

# Inclusion, Exclusion, and the “New” Economic Inequality

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## Introduction

Is racial inequality an unwelcome intruder to the new discourse on economic inequality? The present discourse on economic inequality emphasizes decades-long trends that have increased economic inequality, whether as a result of reoccurring features in the structure of capitalist economies<sup>1</sup> or more recent changes in institutional, structural, and economic conditions.<sup>2</sup> Researchers direct us to the rising fortunes of the top earners and asset holders relative to the rest,<sup>3</sup> the declining fortunes of the middle class<sup>4</sup> harmed by stagnating wages,<sup>5</sup> and the declining share of

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1. See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 24 fig.I.1, 237–42, 260–65, 292 fig.8.6 (Arthur Goldhammer trans., 2014) (providing support for the conclusion that contemporary levels of inequality in the democratic, industrialized countries of North America and Europe are rising to rates similar to the Gilded Age period of the late-nineteenth and early-twentieth centuries). As David Grewal has noted, Piketty “seems divided” on whether certain features of capitalism that produce levels of inequality are necessary rather than contingent: “[Piketty] sometimes discusses [r > g] as a quasi-natural fact, while at other times he emphasizes that it obtains only in particular political contexts.” David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 644 (2014) (reviewing PIKETTY, *supra*).

2. See generally CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY (2008) (arguing that U.S. investments in education and human capital development have not kept pace with technological change, thus driving inequality); Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 71, 182 (Richard D. Kahlenberg ed., 2010) (noting “[t]he current fiscal trajectory in higher education is unsustainable”).

3. There are several ways to measure inequality. See ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE 17–18 & fig.1.1 (2015) (documenting rise in inequality beginning in 1977 as measured by the Gini coefficient, which measures the actual income distribution relative to perfectly equal distribution); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, Q.J. ECON. (forthcoming 2016) (manuscript at 7–8), <http://gabriel-zucman.eu/files/SaezZucman2016QJE.pdf> [<https://perma.cc/C88H-PMDX>] (showing increases in wealth concentration among the top 0.1% since 1979).

4. See Emmanuel Saez, Striking it Richer, The Evolution of Top Incomes in the United States (Updated with 2012 Preliminary Estimates) (Sept. 3, 2013) (unpublished manuscript), <http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf> [<https://perma.cc/RJ38-RAUJ>] (finding that, between 2009 and 2012, top 1% of incomes grew by 31.4% and the bottom 99% grew only 0.4%).

5. See, e.g., JOSH BIVENS ET AL., ECON. POL'Y INST., RAISING AMERICA'S PAY: WHY IT'S OUR CENTRAL ECONOMIC POLICY CHALLENGE 5 (2014), <http://www.epi.org/files/pdf/65287.pdf>

industries (like manufacturing) in the economy.<sup>6</sup> This new economic inequality discourse has preoccupied economists,<sup>7</sup> garnered its own “beat” in leading publications,<sup>8</sup> led to bestselling books,<sup>9</sup> transfixed current political debates,<sup>10</sup> and now (finally) seduced legal academia. The new economic inequality is salient in part because it is a phenomenon not fully constrained by race, ethnicity, or geography that risks altering the fortunes of all “our kids,” including those formerly firmly ensconced within the American dream.<sup>11</sup>

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[<https://perma.cc/V7FG-ER4N>] (showing hourly pay of workers since 1979 have not kept pace with productivity, and—with the exception of a period in the 1990s—stagnated or declined for most American workers); David Cooper, *A Stagnating Minimum Wage Has Left Low-Wage Workers Facing a Longer Climb to Reach the Middle Class*, ECON. POL’Y INST. (Apr. 1, 2015), <http://www.epi.org/publication/a-stagnating-minimum-wage-has-left-low-wage-workers-facing-a-longer-climb-to-reach-the-middle-class/> [<https://perma.cc/W7U6-XBNS>] (noting “today’s minimum wage is equal to only 35 percent of the average production worker’s wage—not far from its lowest point on record”).

6. In a recent book, Professor Robert Putnam tells the story of American inequality through the lens of the decline of his predominantly white childhood hometown Port Clinton, located in Ottawa County, Ohio. See ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 30 (2015) (describing changes in Ottawa County, Ohio, where manufacturing fell from 55% of all jobs in 1965 to 25% in 1995, and where real wages, which were slightly above the national average in the 1970s, fell to 25% below the national average); *id.* at 30 (observing that, by 2012, the average worker in Ottawa County was paid less than their grandfather or grandmother was in the early 1980s).

7. See, e.g., Nelson D. Schwartz, *Economists Take Aim at Wealth Inequality*, N.Y. TIMES (Jan. 3, 2016), <http://www.nytimes.com/2016/01/04/business/economy/economists-take-aim-at-wealth-inequality.html> [<https://perma.cc/2M4N-8FQV>] (reporting on the increasing attention that economists have paid to income inequality in recent years).

8. E.g., The Atlantic Business Editors, *17 Things We Learned About Income Inequality in 2014*, ATLANTIC (Dec. 23, 2014), <http://www.theatlantic.com/business/archive/2014/12/17-things-we-learned-about-income-inequality-in-2014/383917/> [<https://perma.cc/CZZ3-JDXC>].

9. See Sam Tanenhaus, *Hey, Big Thinker*, N.Y. TIMES (Apr. 25, 2014), [http://www.nytimes.com/2014/04/27/fashion/Thomas-Piketty-the-Economist-Behind-Capital-in-the-Twenty-First-Century-sensation.html?\\_r=0](http://www.nytimes.com/2014/04/27/fashion/Thomas-Piketty-the-Economist-Behind-Capital-in-the-Twenty-First-Century-sensation.html?_r=0) [<https://perma.cc/E5D2-SED6>] (recounting that publishers are struggling to keep pace with demand for Thomas Piketty’s *Capital in the Twenty-First Century* and that the economist has become an “intellectual sensation”).

10. See, e.g., Thomas B. Edsall, *Why Trump Now?*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/opinion/campaign-stops/why-trump-now.html> [<https://perma.cc/77YG-CYJ9>] (linking income inequality to rising voter anger and populism in 2016 presidential election); David Lauter, *Income Inequality Emerges as Key Issue in 2016 Presidential Campaign*, L.A. TIMES (Feb. 5, 2015), <http://www.latimes.com/nation/la-na-campaign-income-20150205-story.html> [<https://perma.cc/5YUB-MTS6>].

11. As Putnam writes in *Our Kids*:

My hometown was, in the 1950s, a passable embodiment of the American Dream, a place that offered decent opportunity for all the kids in town, whatever their background. A half century later, however, life in Port Clinton, Ohio, is a split-screen American nightmare, a community in which kids from the wrong side of the tracks that bisect the town can barely imagine the future that awaits the kids from the right side of the tracks.

PUTNAM, *supra* note 6, at 1.

Racial inequality, by contrast, is not new. One might debate the extent, trend line, and causes of racial inequality, but the fact of racial inequality (that socioeconomic status differs on the basis of race or ethnicity) is neither much in contention nor novel. Perhaps for this reason, the role of racial inequality in this new calculus is uncertain. One may note that certain racial, ethnic, or gender groups have experienced greater income and wealth losses from the recession, losses as yet unrecovered.<sup>12</sup> Or even that trends that affect many Americans, such as wage stagnation for lower skilled jobs, declines in unionization, or changes in the relative share of manufacturing jobs, affect some groups more than others.<sup>13</sup> But the fact of racial inequality is a given. Indeed, what is “new” about the present discourse on American inequality is that it emphasizes changes that affect us all. As one commentator recently put it pointedly: “[S]tructural inequity has leapt the racial barrier.”<sup>14</sup>

Add to the unremarkable, un-newness of racial inequality that race may complicate the search for solutions. The proffered solutions to the new economic inequality are not typically targeted at particular racial or ethnic groups. Rather, solutions seek to increase the rewards from work for all (through stronger worker organizations and wage gains),<sup>15</sup> alter the general tax structure,<sup>16</sup> and increase investments in and the quality of training and

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12. See Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [https://perma.cc/DLP5-KRN9] (noting that “racial and ethnic wealth gaps in 2013 [were] at or about their highest levels observed in the 30 years” of available data); Signe-Mary McKernan et al., *Less Than Equal: Racial Disparities in Wealth Accumulation*, URB. INST. (Apr. 26, 2013), <http://www.urban.org/research/publication/less-equal-racial-disparities-wealth-accumulation/> [https://perma.cc/25Y4-CX2Z] (stating that in 2010 whites on average had two times the income of blacks and Hispanics, but six times the wealth).

13. See PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 67 (2013) (recounting the story of transformation of majority black, urban labor markets in the Northeast and Midwest, such as Detroit, New York City, and Chicago, noting that “[f]rom 1957 to 1982, Chicago’s manufacturing industry, which had been a primary source of employment for the black community since the Great Migration, began to shed jobs within the city even as the industry grew nationwide” (footnotes omitted)); Dorian T. Warren, *The American Labor Movement in the Age of Obama: The Challenges and Opportunities of a Racialized Political Economy*, 8 PERSP. ON POL. 847, 851 (2010) (detailing challenges faced by African-American workers due to decreases in manufacturing-sector jobs and attendant levels of unionization); Christian E. Weller, *The Black and White Labor Gap in America*, CTR. FOR AM. PROGRESS (July 5, 2011), <https://www.americanprogress.org/issues/labor/report/2011/07/25/9992/the-black-and-white-labor-gap-in-america/> [https://perma.cc/B9RU-D7PP] (finding that the loss in manufacturing jobs creates a structural obstacle to black employment).

14. Charles M. Blow, *White America’s ‘Broken Heart,’* N.Y. TIMES (Feb. 4, 2016), [http://www.nytimes.com/2016/02/04/opinion/white-americas-broken-heart.html?\\_r=0](http://www.nytimes.com/2016/02/04/opinion/white-americas-broken-heart.html?_r=0) [https://perma.cc/8VZB-EBC9].

15. See BIVENS ET AL., *supra* note 5, at 65–66 (suggesting policies to raise worker pay improves labor market participation).

16. See PIKETTY, *supra* note 1, at 515 (advocating for global tax on wealth).

credentialing institutions like college and apprenticeship programs.<sup>17</sup> And momentum on economic inequality seems most vigorously organized behind movements such as minimum-wage increases and paid sick leave that eschew a racial lens not just, it seems, for expedience, but because these remedies urgently address the immediate harm of wage and work conditions.<sup>18</sup> Indeed, even highlighting racial inequality as a distinct problem does not necessarily require adopting race- or ethnicity-specific solutions. Many of the interventions needed for everyone in the emerging economic reality—better education and training, higher wages—may simply be needed *more urgently* for historically disadvantaged groups. But the interventions are not fundamentally different.

Given this account, what does one gain from highlighting racial inequality in contemporary inequality discourse? One can start by acknowledging that sometimes nothing is gained. For reasons of social-movement solidarity, tactics and strategy, and efficacy of solutions, race is often not the point. The workers who benefit from recent wage reforms or affordable housing creation are typically racially and ethnically diverse, and a majority are women.<sup>19</sup> The role of racial, ethnic, or gender stratification may be salient in the condition of these workers and families, but it need not always be the dimension around which the remedies are organized.

Lawyers and legal academics face a more specific version of this general problem of joining concerns about racial inequality with economic inequality. Discrimination—which is the legal frame for understanding the problem of inequality—is of questionable relevance in dealing with the racial dimensions of economic inequality. It suffers, according to many

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17. See, e.g., GOLDIN & KATZ, *supra* note 2, at 350–51 (proposing investments in financial aid to make college more attainable); ROBERT I. LERMAN, BROOKINGS INST.: THE HAMILTON PROJECT, PROPOSAL 7: EXPANDING APPRENTICESHIP OPPORTUNITIES IN THE UNITED STATES 8 (2014), [http://www.brookings.edu/~media/research/files/papers/2014/06/19\\_hamilton\\_policies\\_addressing\\_poverty/expand\\_apprenticeships\\_united\\_states\\_lerman.pdf](http://www.brookings.edu/~media/research/files/papers/2014/06/19_hamilton_policies_addressing_poverty/expand_apprenticeships_united_states_lerman.pdf) [<https://perma.cc/6RSF-XZJF>] (arguing that “[e]xpanding apprenticeship is a potential game-changer for improving the lives of millions of Americans”).

18. Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/> [<https://perma.cc/NS2Y-8ANM>] (describing “Fight for 15” successes in raising the minimum wage in several cities including Seattle, San Francisco, Los Angeles, New York, Chicago, and Kansas City, resulting in wage increases for more than eight million workers).

19. See IRENE TUNG ET AL., NAT’L EMP. L. PROJECT, THE GROWING MOVEMENT FOR \$15, at 4 (2015), <http://www.nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf> [<https://perma.cc/7XKA-YAUQ>] (reporting that women and people of color make up a disproportionate share of those receiving less than \$15 an hour). Female-headed households make up a disproportionate share of those currently receiving assisted housing, and blacks and Latinos are also more likely than whites to receive housing assistance. E.g., *Who Lives in Federally Assisted Housing?*, HOUSING SPOTLIGHT, Nov. 2012, at 1, 2–3.

analysts, from being an inadequate diagnosis of the problem that leads to racial inequality and thus risks offering no map for new solutions.<sup>20</sup>

Joseph Fishkin and William Forbath’s introduction to this Symposium sounds in the timbre of some of the tensions. They reveal an often fitful and fraught relationship between claims of inclusion based on race, gender, and other grounds and the “democracy of opportunity” tradition.<sup>21</sup> Joined during Reconstruction, these two traditions since emerge more often than not “tragically at odds.”<sup>22</sup> Inclusion seems to have more of a foothold in our constitutional understanding and statutory discourse; the constitution-of-opportunity tradition, by contrast, is forgotten. Both traditions suffer. In earlier work, Fishkin and Forbath have emphasized that the inclusionary tradition, is incomplete when disconnected from the constitution of opportunity tradition.<sup>23</sup> Their aim is to recover the constitution of opportunity tradition but without its exclusionary baggage—to journey forward joining inclusion and anti-oligarchy with the constitution of opportunity tradition. These insights might inform the question of how civil rights regulatory regimes should now account for the complex reality of economic inequality. Indeed, what we understand to be the tools, strategies, and discourse of “civil rights” are already changing, largely in response to the changing economic order. Stratification within racial and ethnic groups has made clear that invocation of race cannot serve as shorthand for exclusion. This recognition of within-group stratification did not begin in the post-Civil Rights era, but was intensified by civil rights and other remedies that produced more benefit for those members of the black community with more socioeconomic status and capital.<sup>24</sup> Indeed, the potential inadequacy of antidiscrimination remedies was understood early by reformers who quickly sought to use antidiscrimination law to advance

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20. See GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 92–94 (2002) (arguing that focusing on development biases is more promising than on discrimination-based reward biases); Roland G. Fryer Jr., *Racial Inequality in the 21st Century: The Declining Significance of Discrimination*, in 4B *HANDBOOK OF LABOR ECONOMICS* 855, 925–26 (David Card & Orley Ashenfelter eds., 2011) (urging educational intervention to address the skills gap).

21. Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 *TEXAS L. REV.* 1287, 1289 (2016).

22. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2017) (manuscript at 6) (on file with the Texas Law Review).

23. Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth & The Constitution of Opportunity*, 38 *NOMOS* (forthcoming 2016) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2620920](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620920) [https://perma.cc/PU79-YMLW].

24. William Julius Wilson documented these changes more than thirty-five years ago in his classic study. See generally WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (2d ed. 1980) (providing evidence that due to these changes race has become less determinative of socioeconomic outcomes of black Americans than class).

economic progress,<sup>25</sup> as well as pursue strategies to address poverty and promote economic inclusion more directly.<sup>26</sup> Lawyers, perhaps even more than legal commentators, have understood that lawyering must respond to the confluence of race and class in new ways. They have understood that modern civil rights legislation alone cannot cure racialized poverty and economic exclusion. Litigation such as *Gautreaux v. Chicago Housing Authority*,<sup>27</sup> *Sheff v. O’Neill*,<sup>28</sup> and *Milliken v. Bradley*<sup>29</sup> represent attempts by litigators to use civil rights law and other legal frameworks to address the joint problems of race and class inclusion increasingly manifest in the spatial isolation of the minority poor. These litigation efforts stemmed from concerns about racial and ethnic exclusion but took aim at the structure of equal opportunity by seeking fair distribution of public goods (like schools and housing) and sought to create a political, economic, and geographic reordering beyond the excluded–included binary.

A key focal point today in joining economic inequality with racial inequality recognizes how place structures inequality. An increasingly rich literature has made clear that segregation, geography, and spatial isolation—which are caused and perpetuated by a confluence of race and class exclusion—help maintain inequality.<sup>30</sup> This increased emphasis on how neighborhoods might serve as sites for opportunity, inclusion, and mobility, instead of exclusion, has led to a renewed focus on economic and racial integration as well as a new set of emerging legal and regulatory responses. The existence of inequality along a spatial dimension that includes race, ethnicity, class, and geography shows us the limits of the formally race-blind opportunity norm. Institutions like housing and education that one might posit as advancing mobility or instantiating an

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25. See Olatunde Johnson, *Leveraging Antidiscrimination*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT FIFTY* 211 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015) (providing an account of early Title VII reform efforts that focused on textile plants and factories in the South).

26. See MICHAEL K. HONEY, *GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE AND MARTIN LUTHER KING’S LAST CAMPAIGN* 23, 176 (2007) (describing how King’s advocacy extended beyond civil rights to economic justice); President Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights” (June 4, 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp> [<https://perma.cc/6PGR-DF7R>] (advocating Great Society programs in addition to antidiscrimination protections as necessary to address black poverty).

27. 304 F. Supp. 736 (N.D. Ill. 1969). For a history of this first major public housing desegregation case, see ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING AND THE BLACK GHETTO* (2006).

28. 678 A.2d 1267 (Conn. 1996) (challenging segregation of schools and housing in Hartford, Connecticut under the state constitution). For a history of the litigation, see SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (2007), and *History of Sheff v. O’Neill, SHEFF MOVEMENT*, <http://sheffmovement.org/history-2/> [<https://perma.cc/3E4D-DWBL>].

29. 418 U.S. 717 (1974).

30. See *infra* notes 31–42 and accompanying text.

opportunity norm operated in ways that created differential points of access, or even compounded patterns of racial and ethnic inequality. This Comment explores how legal regimes have begun to respond to patterns of inequality that are laid bare by differences in mobility and access to opportunity shaped by space. This framework allows entry into the problems of differential inequality, meaning regional differences as well as racial and ethnic patterns of exclusion. This exploration sheds light on the broader questions implicated by this Symposium. It suggests a danger in sidelining differences when we frame the problem of, and solutions to, economic inequality. It also demands that we interrogate whether the narratives and social ordering system drawn from an imperfect past have power to propel us forward.

The remainder of this Comment is organized as follows. Part I provides a brief account of how the framework of spatial and geographic inequality has become a key way of understanding problems of racial and ethnic exclusion as well as class-based exclusion. Part II examines the contemporary legal and regulatory response to this geographical inequity. This includes prominent litigation to redefine the boundaries between communities of high and low opportunity as well as emerging localized efforts by communities that use innovative legal and regulatory tools to redistribute opportunities in cities with currently segmented opportunities. At their best, these efforts can be described not simply as liberalist interventions to gain inclusion into a flawed economic order, but as gesturing towards remaking that economic order. They can be described as seeking economic redistribution with deep attention to inclusion of historically disadvantaged groups. This specific institutional context helps inform some of the questions that have occupied this Symposium, which this Comment takes up in Part III. The current spatial dimensions of inequality remind us that institutions that were the bulwark of creating an opportunity norm often create mobility for some and exclusion for others. And, now, many of those institutions seem under strain for all. If this is true, it should make us skeptical of solutions that lie in recovering past constitutionalism or even in rebooting postwar or New Deal institutional arrangements. Rather, it requires those concerned with inequality to develop new legal and institutional regimes that push both the opportunity and inclusion norms beyond their current formulations.

### I. Difference, Persistence, and Place

Two studies written over the past two years implicate neighborhoods in the transmission of inequality. The first is squarely about race. Patrick Sharkey's 2014 book highlights the end of racial progress—that African-Americans are ten times as likely to live in poor neighborhoods as young whites, and that this experience of neighborhood poverty is durable, persistent, and inhibits intergenerational mobility.<sup>31</sup> High-poverty neighborhoods provide residents with poor schools, fewer opportunities for labor-force participation, and decreased wealth accumulation.<sup>32</sup> Low-income blacks are more likely to live in neighborhoods of high poverty than low-income whites, contributing, at least since the 1970s, to sharply differential patterns of intergenerational social mobility between these two groups.

In part, Patrick Sharkey's work emphasizes what researchers have known at least since Douglas Massey and Nancy Denton's 1993 book *American Apartheid*: poor blacks (and some dark-skinned Latinos who face similar levels of residential segregation and racial discrimination in housing) inhabit neighborhoods that provide them less access to the public and private goods that enable mobility than their white counterparts.<sup>33</sup> Massey and Denton's key contribution was to place the racial dimension of urban inequality back on the table and emphasize that public and private policies of residential segregation and housing discrimination function to maintain "ghettos." Sharkey's central contribution is to show that these patterns are not episodic, but multigenerational. Over two generations, 48% of black families have lived in poor neighborhoods, contrasted with only 7% of white families.<sup>34</sup> The stickiness of poor neighborhoods for blacks has limited progress over the last four decades. African-Americans, according to Sharkey's data, have made little in wealth or income gains since the 1970s (indeed, much of the progress for "blacks" comes from black immigrants).<sup>35</sup> While Sharkey offers a set of solutions centered on promoting access to low-poverty neighborhoods and providing quality programming in high-poverty neighborhoods, his account should lead us to question whether either civil rights remedies (that address segregation and discrimination) or universalist solutions (that seek broadly dispersed

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31. SHARKEY, *supra* note 13, at 1–7, 166.

32. *See id.* at 91, 98, 107, 114.

33. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (discussing the role of racial segregation in creating high-poverty neighborhoods that impede economic mobility for blacks).

34. *See* SHARKEY, *supra* note 13, at 40.

35. *Id.* at 2–4 (explaining black economic progress since the 1970s as attributable in large part to an influx of relatively successfully black families arriving from the West Indies, Africa, and other countries).



economic benefits for low-income people) will do enough to address durable poverty in urban areas.

The second study is, in some respects, the more hopeful flipside: examining where intergenerational mobility might happen. The study by leading economic-inequality researchers (including Raj Chetty and Emmanuel Saez) finds substantial variation in intergenerational mobility within the United States.<sup>36</sup> Relative mobility, they find, is lowest for children in the southeastern portion of the United States and highest in the mountain western states and the rural Midwest, where levels of mobility are comparable to the highest mobility countries in the world.<sup>37</sup> As the paper tells us: “The United States is better described as a collection of societies, some of which are ‘lands of opportunity’ with high rates of mobility across generations, and others in which few children escape poverty.”<sup>38</sup> While the study cannot provide an ultimate causal answer, it identifies factors that correlate with intergenerational mobility, which include the level of residential segregation by race and income, the level of income inequality, as well as school quality, social capital networks, and family structure.<sup>39</sup>

This latter study implicates residential segregation by income as a problem in hampering mobility. Other research has shown that even as levels of racial segregation have declined (modestly and slowly) over the last four decades, levels of economic segregation are rising.<sup>40</sup> These increases parallel the trends of wealth concentration and uneven income gains; the rich are more likely to live apart from the poor now than forty years ago.<sup>41</sup> As one researcher noted in a recent essay: with these increases in socioeconomic segregation, “[i]t is possible to look [at] the distribution of population and resources in metropolitan America as a form of what sociologist Charles Tilly called ‘opportunity hoarding.’”<sup>42</sup>

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36. See Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1556 (2014) (noting differences in mobility across regions).

37. See *id.*

38. *Id.* at 1554.

39. See *id.* at 1557–58.

40. See PAUL TAYLOR & RICHARD FRY, PEW RES. CTR., THE RISE OF RESIDENTIAL SEGREGATION BY INCOME 2 (2012), <http://www.pewsocialtrends.org/files/2012/08/Rise-of-Residential-Income-Segregation-2012.2.pdf> [<https://perma.cc/U9QS-88UX>]; Patrick Sharkey, *Rich Neighborhood, Poor Neighborhood: How Segregation Threatens Social Mobility*, BROOKINGS (Dec. 5, 2013, 12:30 PM), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2013/12/04-how-segregation-threatens-mobility> [<https://perma.cc/YX7Q-NR3H>].

41. See SEAN F. REARDON & KENDRA BISCHOFF, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970–2009, at 21 (2011), <http://www.s4.brown.edu/us2010/Data/Report/report111111.pdf> [<https://perma.cc/DGZ3-2M2H>] (“[S]egregation of families by income has grown significantly in the last 40 years.”).

42. Thomas Sugrue, *Diversity, Toleration, and Space in Metropolitan America*, CITIES PAPERS (July 23, 2014), <http://citiespapers.ssrc.org/diversity-toleration-and-space-in-metropolitan-america/> [<https://perma.cc/B8GV-VUQ3>].

These empirical insights have new relevance for how we understand the impact of the new economic inequality. Even as researchers identify national (and global) trends in inequality, data on residential segregation and regional variation reminds us that spatial difference matters. Racial and economic residential segregation operates to exclude some groups from metropolitan prosperity and to create islands of prosperity within poor places.

## II. Regimes of Remaking Place

One implication for law and regulation of this new emphasis on place is that economic and racial integration are back on the legal and policy map. Promoting residential integration has reemerged as a strategic emphasis of lawyers. The tools for promoting integration draw on the antidiscrimination regime of fair housing law but with the broader goal of economic inclusion in opportunity structures and access to public goods. As this Part suggests, addressing unequal places also will require more nimble and expansive remedies than those provided by the antidiscrimination regime. One sees the contours of this in emerging efforts to use state and local regulatory tools to reconstitute private power and public goods within metropolitan regions.

### A. *Antidiscrimination and Inclusive Communities Project*

The recent Supreme Court fair housing case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*<sup>43</sup> (ICP), provides an example of litigation in the first category. The case employs the antidiscrimination apparatus contained in the Fair Housing Act (FHA) to challenge the placement of housing developments primarily in low-poverty communities of color.<sup>44</sup> In the Supreme Court, the case drew the attention of legal academics because it raised the question of whether the FHA would be interpreted to extend to actions with a disparate impact standard.<sup>45</sup> While more than forty years of lower court rulings had interpreted the Act to prohibit disparate impact discrimination,<sup>46</sup> the Supreme Court had never directly addressed this question. In the end, a majority of the Supreme Court held that the language and history of the

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43. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, No. 13-1371, slip op. (U.S. June 25, 2015).

44. See *id.* at 1 (“The underlying dispute in this case concerns where housing for low-income persons should be constructed . . . in the inner city or in the suburbs.”).

45. E.g., Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 409–11 (2013).

46. See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974) (reading the Fair Housing Act *in pari materia* with Title VII to reach effects claims).

FHA supported disparate impact claims.<sup>47</sup> The Court identified racial integration as a core purpose of the FHA.<sup>48</sup> As a matter of interpretive methodology, Justice Kennedy’s opinion for the majority also read the FHA to achieve coherence with other civil rights statutes, like Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, which the Court had long interpreted to include disparate impact claims.<sup>49</sup> Even as commentators debate whether some elements of the Court’s decision narrowed the disparate impact standard, the Court’s decision left in place a tool that allows the statute to extend beyond the Court’s narrow constitutional understanding of “discrimination” as requiring proof of intent. The Court did not emphasize, as in other recent cases, that the Equal Protection Clause constrains Congress’s ability to promote integration or eradicate bias.<sup>50</sup>

For those concerned about residential segregation, however, the key will be what happens next. The *ICP* litigation is precisely about the confluence of race and class exclusion implied by Sharkey’s and others’ work. In some sense the case is not novel. It is an heir to the public housing desegregation cases like *Gautreaux* that challenge the use of public funds and public-siting decisions to compound race and economic segregation in cities and effectively exclude low-income blacks from housing opportunities in lower poverty communities outside the central city.<sup>51</sup> Doctrinally, these cases rely on various components of the FHA, including its disparate impact prong which has defined disparate impact as

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47. *ICP*, 135 S. Ct. at 23–24.

48. *See id.* at 24 (“The FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.’” (alteration in original) (quoting NAT’L ADVISORY COMM’N ON CIVIC DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIC DISORDERS I (1968))).

49. *See id.* at 7–13 (drawing on the language and purpose of Title VII and the Age Discrimination in Employment Act as well as case law interpreting these two provisions).

50. *See Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (relying on constitutional equal protection standards to resolve when avoiding a disparate impact liability should be a proper basis for race-conscious action); *see id.* at 595–96 (Scalia, J., concurring) (joining majority opinion, but warning that “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them”).

51. *See, e.g., Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 404 F.3d 821, 824 (4th Cir. 2005) (extending the consent decree from a 1995 class action alleging that the Department of Housing and Urban Development contributed to segregation in Baltimore public housing); *NAACP v. City of Yonkers*, 96 F.3d 600, 622–23 (2d Cir. 1996) (finding New York State officials liable for housing and school segregation in Yonkers, New York); *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 737–39 (N.D. Ill. 1969) (challenging the Chicago Housing Authority’s decision to build public housing only in African-American neighborhoods). Indeed, the Inclusive Communities Project arose as a mobility remedy out of the successful Dallas desegregation case. *See Walker v. U.S. Dep’t of Hous. & Urban Dev.*, 734 F. Supp. 1272, 1276–80 (N.D. Tex. 1989), *rev’d*, 912 F.2d 819 (5th Cir. 1990) (discussing consent decree in 1985 suit against the Dallas Housing Authority and HUD for discrimination in public housing).

avoiding the “perpetuation of segregation,”<sup>52</sup> as well as the statute’s requirement that federal grant recipients affirmatively further fair housing.<sup>53</sup> The *ICP* case addresses a less litigated issue within that general framework: the potential segregating effects of the Low Income Housing Tax Credit (LIHTC) program. Today, the LIHTC is the largest source of subsidized rental housing.<sup>54</sup> The claim offered by *ICP*, and consistent with other studies, is that in some regions, LIHTC developments are disproportionately allocated in neighborhoods that are low income and underresourced.<sup>55</sup> *ICP* at the Supreme Court, then, is in many senses a first step. The key question it raises is how the FHA’s antidiscrimination apparatus might be used to promote racial and economic integration within a metropolitan region.

### B. Regulation for Inclusion

A second prong of emphasis is on the federal regulatory—rather than the litigation—front. This regulatory emphasis includes efforts to use federal spending and programmatic regulation to promote economically and racially inclusive communities. The most prominent example is the Obama Administration’s 2015 regulation enforcing the statutory requirement that federal agencies and grantees affirmatively further fair housing (AFFH).<sup>56</sup> The AFFH rule, which replaces a prior rule thought to be less effective, now requires that grantees conduct self-assessments of housing barriers within their communities and develop strategies with community input to promote housing inclusion.<sup>57</sup> The AFFH rule emphasizes that fair housing requires more than elimination of discrimination, such as specific strategies to address racial and economic segregation and promote housing choice among historically excluded groups.

In one sense, the AFFH rule seems firmly within the inclusionary, antidiscrimination tradition: its concern is with promoting access to housing

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52. See *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 445 (E.D.N.Y. 1995).

53. 42 U.S.C. § 3608(d) (2012).

54. See *Low Income Housing Tax Credit*, H.U.D., <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/4QC6-54CG>] (reporting that an average of over 1,450 projects and 110,000 units were placed in service annually between 1995 and 2013).

55. See, e.g., SIMON KAWITZKY ET AL., FAIR HOUS. JUSTICE CTR., CHOICE CONSTRAINED, SEGREGATION MAINTAINED: USING FEDERAL TAX CREDITS TO PROVIDE AFFORDABLE HOUSING 19 (2013), <http://www.fairhousingjustice.org/wp-content/uploads/2013/08/FHJC-LIHTCREPORT-Aug13-Fullv1-7-WEB.pdf> [<https://perma.cc/JA8U-PSEX>] (finding that in New York City, LIHTC units were developed primarily in areas of high or extreme poverty). But see Keren M. Horn & Katherine M. O’Regan, *The Low Income Housing Tax Credit and Racial Segregation*, 21 HOUSING POL’Y DEBATE 443, 454–57 (2011) (finding that use of LIHTC in Massachusetts and Delaware was correlated with declines in segregation at the metropolitan level).

56. See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576) (final rule).

57. *Id.*

opportunity for traditionally excluded groups. But the implications of the AFFH rule inevitably extend to the economic arrangements of metropolitan areas. At stake in most communities will be decisions as to where to site low-income housing, with attendant effects on economic, as well as racial, segregation. AFFH also has important implications for how one defines the boundaries between urban and suburban areas, the reification of which have served as tremendous contributors to current patterns of racial and economic segregation.<sup>58</sup> If *ICP* presents as the opposite of the Court’s cramped constitutional jurisprudence of intent, the AFFH rule is the anti-*Milliken*: a challenge to that case’s cramped view of the connections between housing and other public goods (like schools); the boundaries between cities, counties, states, and the federal government; and the meaning of responsibility for sustaining segregation.<sup>59</sup>

Federal agencies have also used affirmative grant-making power to encourage new structural arrangements that diminish racial and economic segregation. One example is the Department of Housing and Urban Development’s Sustainable Communities grant program.<sup>60</sup> The program, administered in collaboration with the U.S. Department of Transportation and the Environmental Protection Agency aims to use federal funds to help redesign communities so that they provide better housing (including affordable housing), strengthen their infrastructure (including strengthening public and accessible transportation), and connect communities to jobs, all in an environmentally sustainable way.<sup>61</sup> Grantees engage in community planning that includes historically marginalized communities, and they must conduct a Fair Housing and Equity Assessment to promote racial and economic integration in their communities and to advance fair housing.<sup>62</sup> This is not the type of program that could be initiated by an agency

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58. See generally Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 378–80 (2015) (detailing how historically and legally constructed boundaries between cities and suburbs frustrated meaningful integration).

59. See *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) [hereinafter *Milliken I*] (reversing the district court’s interdistrict school integration remedy). For a discussion of *Milliken*’s shortcomings, including its narrow view of federal court remedial power and its enlargement of local sovereignty, see Orfield, *supra* note 58, at 406, 415 (claiming that *Milliken I* not only distorts the holding of prior school desegregation cases but erroneously allows notions of local government sovereignty to limit federal court power to remedy a state’s constitutional violation).

60. *Sustainable Communities Regional Planning Grants*, H.U.D., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/economic\\_resilience/sustainable\\_communities\\_regional\\_planning\\_grants](http://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_resilience/sustainable_communities_regional_planning_grants) [https://perma.cc/C73V-6JTH].

61. See *id.* (describing the grant as an effort to coordinate federal programs “to make neighborhoods more prosperous, allow people to live closer to jobs, save households time and money, and reduce pollution”).

62. See *Regional Fair Housing Equity Assessments*, H.U.D., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/economic\\_resilience/regional\\_fairhsg\\_equityassesmt](http://portal.hud.gov/hudportal/HUD?src=/program_offices/economic_resilience/regional_fairhsg_equityassesmt) [https://perma.cc/DY69-HSAZ] (emphasizing that the fair housing assessment tool encourages housing planning at the regional level with technical assistance from the Department of Housing and Urban Development).

dedicated to fair housing enforcement. Instead, it builds on the funding and programmatic relationship that the agencies have with grantees. HUD's power to advance fair housing here is not its traditional enforcement power to resolve complaints. Instead, it derives from the agency's power to issue grants, provide technical assistance to grantees, convene interested parties (federal agencies and state, local, and regional governments), and collect and analyze data. The program is likely insufficiently funded to fully achieve its goals, but it stands as an example of an effort to use federal regulatory power and funding to remake the geographical arrangements that produce opportunity and mobility.

### C. *State and Local Regulation and the New Spatial Inclusion*

Finally are a set of emerging efforts that use innovative forms of contractual and regulatory power to remake spaces (cities and regions) as sites for inclusion. An example is the use of community benefits agreements (CBAs), which are contractual agreements between community coalitions and an entity (a corporation, institution, or prospective developer).<sup>63</sup> CBAs are advanced by community groups seeking to leverage economic expansion to benefit locally affected communities.<sup>64</sup> Typically, CBAs address wages, hiring, affordable housing, environmental standards (including green building, green space, and cleanup), and the creation of publically accessible institutions such as parks and schools.<sup>65</sup> Employment conditions and inclusion are among the most consistent features of these agreements. Many include targeted hiring requirements, which require hiring and training workers from particular communities or worker centers.<sup>66</sup> Cities, redevelopment agencies, and counties might be parties to these agreements.<sup>67</sup>

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63. For discussions of the history and goals of community benefits agreements (CBAs), see generally VIRGINIA PARKS ET AL., *THE MOBILITY AGENDA, COMMUNITY BENEFITS AGREEMENTS FOR THE TWENTY-FIRST CENTURY ECONOMY* 4 (2008), <http://www.mobilityagenda.org/home/file.axd?file=2008%2F12%2FCBApaperfortheinternet.pdf> [https://perma.cc/6HBR-QES8]; Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88, 89 (2009); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113, 114 (2008).

64. See Parks & Warren, *supra* note 63, at 89 (describing CBAs as part of a larger "new accountable development movement" that seeks to counter inequitable patterns of growth in urban economies).

65. See *id.* at 92 (detailing key components of CBAs).

66. See *Policy & Tools: Community Benefits Agreements and Policies*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies> [https://perma.cc/N79D-522W].

67. See, e.g., *id.* (describing CBAs that establish agreements between developers and local governments); *Policy & Tools: Community Benefits Agreements and Policies in Effect*,

Even where community benefits agreements are contracts between community groups and private developers, municipal governments are often given the role of enforcing the terms of the agreements.<sup>68</sup> They are thus inevitably part of a regulatory project. In addition, an emerging practice of municipal governments is to require negotiation of a CBA as a condition for rezoning a parcel of land, providing a tax credit, or awarding a city contract.<sup>69</sup> As an example, Twitter, Inc. and other technology companies signed a CBA in 2015 in exchange for tax credits when they relocated to the rapidly gentrifying Tenderloin area of San Francisco.<sup>70</sup>

CBAs leverage place and locality to redistribute economic resources. They include agreements for housing and employment and typically seek to benefit residents in the immediate vicinity of the development, such as by developing pathways for particularly hard-to-employ groups (such as those with low levels of formal education, the long-term disabled, and those with prior involvement in the criminal justice system).<sup>71</sup> CBAs and first-source hiring also explicitly include linkages to training and other capacity-building organizations.<sup>72</sup> In this way, they respond to some of the

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PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect> [https://perma.cc/4FTY-MVYU] [hereinafter *CBAs in Effect*] (describing CBAs currently in effect between development agencies and various cities and counties).

68. See PARKS ET AL., *supra* note 63, at 5.

69. See, e.g., *CBAs in Effect*, *supra* note 67 (describing city and councilmember involvement in the Oakland Army Base Agreement).

70. The agreements required support for non-profits and local schools, and purchases from local small businesses. See COMMUNITY BENEFIT AGREEMENT 2015-2018, MEMORANDUM OF UNDERSTANDING BETWEEN CITY AND COUNTY OF SAN FRANCISCO CITY ADMINISTRATOR, AND TWITTER, INC. 8, 10 (2015), <http://sfgsa.org/Modules/ShowDocument.aspx?documentID=12590> [https://perma.cc/S5E3-M2UR] (listing specific commitments of company to partner with local for-profit and non-profit organizations); see also COMMUNITY BENEFIT AGREEMENTS (2013), CITIZEN’S ADVISORY COMMITTEE FOR CENT. MKT. & TENDERLOIN AREA, <http://sfgov.org/centralmarketcac/community-benefit-agreements-2013> [https://perma.cc/92E7-MDWU] (listing CBAs signed in 2013 between the city of San Francisco and six technology companies); Joshua Sabatini, *Mid-Market Tech Companies Reach New Tax-Break Agreements*, S.F. EXAMINER (Jan. 5, 2015), <http://archives.sfexaminer.com/sanfrancisco/mid-market-tech-companies-reach-new-tax-break-community-agreements/Content?oid=2915898> [https://perma.cc/VYV2-CZP2] (recounting that the CBAs had their origin as part of a tax break established in 2011 to “soften the impacts of gentrification” while contributing to revitalization).

71. See KINGSBRIDGE ARMORY CBA, COMMUNITY BENEFITS PROGRAM, EXECUTION DRAFT at A-9–10 (2013), <http://www.forworkingfamilies.org/sites/pwf/files/documents/Kingsbridge%20FINAL%20Exhibit%20A%20-%20Community%20Benefits%20Program.pdf> [https://perma.cc/KE8Z-D422] [hereinafter KINGSBRIDGE ARMORY CBA] (requiring hiring of a particular percentage of “‘Targeted Job Applicants’ includ[ing], but not limited to, the Underemployed, the Unemployed, and individuals from the Targeted Population living in designated areas surrounding the Project”).

72. See PARKS ET AL., *supra* note 63, at 7 (“CBAs often stipulate that the developer contribute funds to support existing job training services or create new training services necessary for the development, to which a range of workers have access.”); see also KINGSBRIDGE ARMORY CBA, *supra* note 71, at A-9 (requiring that the developer “shall engage the best in class hiring, referral

limitations of the liberalist framework of the antidiscrimination regime by expanding the supports that enable workers to succeed. These supports may include meaningful training, child care, and transportation. CBAs often avoid exclusive focus on race and ethnicity, yet the large cities in which CBAs are typically deployed and the local politics undergirding their adoption has meant that they often benefit a racially and ethnically diverse population.

CBAs alone cannot provide an answer to the complex problems of economic exclusion within metropolitan regions. For one, they will work best for areas that are growing economically: communities that remain attractive to industry or development. Yet what is novel as a regulatory approach and framework is the shift from antidiscrimination's rights framework (often centered on courts) to a framework in which redistributive demands are made of private power and public goods. The aspiration of the CBA framework is not simply inclusion in structures of opportunity presumed to be operating correctly, but the remaking of the terms of how those structural arrangements distribute opportunity. In that sense, they are of piece with current social movements centered on raising the minimum wage or advancing affordable or low-income housing through inclusionary zoning. At the same time, CBAs are not blind to questions of differential opportunity: they attend to multiple forms of exclusion—avoiding the either/or formulation of race, ethnicity, or gender on the one hand and economic exclusion on the other.

This recognition of the spatial dimensions of inequality, as well as the insights offered by the “new” economic equality lead to new legal and regulatory structures that remake the conception of how those structures should function in seeking inclusion. The antidiscrimination model cannot do this alone. The antidiscrimination approach often depends on the assumption that the institutions of opportunity (housing, schools, job markets) are essentially functioning well but need to better include historically disadvantaged groups. The new economic inequality reveals the fragility of those institutions. The enduring fact of racial and ethnic inequality has revealed how the success of those institutions often depended on walling off the poor and racial and ethnic minorities.

### III. Reconciling Traditions

This journey into the spatial and racial dimensions of inequality has implications for the narratives that will now propel us forward. Fishkin and Forbath seek to recover a constitutional discourse of economic opportunity. They recognize that this discourse often excluded certain groups—women, formerly enslaved people, the indigenous, and racial and ethnic minorities.

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and training agencies to identify and train qualified employees from the Bronx and New York City, with a priority to local residents”).



But this is not insurmountable to their project. In their view, the constitution of opportunity tradition need not depend on this exclusionary tradition. Rather, it can go forward with the contestations offered by the constitution of inclusion. This inclusionary tradition began with Reconstruction and was realized at least in part by the constitutional and statutory transformations of the 1960s civil rights era. This invitation must contend with at least two challenges. First, is the role of constitutionalism, which presents an obstacle to economic justice claims in court and has not figured prominently in contemporary social movement efforts. Second, are the potential limits of recovery discourse, given the inadequacy of past institutional arrangements.

On the first point, Fishkin and Forbath put their faith in constitutionalism while the examples discussed in Part II of this Paper are explicitly statutory and regulatory. Success will depend, then, on whether (and how) recovery of the constitution of economic opportunity tradition can counter the *Lochnerism* that pervades the American constitutional tradition; its persistence evident in the “neo-*Lochnerism*” of more recent Supreme Court jurisprudence.<sup>73</sup> Constitutional law in the race or ethnicity and antidiscrimination area has had its own analogue to *Lochnerism*—a cramped view of state complicity and state responsibility for remedy that pervades constitutional opinion. *Milliken* stands as one example. The decision takes as fixed what are in fact contingent barriers between city and suburb, discounting government complicity for residential arrangements and limiting courts’ remedial power.<sup>74</sup> Indeed, “big-C” constitutionalism’s narrow conceptions of equal protection and remedy guide most modern civil rights and inclusionary reform efforts *away* from constitutionalism into the domain of statutes and regulations.<sup>75</sup> One can, of course, claim these statutes and regulations as part of a larger constitutional project—a “small-c” constitutionalism that more expansively realizes fundamental commitments.<sup>76</sup> One might also argue that recovering constitutional meaning is more faithful to history and avoids unnecessarily ceding

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73. See Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY: J. IDEAS, Winter 2012, at 46, 51, 55 (discussing “economic libertarianism” of the *Lochner* Court).

74. See *Milliken v. Bradley*, 418 U.S. 717, 744–45, 751–53 (1974) (limiting the power of the district court to order an interdistrict, metropolitan-wide, school desegregation remedy).

75. See Kate Andrias, *Building Labor’s Constitution*, 94 TEXAS L. REV. 1591, 1617–18 (2016) (arguing that modern labor movements often rely on “small-c” constitutional arguments rather than “big-C” constitutional arguments); Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROB. (forthcoming 2016) (detailing social movement mobilization to advance legislative and regulatory reform at the subnational level).

76. See generally WILLIAM ESKRIDGE & JOHN FEREJOHN, THE REPUBLIC OF STATUTES: A NEW AMERICAN CONSTITUTION 5–9 (2010) (arguing that certain statutes of great importance have instantiated norms, rights, and protections more expansive than the formal Constitution, and as entrenched).

constitutional ground to economic libertarians. In a world in which history often informs constitutional argumentation and even statutory implementation,<sup>77</sup> reclaiming a different history may be necessary. The hope is also that the Constitution deployed beyond clause-bound interpretation can shape broader narratives that extend beyond courts. These narratives can then provide the framework for judicial opinions as well as legislative and public actions. The Constitution may play an inevitable role in legal interpretation and political discourse, but there are reasons to be skeptical about encouraging the Constitution to be at the center of that discourse. In fact, statutes, regulations, and policy reform are typically the focus of contemporary advocacy in and outside of courts. Statutory and regulatory measures provide more specific tools for addressing complex problems of economic justice and inclusion, and they provide a potentially responsive site of organization for social movements. Fishkin and Forbath may be correct that it is important not to cede constitutional ground to those skeptical of public law's role in advancing economic justice. But it is equally important not to allow constitutionalism to occupy the field of possible legal and regulatory interventions.

Second, are the limitations presented by a project of recovering past traditions—is it worth recovering such a flawed tradition? Similar questions are embedded in the current discourse on economic inequality, which often has hints of nostalgia for a deeply imperfect past.<sup>78</sup> One should ask whether the past can provide a guide for what inclusion might look like in the future. This is not simply a rhetorical point about a constitutional order built on racial and gender inclusion. Recovery also implicates twentieth-century institutions and structural arrangements. The institutions that built postwar middle-class prosperity—housing, education, and labor arrangement—were built on exclusion. The problem of residential racial segregation reveals the limitations of the New Deal and postwar institutions that created the mid-twentieth century middle class.<sup>79</sup> Indeed, the fact of

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77. See generally Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015) (arguing that recent Supreme Court decisions under the guise of the constitutional avoidance canon articulate new constitutional norms and rewrite statutes); Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203 (2011) (arguing that the Supreme Court often chooses statutory interpretations that privilege its constitutional values and thus channels statutory interpretation away from implementing the norms of legislative majorities).

78. New York Times columnist Charles Blow captures this nostalgia well in a recent piece highlighting “white America’s” newfound despair about economic inequality, a reality with which blacks have long lived. Blow, *supra* note 14; see also Andrew J. Cherlin, *Why Are White Death Rates Rising?*, N.Y. TIMES (Feb. 22, 2016), <http://www.nytimes.com/2016/02/22/opinion/why-are-white-death-rates-rising.html> [<https://perma.cc/TU99-L9MU>] (linking rising white death rates to a perception of declining economic prospects in comparison with previous generations).

79. See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (examining how

residential segregation suggests that many of the institutions we credit with creating opportunity in fact depended on *hoarding* opportunity. Prosperity may have depended on stratification; the “good life,” on exclusion.<sup>80</sup> Structuring middle-class space through public and private actions depended on generating spatial inequality, which endures. If that is the case, as a matter of both narrative and implementation, the past may provide a limited guide for the future. The challenge is to develop regulatory and policy regimes that remedy the failures of the past, while responding to an evolving economic and racial order.

### Conclusion

Highlighting race, ethnic, and gender difference, then, is a necessary disruption of the current interest in economic inequality. It rightly challenges both the civil rights and the “opportunity” frameworks. Civil narratives of integration into functioning institutions are challenged when those institutions are fraying. Conversely, our best models of economic opportunity may depend on exclusion. This demands that equality frameworks shift away from rights to redistribution while still calling attention to how difference structures economic arrangements. Whether in the domain of the Constitution, statutes, or regulations, both frameworks must now make demands of private power and offer a new conception of how public goods might be shared.

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policies during the 1930s and 1940s significantly disadvantaged African Americans and connecting those inequalities to de facto segregation and racial inequalities).

80. See generally David Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in *THE NEW SUBURBAN HISTORY* 11 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (providing an account of how federal policies facilitated the creation of a segregated, two-tiered housing market, yet federal officials advanced notions that housing arrangements reflected market, not government, choices).