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America's Enduring Legacy: Segregated Housing and Segregated Schools

BY JONATHAN K. STUBBS



Jonathan K. Stubbs

Recently, the global human rights community experienced the loss of Oliver W. Hill. During his 100 years, Mr. Hill received many well-deserved awards including the NAACP's Spingarn Medal, the Presidential Medal of Freedom, and the highest awards of the ABA. He was perhaps best known for his inspiring role as co-lead counsel in the Prince Edward County, Virginia, school desegregation case, *Davis v. County Board of Education*,¹ which the Supreme Court consolidated with three other cases in *Brown v. Board of Education*.² For 80 of his 100 years, first as an activist and later as a lawyer, Mr. Hill fought to create a more civilized society based upon a "renaissance in human relations."³ For 15 years, I was blessed to know him and came to call him mentor and, most importantly, friend. In his memory, and hopefully in his spirit, I offer these thoughts regarding some ways to achieve justice for all.

The best proof that we needed and still need affirmative action was that the segregationists were and still are resisting desegregation. If there were

no authoritative pressure segregationists would never change their discriminatory practices.⁴

In *Brown*, the United States Supreme Court ruled that when a state segregates children in public schools solely on the basis of race, the state unconstitutionally deprives them of equal educational opportunities.⁵ For over 50 years, America has wrestled with how to desegregate public schools as a means to achieve equal educational opportunity. Segregated schools reflect a larger American dilemma: for many decades (often using American tax dollars), America's political, business, religious, educational, and professional leaders have planned and implemented segregation. This article focuses only upon one aspect of America's segregation problem: the conjoined twins of education and housing segregation.

A prime example of the federal government's national segregation policy involves the Federal Housing Administration (FHA). Created during the Great Depression, the FHA insured residential housing loans for private lenders so that the lenders could provide financing for borrowers. Because the Depression shoved private lenders into financially precarious positions, for all practical purposes, the FHA's lending policies dictated the

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Navigating the Maze: A Primer on Civil Jurisdiction in Indian Country

BY ELIZABETH ANN KRONK



Elizabeth Ann Kronk

[I]n matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is.

—Chief Justice Vande Walle,
North Dakota Supreme Court¹

Federal Indian law is a complex field that has befuddled many judges, attorneys, and policymakers since the formation of the United States. Jurisdiction in cases involving individual Indians² and tribes³ can be particularly confusing

because it does not follow the traditional rules of state or federal jurisdiction. This article provides broad guidance on how to determine whether the tribal, state, or federal courts have adjudicative civil jurisdiction in matters involving Indians.⁴ Included is a brief overview of why tribes and individual Indians have a unique status within the United States and a short overview of general civil jurisdiction in Indian country.⁵ This article also provides a brief description of the factors involved in determining tribal, state, and federal civil jurisdiction in matters involving tribes, individual Indians, or cases arising in Indian country.

The Unique Status of Tribes and Individual Indians

There are three sovereign governments within the United States: the federal government, state governments, and tribal governments. Tribal sovereignty, however, is somewhat unique. Because tribal governments existed before the formation of

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terms (nationwide) upon which housing loans were premised.⁶

As early as 1936, the FHA's underwriters' manual mandated racial (and class) segregation in housing:

The Valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. *If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes.* A change in social or racial occupancy generally leads to instability and a reduction in values. The protection offered against adverse changes should be found adequate before a high rating is given to this feature.⁷

The 1936 manual also expressly linked housing segregation with school segregation:

The social class of the parents of children at the school will in many instances have a vital bearing. Thus, although physical surrounds of a neighborhood area may be favorable and conducive to enjoyable, pleasant living in its locations, *if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist.*⁸

Moreover, the FHA manuals published instructions regarding how local governments, private developers, and financiers could build and secure government funding for segregated housing developments. An example involves the 1938 underwriting manual that mandated racially restrictive covenants to buttress exclusionary zoning ordinances: "[D]eed restrictions, to be effective, must be enforced. In this respect they are like zoning ordinances. If

there is a probability of voiding the deed restrictions through inadequate enforcement of their provisions, the restrictions themselves offer little or no protection."⁹

Elements of the government's segregated housing master plan persist to this day.

The FHA also worked closely with the Home Owners' Loan Corporation (another Depression-era federal agency seeking to reduce residential mortgage foreclosures by making loans to homeowners)¹⁰ to create a national financial risk assessment system that explicitly considered race as a primary factor in determining whether to make a loan.¹¹ In extending loans to prospective borrowers, the FHA directed lenders to use its color-coded residential neighborhood maps (Residential Security Maps).¹² Neighborhoods that were in the "A" category were colored green, those in "B" were colored blue, those in "C" yellow, and those in the "D" category were colored red. Upper-class, all white neighborhoods typically received A grades, while communities with blacks, foreign immigrants, and Jews frequently received Cs and Ds.¹³ This approach, known as "redlining," persists today in various guises including lenders making low interest fixed loans to whites and higher interest "subprime" loans to people of darker colors who have similar credit histories.¹⁴

Mr. Hill referred to the United States government's master plan for national housing segregation as replete with "gimmicks that were used to maintain and guarantee segregated communities."¹⁵ Even after the Supreme Court struck down racially restrictive covenants in *Shelley v. Kramer*,¹⁶ the FHA knowingly continued lending taxpayer dollars to segregationist landlords who "do not file such covenants, since they are unenforceable in federal courts, but keep them alive as 'gentlemen's

agreements."¹⁷ Not only did the FHA reinforce housing segregation by loaning the public's money to individuals with verbal unrecorded racial covenants, but the FHA also persisted in financing loans to persons who already had recorded restrictive covenants.¹⁸ Prominent social scientists have pointed out the pernicious and effective nature of such "gimmicks":

One infamous housing development of the period—Levittown—provides a classic illustration of the way blacks missed out on this asset accumulating opportunity. Levittown was built on a mass scale, and housing there was eminently affordable, thanks to the FHA's and VHA's accessible financing, yet as late as 1960 "not a single one of the Long Island Levittown's 82,000 residents was black."¹⁹

Segregated suburbs like Levittown are not quite as surprising when one considers the historical backdrop. Not long after the Court's decision in *Brown*, the federal government began implementing a national transportation program that featured easy travel for white persons seeking homes in government-funded lily-white suburbs.²⁰

In 1961, Mr. Hill accepted a position in the Kennedy Administration to combat segregationists' use of government to further housing segregation. He achieved limited success by helping to persuade President Kennedy to issue Executive Order 11063, which, according to Mr. Hill, "face[d] the government in the right direction."²¹

Despite the valiant efforts of Mr. Hill and others, elements of the government's segregated housing master plan persist to this day. For example, in *Miller v. Dallas*,²² plaintiffs alleged that the City of Dallas practiced race discrimination in the delivery of municipal services. In *Miller*, the trial court stated:

Plaintiffs have adduced evidence that through the 1940s, while the City of Dallas was still part of a segregated society, the City adopted racial ordinances that prohibited Caucasians and African-Americans from living in areas populated by the other group. . . . [D]uring the 1940s, the City viewed racial segregation as a legitimate policy goal in making the types of decisions

that plaintiffs challenge . . . (memorandum from City Plan Engineer referring to “Negro Subdivision Development,” development of a “real good negro area,” and “a real good subdivision that was sold out to negroes very quickly”). Plaintiffs have cited numerous examples of other evidence, some referring to decisions made by the City and its agents as late as 1993, that a reasonable trier of fact could find indicate a history of racial discrimination in policies toward minority communities.²³

The *Miller* plaintiffs used geographic mapping and other sophisticated technology to provide compelling proof that current segregated housing patterns were no more a natural sociological phenomenon than an elephant sitting on a flagpole.²⁴ In Dallas (and nationwide), government financed and mandated segregation. In such circumstances, segregated schools flowing from segregated housing are neither accidental nor natural.

Unfortunately, the current Supreme Court seems to accept the idea that massive housing segregation in the United States is merely an example of “demographic shifts,” and that such shifts are a “natural” social occurrence. In *Freeman v. Pitts*,²⁵ the Court upheld a district court’s decision to partially relinquish judicial supervision after the trial court had concluded that the local school system had partially complied with the trial court’s mandate.²⁶ In *Freeman*, many whites left the southern part of DeKalb County, Georgia, as blacks moved in. The whites settled in the northern part of the county, leaving a number of schools in southern DeKalb County nearly all black and corresponding schools in northern DeKalb County overwhelmingly white. Writing for the majority, Justice Anthony Kennedy acknowledged:

[T]he potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.²⁷

Nevertheless, the Court also stated:

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive *demographic shifts*. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.²⁸

Compare the *Freeman* majority’s comments with those published by an FHA official in 1937 in the FHA’s Insured Mortgage Portfolio:

The tendency of the population of a city to divide itself into a number of subordinate communities has been termed “segregation.” Because the areas in which the group settles are the outgrowth of a natural tendency, rather than any plan or design, the areas are termed “natural areas” . . . Such areas have marked characteristics based upon racial interest, economic status, culture, or other like features . . . From a sociological standpoint, this type of segregation is considered neither undesirable nor unwholesome. As a matter of fact, the tendency to form groups enables a great multitude of people, with different ideas and cultures, harmoniously to make up a single city community.²⁹

In this historical context, the *Freeman* majority’s “demographic shifts” language is hauntingly familiar. Seventy years ago, using “gimmicks” including restrictive covenants, exclusionary zoning, and redlining, governments as well as private individuals planned and implemented the “demographic shifts” that resulted in segregated schools and neighborhoods. Today, federal, state, and local governments continue to channel taxpayer money to affluent, nearly all-white neighborhoods and schools created using the

FHA’s planning blueprints dating from the 1930s. Where the government sponsors and funds “demographic shifts” resulting in school segregation, the courts have the authority and the responsibility to intervene to ensure equality of opportunity under the Fourteenth Amendment’s Equal Protection Clause (as well as its Privileges and Immunities Clause).³⁰

Recently, the Court’s limited judicial worldview led it to reach the wrong result in the *Seattle School District* decision.³¹ In holding that the school systems of those two jurisdictions attributed too much weight to race in attempting to voluntarily desegregate, the majority overlooks continuing governmental subsidy of tried, true, and effective housing development schemes designed to maintain racial and class segregation.

**Courts have
the responsibility
to ensure equality of
opportunity under the
Fourteenth Amendment.**

The present challenges are great, but the opportunities are greater. Advocates who wish to further the legacy of Oliver Hill, Thurgood Marshall, Charles Hamilton Houston, and other human rights lawyers and activists need to educate the general public and courts about the government’s role (federal, state, and local) in perpetuating housing segregation and its conjoined twin of segregated education. In tandem with the human rights education campaign, litigation should carefully link government housing segregation with government sponsored segregated education. Painstaking fact investigation can help establish the necessary proximate causal nexus. For example, modern exclusionary zoning ordinances can (in part) be traced to the FHA manuals of the 1930s and 1940s mandating such zoning as a primary defense to exclude “inharmonious racial groups.”³² Today, without the explicit

racist language, similar ordinances continue to disproportionately exclude persons of color.

The government furnishes substantial financial subsidies to lenders, insures their loans, and licenses them to finance development of neighborhoods with exclusionary zoning ordinances. Frequently, today's segregated housing reflects state and local government action in implementing the federal blueprint (now over 60 years old) to perpetuate segregation. The government is similarly implicated in its relationships with lenders that make subprime loans to people of color with credit scores that merit conventional loans especially when the subprime loans help keep the borrowers bottled up in segregated communities.³³ How can such sustained, concerted government behavior stretching over decades not constitute state action? The myth that housing segregation is simply the result of "demographic shifts" exemplifies the national denial and blindness plaguing American society regarding issues of race and class. Stated less charitably, government-sponsored "white flight" is a segregationist's delight.

A final point: Another important facet of a comprehensive human rights agenda involves electing progressive local, state, and national legislators to vindicate equal educational opportunity. Legislators should take more effective legislative measures to eliminate government subsidies (e.g., loans, tax breaks, and insurance) for individuals and entities that use exclusionary zoning and other segregationist planning blueprints to exclude persons of color and economically disadvantaged individuals.³⁴

In the *Seattle School District* case, the Court argued for "narrow tailoring" of remedies for state violation of equal educational opportunities based on race.³⁵ In light of systematic government-sanctioned segregation, the United States Supreme Court's focus on narrow tailoring of remedies for race discrimination is like trying to cut down a giant redwood tree with a

butter knife. Segregated education and housing are in large part orchestrated by governmental entities. Simply put, *Brown* recognized that the Court has inherent equitable authority to fashion *effective remedies* for constitutional violations. Now is the time to use them. ■

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Endnotes

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25. *Freeman v. Pitts*, 503 U.S. 467 (1992).
26. *Id.* at 471, 490–91.
27. *Id.* at 490.
28. *Id.* at 495 (emphasis added).
29. "City Growth and Population Patterns," FHA INSURED MORTGAGE PORTFOLIO 1937 cited in Kimble, *supra* note 5 at 409.
30. For a more extensive argument on the scope of the Privileges or Immunities Clause, see Jonathan K. Stubbs, *Implications of a Uniracial Worldview: Race and Rights in a New Era*, 5 BARRY LAW REV. 1, 39–41 (2005).
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33. National Community Reinvestment Corporation, *supra* note 14 at 8–9.
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