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Residential Segregation: Vouchers and Local Government Monoplists

Vicki Been[†]

Professor Schuck has given us a nuanced, thoughtful and provocative view of the controversy over efforts to “open up the suburbs” to people of color and the poor and working classes.¹ His in-depth look at the three landmark cases in the controversy—New Jersey’s *Mt. Laurel*,² Chicago’s *Gautreaux*,³ and Yonkers infamous school and housing segregation fight⁴ (especially his analysis of the Yonkers litigation)—are extremely helpful and ground his recommendations and analyses concretely and practically.

Professor Schuck begins by reviewing generally our scheme of land use regulation, pointing out both how concerned housing consumers are about making a wise purchase, and how concerned they remain about protecting the value of their investment. He notes the incredible stew of policies from every level of government that affect the residential housing market, often at cross-purposes.⁵ He then quickly reviews evidence about the extent of racial and class segregation in our housing patterns, noting that there is some evidence that racial segregation is lessening, and that suburbs are becoming more racially and ethnically diverse.⁶

In exploring the causes of the racial segregation that still plagues our neighborhoods, he points to the continuing legacy of a history of explicit racism, but he focuses also on three other factors. First, he argues that people choose to cluster with people like them for a variety of reasons—“straightforward economic and social reasons, as well as for more elusive psychological ones”—so that, even in the absence of discrimination, much residential segregation would occur.⁷

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1. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 203-60 (2003).

2. *S. Burlington County NAAPC v. Mount Laurel Township* (Mount Laurel II), 456 A.2d 390 (N.J. 1983); *S. Burlington County NAAPC v. Mount Laurel Township* (Mount Laurel I), 336 A.2d 713 (N.J. 1975).

3. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

4. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *aff'g* 635 F. Supp. 1538 (S.D.N.Y. 1986) *and* 624 F. Supp. 1276 (S.D.N.Y. 1985).

5. SCHUCK, *supra* note 1, at 205-07.

6. *Id.* at 208.

7. *Id.* at 209.

Second, he notes that residential choices are constrained by a form of prisoners' dilemma: Even if a family prefers a particular racial mix in their neighborhood—let's say 50/50 white and African American—because the family will be unable to secure and enforce agreement from its neighbors to maintain the neighborhood at that level, the family's self-interest in protecting the value of its investment in housing will prompt it to flee the neighborhood (or to avoid the neighborhood if it is making an initial location choice), once the neighborhood begins to integrate or nears the so-called "tipping point."⁸

Third—and this is crucial to his analysis of the problem—he emphasizes the role that what he calls "classism" plays in racial segregation. He argues that classism—the belief that "one improves one's housing by ascending a ladder, reaching higher rungs only when one's ability to pay rises"⁹ is so deeply ingrained in our capitalist system that it seems "the natural order of things."¹⁰ Under a classist view, which Professor Schuck maintains is widely shared by Americans, "Government . . . has no business inserting people who have not climbed the ladder in the customary way into a neighborhood they cannot afford among people who can afford it through their own (or family) efforts."¹¹ Professor Schuck believes that classism explains "much residential segregation," although he recognizes that it is difficult to disentangle racism and classism and that racism can be couched in classist terms.¹² "Classism countenances discrimination on the basis of wealth, income, social class, or perceived ability to pay."¹³

Professor Schuck then explores the ideal of residential diversity. He supports the norm of non-discrimination—the idea that one should make one's housing choices in markets unimpeded by the biases of others. He seems somewhat ambivalent about going beyond a principle of non-discrimination, however. He neither explicitly endorses nor explicitly condemns this classism. But he notes that a "broad consensus has long existed that greater residential mobility and access to suburban jobs for low-income families and racial minorities, especially blacks, is essential not only for them but also for American society as a whole."¹⁴ The question is, however, what role law can and should play in pursuing that leading policy goal.¹⁵

Professor Schuck then turns to a close analysis of three cases in which judges tried to impose an affirmative obligation on government to increase

8. *Id.* at 210-13.

9. *Id.* at 207.

10. *Id.* at 207.

11. *Id.*

12. *Id.* at 213.

13. *Id.* at 207.

14. *Id.* at 218.

15. *Id.*

demographic diversity in housing.¹⁶ Although he is skeptical of the judge's goals—faulting the *Mt. Laurel* court, for example, for trying “to enforce a substantive right of low- and moderate-income families to live in residential communities that they could not afford without public subsidies,”—he focuses primarily on remedy: He argues that the preferred tool for achieving greater racial and economic integration is market-based vouchers, rather than mandated fair shares, mandated inclusionary zoning, or bricks and mortar programs.¹⁷

THE “SPECIAL” CHARACTER OF THE PROBLEM OF RESIDENTIAL SEGREGATION

That very brief summary hardly does justice to Professor Schuck's careful and nuanced analysis, but it is enough to allow us to look further at several of the issues his analysis raises. First, this chapter tackles the problem of diversity in a context that is different from the workplaces, educational institutions, religious houses of worship, and national borders that he addresses in other chapters. Several differences are stark. To begin with, the problem of managing diversity in the context of where people chose to live, or are forced to live, underpins many of the other problems. Where you live to a large part determines what educational opportunities you have, what religious institutions you have easy access to, what jobs are available and accessible to you, what kinds of health care you receive, what environmental toxins you are likely to be exposed to, what social networks you are likely to belong to, what brushes you are likely to have either with crime or with law enforcement, and so on. So, managing diversity in housing choices is fundamental: Even if we were to achieve the perfect solution to affirmative action conundrums in the workplace or in educational institutions, for example, we would only have just scratched the surface of providing truly equal access for educational opportunities if we have not also managed to ensure that the neighborhood in which one grows up is not so mired in a culture of poverty that educational opportunities are beyond the imagination, much less the reach, of the neighborhood's residents. Opportunity is so tied to geography that we have a special obligation to solve problems of segregation in the housing market.

Second, managing diversity in the context of residential housing poses a special challenge because, more than any of the other areas Professor Schuck studies, it engages our federalist system of government—our delegation, or reservation, to local governments of the power to control the use of land.

Third, while none of the areas Professor Schuck chooses to address are free from government choices that have created or contributed to a lack of diversity in the housing area, the role of government has been so pervasive (and perverse) that it is simply impossible to imagine what neighborhoods would

16. *Id.* at 218-57.

17. *Id.* at 257-60.

have looked like in a “free market” that left residential choices up to consumers. From the federal government’s massive highway project, to the biggest housing program the world has ever known—the federal mortgage interest deduction—to the blatant racism of the Federal Housing Administration’s redlining policies, the government has shaped our land use and residential housing patterns from top to bottom.¹⁸ Residential segregation by race is a relatively new phenomenon. Prior to the turn of the twentieth century, worker housing was located near employer housing. Some of the current separation of classes and races can be attributed to changes in transportation opportunities—maids, gardeners, nannies can now commute to work more easily and need not live near the houses of their wealthy employers, for example. But much is attributable to government policies that encouraged, indeed required, residential segregation by race.

The pervasiveness of government policies that shape who lives next to whom is not just a historical artifact. Today, the law does not allow one to house her own grandmother, or nanny, in a granny flat. If one wants to live in a mixed use neighborhood, most jurisdictions simply do not provide them. If one wants to live in the center city, the tax ramifications of doing so make that “choice” unavailable for all but the wealthiest of families. Indeed, if one wants to live in any place other than the suburbs, the economics of doing so are daunting, not because of the market, but because of the myriad ways in which federal and state governments subsidize the cost of living in the suburbs. In many parts of the country, if one wants to buy a new house, most of what is for sale will be in a gated subdivision. So, while we extol individual freedom, and bemoan the role that individual choices play in residential segregation, we should not ignore the fact that law constrains those choices in so many pernicious ways that the notion of “choice” is problematic.

Professor Schuck recognizes that “[t]he historical shame of Jim Crow may affect whether we think today’s choices are free enough to be given legal effect, but it does not negate the fundamental value of choice.”¹⁹ I would be the last to argue against the value of choice, but to blame or excuse residential racial segregation as a necessary risk we run by allowing choice is much too simplistic. We are so far from a free market for housing, in which individuals shop with their feet, that worrying over the risks to diversity ideals that choice in a genuinely free market might pose misses the very real, immediate need to

18. The classic exploration of the causes of our current land use patterns is KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994). For a review of the literature attempting to quantify the extent to which various policies contribute to suburbanization in general, and sprawl in particular, see GEN. ACCOUNTING OFFICE, *COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON “URBAN SPRAWL” IS UNCLEAR* (1999).

19. SCHUCK, *supra* note 1, at 311.

undo the legacy of distortions in the market.

The differences between residential segregation and the other contexts in which Professor Schuck explores the meaning of diversity make several of his general conclusions, both about premises and about principles, problematic in the context of housing patterns.

DIVERSITY IS OFTEN A ZERO SUM GAME

One of the ways in which diversity is a zero sum game receives little attention in Peter's discussion, and is conspicuous in its absence. The average American has a huge percentage of her assets tied up in her house, and much of how Americans act—in the land use regulatory system, the tax scheme, the educational system and elsewhere—is inextricably tied to their efforts to protect and enhance the value of their investment. The sad truth is that segregation pays—it props up the value of housing for white Americans. One cannot even begin to think about solutions to the problem of segregation without tackling current homeowners' resistance to taking any risk with the value of their home and their resistance to any redistribution of wealth. That problem is one that Professor Schuck's emphasis on vouchers simply ignores: Who is going to pay for the subsidy that vouchers reflect? The money to fund the vouchers in Gautreaux came from the federal government, but the federal government has shown no interest in expanding the program to any meaningful level. Indeed, the Bush administration recently announced that it was drastically cutting back on the program. Local governments have no incentive to provide vouchers because of fear that the vouchers will simply attract poor residents from neighboring jurisdictions. State governments too have been unwilling to put enough money on the table for housing. So where are the funds to subsidize low income renters and send them into the housing market going to come from?

Further, if we were to suddenly decide to make the voucher program address more than a tiny fraction of the need, what good will vouchers do when they become sufficiently widely used that neighbors feel threatened and seek to restrict rental housing that could be used for voucher residents?

DIVERSITY'S VALUE DEPENDS ON ITS PROVENANCE

There is little doubt that Americans, and probably everyone else as well, prefer to choose their own destiny rather than have it imposed by a court, or any authority figure or outsider, for that matter. But that observation is trite, and Professor Schuck is never trite. Instead, his contention is much more nuanced. He argues that "[t]he most plausible account of the disputes that arose in these communities, then, is that the mandated diversities seemed inauthentic precisely because they *were* mandated and lacked the only provenance, ability

to pay, that Americans value as a legitimate eligibility criterion for residential communities.”²⁰

I question Professor Schuck’s belief that classism largely explains our residential patterns. Exclusionary zoning in particular, and land use policy in general, is not just about ensuring that the only entrants to the community are people of the same social class as the existing residents. Many of the people already there—the ones adopting the exclusionary zoning policies—could not afford to live there either if their housing was forced to conform with the standards they impose on newcomers, or if they had not been the beneficiaries of massive subsidies that are not or were not equally available to the newcomers, and especially to people of color or the poor. Further, at least some, and perhaps much, of exclusionary zoning is less about ensuring the social class of newcomers, and more about rent-seeking—trying to expropriate the wealth of new entrants—as a “price of admission.”

In addition, exclusionary zoning is about protecting privilege, protecting the value of homes. That value has relatively little to do with hard work or other bases for a “moral” claim about merit and has much to do with the ways in which government has subsidized the American dream of homeownership, for some, but by no means all, voters. While ability to pay might be an agreed-upon criterion in our capitalist, individualistic society, that criterion loses its legitimacy when ability to pay can be deliberately manipulated by haves against the have-nots. It is not appropriate to tell people that it’s just a matter of them climbing the ladder, when the rungs of the ladder are constantly raised higher and higher by those already in a jurisdiction.

GOVERNMENT SHOULD NOT TRY TO CREATE, CERTIFY OR CULTIVATE
SPECIFIC DIVERSITIES, BUT SHOULD FOCUS INSTEAD ON PROTECTING
DIVERSITY FROM DISCRIMINATION AND MONOPOLY

Professor Schuck argues that law is “seriously disabled”²¹ in generating diversity because it is “so much harder for government to promote new diversities than to protect old ones.”²² But that depends, of course, on your baseline. Is the goal of promoting racial and economic integration in housing seeking a “new diversity”? Or is it seeking to undo the intended and unintended segregative effects of decades of myriad public policies?

Professor Schuck would confine government’s role to protecting diversity from discrimination and monopoly. Land use regulation is a monopoly—existing residents act through their local governments to limit the availability of land in the jurisdiction to protect their investments. The more limited the land

20. *Id.* at 319.

21. *Id.* at 324.

22. *Id.* at 321.

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for new housing, the more valuable the existing housing. Again, Professor Schuck's emphasis on vouchers pays insufficient attention to the monopolistic tendency of existing homeowners. Vouchers only work if there is a sufficient supply of rental housing to create vacancies for which the vouchers can be used. By leaving the existing system of land use regulation essentially untouched, Professor Schuck's emphasis on vouchers will not accomplish the goal of protecting diversity from discrimination and monopoly.

CONCLUSION

Professor Schuck has made a very significant contribution to our thinking about diversity generally and residential segregation specifically. The latter topic has spawned dozens of book-length explorations, so Professor Schuck cannot be expected to solve in a chapter problems that have vexed others in thousands of pages. Professor Schuck has begun an important conversation, but to go further, we must deal with the complexities that the three special features of residential segregation—the lack of anything approaching a free market, the pervasive role of government in creating segregated communities, the connections between residential segregation and almost every other social problem we confront today—pose to achieving greater diversity.

