff's Prima Facie Case

First, a plaintiff must statistically demonstrate existing patterns of segregation within the community. In a challenge to a proposed incorporation, the community examined should be the proposed city area compared to neighboring communities and the demographics of the county at large.<sup>198</sup> In *City of Black Jack*, the court also looked to migratory patterns within the county, demonstrating that black residents were increasing in the city (which was already majority-black) while not increasing in the majority-white suburbs, north of the city.<sup>199</sup> Such an analysis will be highly fact specific.

The plaintiff may use a variety of methods to demonstrate demographics and segregation patterns but most courts have relied on unsophisticated census data.<sup>200</sup> For instance, the LSU Study comparing the demographics between the first proposed city of St. George (“70 percent white, 23 percent Black, and 4 percent Asian”) and the neighboring City of Baton Rouge (“55 percent Black, 40 percent White, and 3 percent Asian”) should begin to paint the picture of existing segregation.<sup>201</sup> Plaintiffs can also present other evidence of digital mapping and segregation indices to demonstrate demographic patterns.<sup>202</sup> Facts at this phase should be relatively uncontested as it is merely a presentation of the existing patterns.

The second element requires proof that the defendant's practice “creates, increases, reinforces, or perpetuates” existing segregated patterns.<sup>203</sup> Under *Inclusive Communities*, a “policy” must be challenged, as opposed to a one-time decision, for disparate impact claims.<sup>204</sup> Although, under prior segregative effects cases and HUD's governing regulation, there is evidence that a one-time decision may give rise to liability under segregative effect,<sup>205</sup> an incorporation may also be framed as a policy within the meaning of *Inclusive*

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198. See *United States v. City of Black Jack*, 508 F.2d 1179, 1183 (8th Cir. 1974) (comparing demographics of the newly incorporated city to the surrounding area demographics and county-wide demographics).

199. *Id.*

200. LEAH HENDEY & MYCHAL COHEN, URBAN INST., USING DATA TO ASSESS FAIR HOUSING AND IMPROVE ACCESS TO OPPORTUNITY: A GUIDEBOOK FOR COMMUNITY ORGANIZATIONS 123 (2017) (describing dissimilarity, isolation, and other indices of segregation).

201. RICHARDSON ET AL., *supra* note 78, at 4.

202. HENDEY & COHEN, *supra* note 200; SCHWEMM, *supra* note 105.

203. 24 C.F.R. § 100.500(a) (2018).

204. 135 S. Ct. 2507, 2523-24 (2015).

205. Schwemm, *supra* note 141, at 713.

*Communities*. The United States Court of Appeals for the Second Circuit was instructive for this distinction in *Mhany Management, Inc. v. County of Nassau*, where a developer challenged a city’s rezoning of land to block a low-income housing unit.<sup>206</sup>

[G]iven the many months of hearings and meetings, . . . and that the change required passage of a local law, we are confident this case falls well within a classification of a “general policy.”

. . . Indeed, other circuits have described the distinction between a single isolated decision and a practice as “analytically unmanageable—almost any repeated course of conduct can be traced back to a single decision.”<sup>207</sup>

Similar to a zoning ordinance decision, incorporations are organized, collective efforts and protracted bureaucratic processes that include petition signing, town meetings, planning and drafting official documents, approval of state authority, a popular referendum, and officer elections thereafter.<sup>208</sup> The process occurs over many months to many years and, if successful, an incorporation is much more powerful and impactful than any single decision. An incorporation, like local zoning, is a grant of state power as authorized by the state legislature.<sup>209</sup> And, as Justice Kennedy stated, “housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification,” like zoning, are the “heartland of disparate-impact liability.”<sup>210</sup> Disproportionately excluding residents of one race from a new city would squarely fall within such a classification.

The second element overlaps with *Inclusive Communities*’s safeguard of “robust causality” but also offers alternatives. Justice Kennedy stated that “[r]acial imbalance . . . does not, without more, establish a *prima facie* case of disparate impact’ and thus protects defendants from being held liable for racial disparities they did not create.”<sup>211</sup> Defending incorporations may not be held liable for the segregation patterns proven in the first element. Their practice or policy must do *more* and “increase[], reinforce[], or perpetuate[]” those

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206. 819 F.3d 581, 619 (2d Cir. 2016).

207. *Id.* (quoting *Council 31, Am. Fed’n of State, Cty. & Mun. Emps., AFL-CIO v. Ward*, 978 F.2d 373, 377 (7th Cir. 1992)).

208. Briffault, *supra* note 32, at 74.

209. *Id.*

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

211. *Id.* at 2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

patterns.<sup>212</sup> Proposed municipalities should not be held liable for the racial imbalance and segregated residential patterns in which they currently exist. However, incorporation efforts cannot, necessarily, be so passive where proposed boundary lines are drawn along race and class lines. While they may not be creating the existing segregation, the very nature of boundary lines and disproportionate exclusion from a community will surely increase, reinforce, and perpetuate that segregation. Incorporation efforts should not be permitted to exploit or hide behind segregation patterns because they did not create them. HUD's regulation accounts for that in its alternative language to "create."<sup>213</sup>

It is important to reiterate that boundary lines are entirely self-determined by the proposed city,<sup>214</sup> their hands are not tied, and it is their choice in how boundaries are configured—it is a meaningful choice. For instance, the boundaries of St. George's map are pocked with carve outs and holes near the edges of their city representing pockets of low-income apartment buildings, which they intentionally exclude from their new city.<sup>215</sup> In *Gomillion*, the Supreme Court made much of the twenty-eight-sided map contorted around African-American residences finding such contortions likely unconstitutional.<sup>216</sup> Surely, a court would reel at the Rorschach blot of St. George.<sup>217</sup>

Boundary lines are exclusionary by their very nature. They become literal barriers to integration and inclusion. Courts have

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212. 24 C.F.R. § 100.500(a) (2018).

213. *Id.* ("creates, increases, reinforces, or perpetuates" (emphasis added)). Alternative language is critical to the survival of segregative effect claims given the recent discord in Courts of Appeal over the interpretation of *Inclusive Communities*' "robust causality" safeguard. *See supra* notes 121, 131.

214. Briffault, *supra* note 32, at 73.

215. *See supra* note 77. St. George's proponents contend that apartment complexes with low-income and black residents were removed from the second proposed map because those areas did not support the incorporation. Although this Comment examines a segregative effect claim rather than analyzes discriminatory claims, it warrants mentioning that St. George's offered reason for narrowing its boundaries albeit facially neutral could be found pretext for a discriminatory intent.

216. *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

217. It may be more difficult to challenge incorporations where smoother boundaries are less obvious in their exclusion. The analysis will be fact intensive given the circumstances. For instance, Eagle's Landing was slightly smoother in their area boundaries; however, the nature of their incorporation—to take resources away from a majority-black city—should be considered in the analysis. Moreover, where a plaintiff can establish segregative patterns in the relevant area, boundary lines should be suspect and analysis should proceed to a defendant's justification and a plaintiff's less discriminatory alternative.

acknowledged the pernicious and lasting effects of such divisions when drawn on racial lines.<sup>218</sup> The act of drawing boundaries that correlate with race may be enough to reinforce or perpetuate segregation through the exclusion of one race disproportionately. However, plaintiffs should bolster their claim with evidence of the anticipated harm as a result of those boundary lines, beyond the segregative effect, which may further entrench racial inequality.

School desegregation cases are an instructive parallel to incorporation challenges. And, as with St. George, a desire for an independent school district can be a motivation for municipal incorporation; therefore, the two civic structures are closely related.<sup>219</sup> Attempts to form new school districts seceding from districts under integration mandates, subsequent to *Brown v. Board*, were not permitted where integration would be impeded or financial harm would occur.<sup>220</sup> In incorporation, one town is attempting to break away from the county structure where it may create financial harm and impede integration in subversion of Congress's FHA integration mandate.<sup>221</sup> Although communities are not required to proactively integrate, they are prohibited from "creat[ing], increase[ing], reinforc[ing], or

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218. *Gomillion*, 364 U.S. at 347 ("While in form this is merely an act redefining metes and bounds, . . . the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their . . . rights."); *Lee v. Macon Cty. Bd. of Educ.*, 448 F.2d 746, 753 (5th Cir. 1971) (describing municipal incorporations' role in creating segregated areas where segregation persisted thereafter by custom).

219. *FAQ's*, *supra* note 64; *Harris*, *supra* note 98.

220. 349 U.S. 294 (1955); *see* *Wright v. Council of City of Emporia*, 407 U.S. 451, 470 (1972) (holding a "new school district may not be created where its effect would be to impede [integration]"); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489 (1972) (same); *see also* *Burleson v. Cty. Bd. of Election Comm'rs.*, 308 F. Supp. 352, 357 (E.D. Ark. 1970), *aff'd.*, 432 F.2d 1356 (8th Cir. 1970) (prohibiting secession of an area due to the damaging effect the loss of tax revenue would have on the education system).

The Court finds from uncontradicted evidence that the secession of the Area would inflict severe damage upon the District financially. According to the testimony the District's loss of tax and other revenues based in large measure . . . [i]f the District has to bear that loss it is doubtful at best that it can provide any kind of quality education for its students. . . .

. . . [R]esidents of the Area as a class cannot be permitted while remaining where they are to use the State's laws and procedures to take the Area out of the District.

*Burleson*, 308 F. Supp. at 356-57; *see also* *Macon Cty. Bd. of Educ.*, 448 F.2d at 753 (describing municipal incorporations' role in creating segregated areas wherein segregation persisted thereafter by custom and finding "[*Brown v. Board of Education*] and its progeny require not only that past discriminatory practices be overcome by affirmative actions but also that new forms of discrimination not be set up in their place").

221. *Waldner & Smith*, *supra* note 9, at 176.

perpetuat[ing]” residential segregation patterns.<sup>222</sup> Where incorporation actions impede integration efforts and financial inequities along racial divides follow, such actions should be unlawful, following the example of the school desegregation cases.

The United States Court of Appeals for the Eighth Circuit affirmed a school district secession case in which the district court exhorted that once the problem of integration is remedied, then residents might create their own school district, but in the meantime the secession effort “cannot be permitted . . . to use the State’s laws and procedures to take the Area out of the District.”<sup>223</sup> Realistically, such a stringent prescription for incorporations may not gain traction absent discriminatory intent when balanced against the power of a referendum. However, under an effect claim, intent is not required to find liability.<sup>224</sup>

Intent and impact claims do influence each other though. Some evidence of intent provides patina to an effect claim, and evidence of effect is one of the *Arlington Heights* circumstantial evidence factors for a discriminatory intent claim.<sup>225</sup> The close link between the two strikes at the core purpose of discriminatory effect claims. “[D]isparate-impact liability under the FHA . . . permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result . . . .”<sup>226</sup> For instance, when a community drawn along racial and economic lines wishes to break away from their lower-income and minority neighbors, not out of explicit animus but to hoard their resources, thereby deepening inequality.

#### b. Defendant’s Legitimate Interest

Upon the plaintiff successfully pleading a prima facie case, the defending incorporation must prove that their policy was necessary for a legitimate interest.<sup>227</sup> The “legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.”<sup>228</sup>

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222. 24 C.F.R. § 100.500(a) (2018).

223. *Burleson*, 308 F. Supp. at 357.

224. 24 C.F.R. § 100.500.

225. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977).

226. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522.

227. 24 C.F.R. § 100.500(b)(1)(i).

228. *Id.* § 100.500(b)(2).

A pretextual reason is not legitimate, and where the court finds discriminatory intent, the incorporation should be invalidated.<sup>229</sup>

In an incorporation challenge without discriminatory intent, a defending incorporation should have little trouble pointing to a legitimate interest: self-determination, a desire for more localized government, dismay with county governance, and desire for increased control are all legitimate objectives in support of incorporation. As long as the defending incorporation can offer evidence of their interests to the satisfaction of the trier of fact, the act of incorporation itself is unlikely to be illegitimate.

However, legitimate justification must be offered for the specific way the proposed boundaries are drawn (as the challenged policy), not just the act of incorporation itself. Boundaries contorting themselves around low-income or minority communities should be justified. St. George would need to account for why low-income apartment buildings and areas with higher concentration of black residents are notched out of their new map. The explanation that “they didn’t sign our petition and therefore don’t want to be a part of our town” is likely pretextual, intent-focused rather than effect-focused, and should not satisfy the legitimate justification requirement when the boundaries would have a segregative effect.<sup>230</sup> A new city cannot claim that the successful path to incorporation means excluding black residents from the political process. Such a defense is inherently discriminatory. Permitting such a justification would lead to absurd and damaging results—allowing one discriminatory effect (exclusion from the voting process) to justify another discriminatory effect (exclusion from the proposed city)—and further marginalizes a protected class. As one court described in a school district secession case, “residents of the Area . . . cannot be permitted while remaining where they are to use the State’s laws and procedures” to secede where redrawing boundary lines would cause financial harm to the district.<sup>231</sup>

Incorporation campaigns that advertise their desires to segregate themselves from their lower-income neighbors are not providing legitimate justification even though income is not a protected status under the FHA. Race and class are “inextricably linked” in the United

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229. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988).

230. See *supra* note 77.

231. *Burleson v. Cty. Bd. of Election Comm’rs*, 308 F. Supp. 352, 357 (E.D. Ark. 1970), *aff’d.*, 432 F.2d 1356 (8th Cir. 1970).

States.<sup>232</sup> Substituting class as a proxy for race is no more lawful than other pretextual claims.<sup>233</sup> The racial wealth gap and its genesis in historical discrimination, specifically housing discrimination, is widely documented.<sup>234</sup> Indeed, in congressional hearings on the FHA, Senator Mondale cited suburbia's unwillingness to create low-income housing as a contributing factor in segregation, which continues to be one of the most contested issues under the FHA.<sup>235</sup> Courts are recognizing the use of class as a proxy for race discrimination. For instance, in *Mhany*, the Second Circuit affirmed the district court's finding that statements about class and "character" were indicative of racial animus in conjunction with the other *Arlington* factors.<sup>236</sup> If a court engages in an honest fact-specific inquiry into interest and legitimacy, some pernicious incorporation efforts should fail on a pretextual basis.

c. Plaintiff's Less Discriminatory Practice

Upon the defendant's demonstration of legitimate interest, the burden shifts back to the plaintiff to show that such an interest may be served in a less discriminatory manner.<sup>237</sup> Here, plaintiffs should prevail, if they have gotten this far, because surely boundaries could be drawn more inclusively without disproportionately excluding minority populations where segregated neighborhoods abut each other. The incorporation proponents have a "meaningful choice"<sup>238</sup> in how they elect to draw their boundaries; indeed, there are no restrictions in the way they create their proposed maps—they choose the boundary lines. An argument that other proposed maps would fail in referendum, whether legitimate or not, should not be considered or determinative here. Plaintiff must only show a less discriminatory alternative is

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232. See Ford, *supra* note 173, at 1856.

233. See, e.g., *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 616 (2d Cir. 2016).

234. See MASSEY & DENTON, *supra* note 108; Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, ECON. POL'Y INST. (Feb. 13, 2017, 12:01 PM), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/> ("Overall, housing equity makes up about two-thirds of all wealth for the typical (median) household. In short, for median families, the racial wealth gap is primarily a housing wealth gap."). The wealth gap between white and black Americans is currently a 12:1 ratio. Jones, *supra*.

235. 114 CONG. REC. 2277 (1968).

236. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977); *Mhany*, 819 F.3d at 611-12, 619.

237. 24 C.F.R. § 100.500 (2018); see also *supra* note 121 (regarding HUD's proposed amended regulation).

238. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015).

available.<sup>239</sup> The goal is not to deny proposed incorporators self-determination but rather ensure that municipal incorporation does not discriminate or perpetuate segregation in violation of the FHA.

## V. CONCLUSIONS AND RECOMMENDATIONS

The FHA is uniquely suited to combat discriminatory incorporations because of its twin goals of antidiscrimination and integrated living and its legal principles of broad standing, discriminatory effect liability, and applicability to private persons as well as local governments.<sup>240</sup> Where discriminatory intent is either unknown or difficult to prove but a municipal incorporation has a discriminatory effect, an FHA claim may be viable under the less traveled segregative effect path. However, the challenges and barriers to a successful case are numerous and should not be discounted. Timing, costs, political will, availability of data, scope of the FHA, and novelty of claim collectively create a burdensome endeavor.

Ultimately, states are in the best position to oversee and regulate municipal incorporations to ensure their grant of state power is advanced in accordance with state and federal laws and for the health, safety, and well-being of their citizens. States with lax incorporation laws should consider (1) increased oversight,<sup>241</sup> (2) expanding voting areas to citizens outside the proposed municipality, and (3) reviewing incorporation statutes to ensure safeguards are in place to prevent discriminatory incorporations. States that organize local supervisory committees to vet incorporations appear to have success in preventing discriminatory incorporations.<sup>242</sup> Supervision at the legislative level appears less effective, as evidenced by Georgia's flood of incorporations.<sup>243</sup>

HUD, as the authoritative agency of the FHA, should also take a position on discriminatory incorporations to guide localities and restrict release of federal HUD funds to new cities that form with a discriminatory effect. Municipalities that have elected to isolate their resources causing a discriminatory effect should not later be eligible to

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239. 24 C.F.R. § 100.500.

240. *See* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

241. *See, e.g., In re Incorporation of Borough of Bridgewater*, 488 A.2d 374, 375 (1985) (noting prior to referendum, state law required board of oversight to review a proposed incorporation and ultimately the board recommended denial, based upon the anticipated disadvantages and its segregative effect; the court upheld the board's decision).

242. Briffault, *supra* note 32, at 82-83.

243. Mock, *supra* note 47.

receive federal funding to further develop their town, unless there is a willingness to concretely engage in regional planning, create affordable housing, and create inclusive communities through affirmatively furthering fair housing.<sup>244</sup>

The ways in which we are permitted to organize our communities matters. Organization efforts have far-reaching and long-lasting effects for the populations both included and excluded. Our communities shape our lives: our opportunities and challenges. The community in which one lives affects their access to education, employment, health and safety, and opportunities rippling through generations. “Who gets to define our communities and how?” is an essential question with which Americans have long grappled. As economic inequality increases in our suburbs and wealthy enclaves continue to use state-sanctioned legal mechanisms to isolate themselves and their resources, it is critical to acknowledge the pernicious effects of discriminatory incorporations and understand whether the FHA can deliver on its aim to create “truly integrated and balanced living patterns.”<sup>245</sup> Should we continue to permit deleterious incorporations, we risk unraveling the FHA’s progress and instead move closer toward the Kerner Commission’s “grim prophecy,” even in 2019, of two separate and unequal societies.<sup>246</sup>

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244. See HUD Affirmatively Furthering Fair Housing, 24 C.F.R. § 5.150 (2019).

245. *Trafficante*, 409 U.S. at 211 (citing 114 CONG. REC. 3422 (1968)).

246. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015).