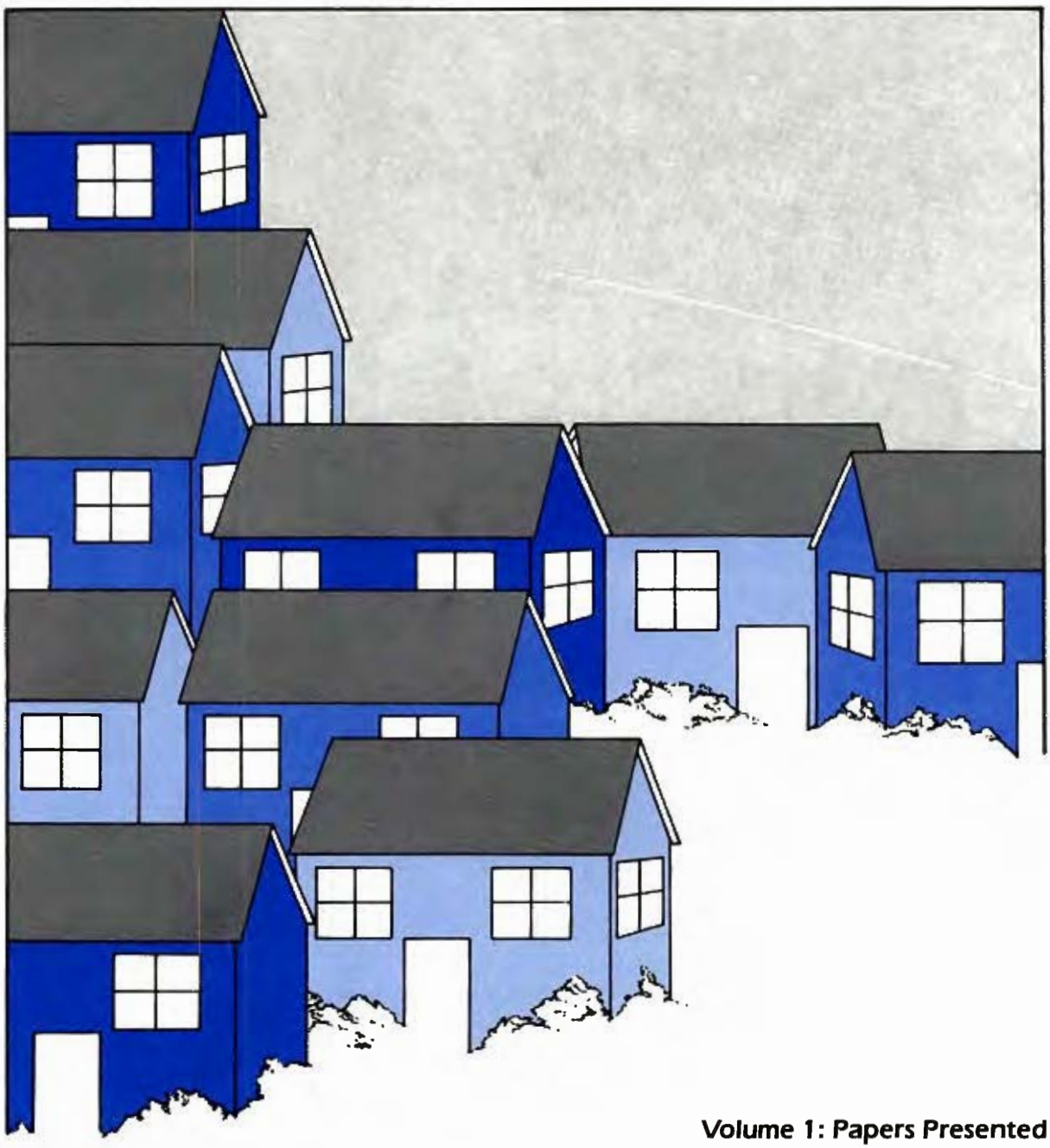
ISSUES IN HOUSING DISCRIMINATION

A Consultation/Hearing of the United States Commission on Civil Rights, Washington, D.C., November 12-13, 1985



Volume 1: Papers Presented

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- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
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CAUSES OF HOUSING SEGREGATION

The Causes of Housing Segregation

By Richard F. Muth*

Introduction and Summary

Residential segregation refers to the spatial separation of one group from another. It is sometimes said to result from discrimination. Discrimination, however, is used in economics to refer to price differences relative to marginal costs. Hostile attitudes or acts that are categorically rather than individually based are best termed prejudice. Black residential segregation may result from prejudice so defined and may or may not be associated with discrimination.

Measures of black segregation are based upon calculated differences in expected and actual numbers of black households summed over certain areal units of a city or metropolitan area. Expected numbers are the fraction of black households for the city or area as a whole possessing a particular characteristic multiplied by the total number of households possessing that characteristic and summed over all characteristics. Many segregation indexes have been calculated using block data. These allow less chance for within-unit segregation than data for larger areal units. Most segregation indexes take the value zero if black and other households are distributed identically; unity, if blacks are perfectly separated from other households. Their value typically shows the proportion of black households that would have to be relocated to produce equality of residential distribution with other households.

Segregation indexes that have been calculated accord with casual observation in that they suggest that blacks are highly segregated. The typical value found for U.S. cities in 1960 was about 0.85. Moreover, in three-tenths of U.S. cities, the index was between 90 to 95 percent. Segregation indexes have been calculated for 10-year intervals extending back to 1940. It is difficult to judge from values for any given city whether or not segregation has declined. The average city showed a decline of from 85 to 80 percent between earlier years and 1970. In half of the 100 or so cities for which 1940 to 1970 values of segregation indexes are available, I see no obvious decline in the value of the index.

Segregation is sometimes ascribed to income differences between black and white households. However, when segregation indexes of the kind described above are standardized for income, values of 0.5 to 0.7 rather than 0.8 are found. This suggests that black segregation is only partly accounted for by income differences.

Black segregation is quite commonly attributed to acts by owners or managers of rental property, by real estate agents, or by mortgage lenders. The first of these are said to refuse to show vacant apartments to blacks. If they did as alleged because of a unique aversion to dealing with blacks not shared by the rest of the community, units in the building in question would be vacant a greater than average period of time. The rental income received from the building would thus be smaller than it would

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otherwise be. Consequently, the owner of the property would have an incentive to change managers or to sell his interest in the building to someone without his aversion to dealing with blacks. Similar considerations apply to real estate agents who fail to show houses for sale or to mortgage lenders who refuse to lend to blacks.

Governmental bodies are also alleged to have contributed to black segregation. Racially restrictive covenants in deeds have been legally unenforceable since 1948. The Federal Housing Administration practices that many have stated contributed to black segregation were presumably eliminated by President Kennedy over 20 years ago. Yet, black segregation has shown little decline. Site selection for public housing or freeways has been said to have been racially motivated. As in the case of private behavior, however, acts by those in government not in accordance with the wishes of a majority of the electorate may have adverse consequences for them.

The best explanation for the residential segregation of blacks, in my judgment, is that whites are willing to pay more for housing in the vicinity of other whites than blacks are. Consequently, areas that are largely white remain so or become more so as white buyers outbid blacks for vacant dwelling units. The hypothesis that segregation results from market offers to rent or buy is consistent with a variety of other segregation of land uses. Among these are the segregation of other ethnic minorities in various times in U.S. cities. In some cases, however, members of these minorities may have preferred segregation from the native-born population, while blacks would appear to prefer integration with whites. Other instances of segregation that can be explained along the lines suggested above are Protestants and Catholics in Northern Ireland, Christians and Muslims in Lebanon, and clusters of various types of business firms in U.S. cities.

The behavior of owners and managers of rental property as well as real estate agents and mortgage lenders is readily understandable in terms of the hypothesis regarding black residential segregation suggested above. If whites offer higher rentals to live among other whites, the maximum rentals white tenants would offer will fall if a black household moves into a building. Either rental rates to white tenants would have to fall or dwellings would remain vacant once vacated. In either case, the rental income from a building into which black tenants have moved would fall. Along similar lines, real estate agents might lose future business by showing houses for sale in white neighborhoods to blacks. Mortgage lenders might anticipate greater turnover among dwellings occupied by blacks in largely white areas, and thus that lending to blacks under such circumstances would be more costly than average.

There is little reason to believe that the shapes of segregated black residential areas are determined so as to minimize the length of the boundaries separating these areas from others. Rather, the shapes of these areas are best explained, I believe, by the historical growth process. Areas of a given type of residential land use tend to extend radially from the city center, and expansion outward along radial lines is easiest when the black population grows. It is frequently said that segregation increases the cost of housing to blacks. The hypothesis suggested above, however, implies that if the black residential area is not growing, housing costs are likely to be lower in the black residential area than in the white. The best empirical studies fail to demonstrate that blacks pay appreciably more for housing of comparable quality than whites do.

My analysis suggests that a better enforcement of existing legislation such as Title VIII of the Civil Rights Act of 1968 is not likely to reduce black residential segregation. For, although stronger enforcement may reduce the incidence of certain types of behavior, it is unlikely to prevent white families from moving out of integrated neighborhoods. Even more important, it cannot force white households to move into such neighborhoods. In my judgment, the only way to reduce or eliminate black residential segregation is through increasing the amounts either white or black families will offer for housing in integrated neighborhoods.

The Facts of Black Residential Segregation

In this section I shall summarize briefly measures of the residential segregation of Negroes or of blacks from the rest of the population. These measures are useful for two purposes. First, they document the extent of black segregation in U.S. cities. Not surprisingly, they reveal that blacks are highly segregated from other residents of U.S. cities. More important, perhaps, these measures enable one to form a judgment as to changes over time in the intensity of black segregation.

Before discussing measures of segregation, however, it is necessary to define carefully what is meant by it and by related terms. Residential segregation refers to the spatial separation of the residences of members of a group from those of others. Now, of course, even if households were scattered at random among residences in a city without regard to race, some differences in residential distribution would occur purely by chance. To be meaningful, segregation would have to be defined as more spatial separation of residences than would occur purely by chance.

Segregation is sometimes said to result from discrimination. The latter is taken to mean one of any number of hostile attitudes or acts based upon category rather than upon individual merit. I prefer to use the term prejudice for such attitudes or acts, however. In economics, the term discrimination has a narrow, technical meaning. It may mean either differences in product prices relative to their marginal costs or differences in factor prices relative to marginal productivities. Reserving the term discrimination for the latter, residential segregation need not be associated with discrimination in housing, as I will argue later on. Whether or not residential segregation results from prejudice is another question, the answer to which I shall defer until later.

Most measures of black residential segregation are based upon the difference between an "expected" and the actual number of black persons or households summed over a city's areal units. There are several ways to define an expected number. One, which is most commonly employed, is to take as the expected number of black households the fraction of the city's black households multiplied by the number of households in the areal unit in question without regard to race. Such, of course, is the actual number of black households that would inhabit the areal unit if the former were distributed uniformly over the city.

Expected numbers are sometimes defined so as to standardize for some factor such as income whose average value differs as between black and other households. Suppose, for simplicity, that households may be divided into two classes by income, high and low. The expected number of high-income blacks in an areal unit would then be the fraction of high-income blacks in the city as a whole multiplied by the number of high-income households in the areal unit without regard to race. The expected number of low-income blacks would be similarly defined. The expected number of blacks would then be the sum of the expected numbers in the two categories by income. Such a definition, of course, readily generalizes to a larger number of income classes.

Expected numbers so defined can and have been defined for a number of different kinds of areal units. Among these are the block, the census tract, and the neighborhood. Blocks, of course, are composed of the residences enclosed by the same set of streets, usually four. Census tracts are combinations of adjacent blocks that are more or less similar on the basis of a variety of characteristics of residences and their inhabitants. Neighborhoods may be defined as aggregates of adjacent, more or less similar census tracts.

Presumably, the smaller the area over which expected and actual numbers are compared, the more accurate the measure of segregation. This is the case because the smaller the area, the less the likelihood that within-unit segregation exists. Data have been available for blocks for a longer period of time than for census tracts, so that comparisons over time are facilitated when using block data to calculate measures of segregation. However, the coverage of a metropolitan area by block data has increased over time. Consequently, comparison of measures made at different times may be distorted by the fact that these measures refer to a differing areal extension over time.

Indexes of black segregation are most usually the summation of the difference between the expected and actual number of black persons or households over all areal units for which the expected number is at least as large as the actual divided by the total of all blacks. (The sum over all areal units of expected minus actual black households would be zero, of course, regardless of the degree of segregation. As an alternative to summing only over those units for which the deviation is not negative, one might sum differences without regard to sign or squared differences.) For an index so defined, a value of zero would mean an identical residential distribution of blacks and all others. A value of unity would mean perfect separation of black from other households. Stated differently, a unit value of the segregation index would mean that all areal units were occupied either wholly by blacks or wholly by others. More generally, a segregation index as defined above is equal to the proportion of blacks who would have to be moved to achieve an identical distribution over areal units with all other households.

It is difficult to find indexes covering a time period sufficiently long so that a firm judgment may be formed about changes in the intensity of black segregation. The compilation covering the longest time period of which I am aware is that made by Kain (1985). Kain shows indexes for Chicago, Evanston, Cleveland, and for three cities in the San Francisco Bay area for census years from 1940 to 1980. The values he presents suggest to me that the intensity of black segregation has remained essentially unchanged during the post-World War II period in Chicago and Cleveland. For San Francisco and Berkeley, there is a sharp decline from 1950 to 1960, following which the indexes show little apparent trend. Evanston and Oakland show persistent declines over the postwar period, the sharpest declines having come since 1970.

Segregation indexes for nonwhites for census years 1940 through 1970 are presented by Sorensen, Taeuber, and Hollingsworth (1975) for 109 U.S. cities. The mean of these indexes is virtually constant at about 85 percent from 1940 to 1960 and falls to about 80 for 1970. As I interpret the data for individual cities, in only about half of them is there any indication of an appreciable decline. Since these indexes refer to nonwhites rather than blacks, they may not be very reliable indicators for cities with sizable Asian populations.

From the data cited above, the most reasonable inference is that black segregation has declined, but only marginally in recent years. The typical decline in the cities cited by Kain is of the order of from 80 to 70 percent, while for the Sorensen, Taeuber, and Hollingsworth data, it is from 85 to 80 percent. However, with observations for only 4 or 5 years, it is quite difficult to judge whether the trend is indeed downward. The residential segregation of blacks would appear to stand in stark contrast with reductions in black segregation in employment, public facilities, and education that have occurred in the past 25 years.

Inadequate Explanations of Segregation

In view of the marked progress in other aspects of race relations that has taken place in the past 25 years, the apparent persistence of black segregation in U.S. cities is quite surprising. One of the reasons for its persistence, perhaps, is that the reasons for black segregation are not well understood. In consequence, efforts to reduce it have proven unsuccessful. In this section of the paper, I wish to discuss many common explanations of black segregation and why I think they are deficient. In the following section, I will discuss what I believe to be a better explanation for residential segregation by race.

A common explanation for black segregation is that it arises from characteristics other than, but associated with, race. Among the principal of such characteristics is income. It is well known that the incomes of black families are lower on the average than those of other families. It is also believed that income is an important determinant of residential location, especially when comparing central-city and suburban residences. Consequently, many have mistakenly inferred that concentrations of black families, especially in poor-quality central-city housing, result from income differences.

There are several reasons why the belief that income differences account for black segregation is mistaken. First of all, in many U.S. cities, separate black and white low-income residential areas have existed at various times in the past. The city of Chicago provides an excellent example of this. For many years, the area extending south from the Loop to the east of State Street was inhabited largely by blacks; the area west of State Street, by whites. Moreover, many instances of suburban concentrations of blacks—often of relatively low income—have existed in metropolitan areas of this country.

My earlier research, Muth (1969), strongly suggests, of course, that income is one of the principal correlates of dwelling unit condition. However, it would appear that dwelling unit condition adapts to the income level of its inhabitants rather than the other way around. Moreover, I fail to find any tendency for a higher proportion of black households to inhabit poor-quality housing once income differences are controlled.

Furthermore, popular beliefs as to income differences as between the central city and its suburbs are greatly exaggerated. It is probably not an exaggeration to state that many believe that central cities contain only the poorest—and suburbs only the richest—of an urban area's families. Some are doubtless aware of higher income districts in central cities such as Georgetown in the Washington, D.C., area. Few, however, ever consider the lower income suburban enclaves that most metropolitan areas possess. Yet the differences in average income levels between central cities and their suburbs are on the average quite small. Data in the 1980 census indicate that the average income of white, central-city

families was about $20,100 in 1979, as compared with $23,700 for white suburban families. The difference is only about 16.5 percent, considerably smaller than the difference in average income of blacks and other families.

The strongest evidence against the income difference explanation for black segregation comes from segregation indexes that standardize for income. Among the best of these are those in Zelder (1970). Zelder calculates segregation indexes for Chicago, Kalamazoo, Detroit, and Rochester for 1960 that are standardized for income and for housing expenditure. The latter, Zelder argues, may be a more reliable indicator of longrun income than current income. Zelder finds values of from 0.5 to 0.7, slightly higher ones for Standard Metropolitan Statistical Area (SMSA) than for city census tracts. Although somewhat lower than values cited in the last section for indexes not standardized for income, they clearly indicate that income alone is responsible for only a part of black residential segregation.

Black residential segregation has also been ascribed to a variety of practices by private individuals and firms and to acts by various governmental units. Most of the alleged practices are unsavory at best. Yet those who so argue almost invariably make no attempt to show why such practices are in the interests of those alleged to be engaging in the activity. Moreover, in many cases the alleged behavior can readily be seen to be against the interests of those said to engage in it. As an economist who accepts the hypothesis that people, and especially business firms, act in their own best interests, I find it difficult to take such explanations very seriously.

An excellent example is provided by the classic assertion that segregation results from a refusal by landlords of largely white-occupied buildings to show vacant apartments to prospective black tenants. If landlords were to do so because of an aversion to dealing with black tenants, they would experience a higher level of vacancies in the buildings they manage than they otherwise would. As a result, rental collections and thus the net income received from their buildings would be lower. In effect, the market would penalize such landlords for their alleged behavior. Moreover, other managers or owners without an aversion to dealing with black tenants would be able to earn higher incomes from the same buildings. Consequently, one would expect owners to change managers or to sell their buildings to others.

Much the same can be said about real estate agents who fail to show houses for sale in white areas to black potential buyers. Those agents who do so because of an aversion to dealing with black buyers would make fewer sales on the average than those agents who have no such aversion. Agents who have no aversion to dealing with blacks presumably earn incomes that are just equal to those that could be earned in alternative occupations. Agents averse to dealing with blacks, therefore, would earn lower incomes than in alternative occupations. They thus could be expected to leave real estate and to go into other lines of work. Moreover, those with an equity interest in real estate agencies would have an incentive to sell out their interest to others.

Mortgage lenders, too, have been held responsible for black segregation. Lenders are said variously to make loans to black borrowers only when they live in black areas and to fail to loan funds for construction to developers of integrated housing projects. As is the case with landlords and real estate agents, the motives for their alleged behavior are rarely stated by their accusers. If motivated by a unique aversion to dealing with blacks not shared by the rest of the population, the consequences of their action would be similar to the acts of landlords and real estate agents discussed above. The earnings of their institutions, and thus, presumably, their salaries, would be lower than otherwise.

Other examples of allegations of private behavior leading to black residential segregation might well be given. I think it would merely belabor the obvious to do so, however. In every instance of which I am aware, the alleged behavior would result in lower income for the culprit whose acts are said to produce black segregation. Not only would the individual have the incentive to leave his current occupation and seek another type of employment not involving contact with blacks, he would also benefit from selling any equity interest in the business in which engaged to someone else.

Actions by government agencies at various levels are also widely alleged to have produced black residential segregation. Like the private behavior discussed above, the motives for those in government are rarely if ever discussed. And, as in the case of private behavior, acts by those in government not in accord with the desires of a majority of the electorate may have consequences that are adverse to those acting so as to produce segregation. Just as private individuals may earn lower incomes and

firms lower profits, those in government might well lose their positions. This may occur directly through the loss of elections by those in elective office or indirectly for those appointed to office through their replacement by elected officials. Moreover, many of the alleged actions of government officials have long since ceased, with little or no apparent impact on the extent of black residential segregation.

A good example of this last is racially restrictive covenants in deeds. Restrictive covenants included in deeds to properties by the developers of housing or other real estate are a means of ensuring the purchaser against certain kinds of changes in land use in parcels adjacent to his. Hence, they might be expected to increase the value of the development. As noted by Siegan (1970), they are an alternative to zoning and have been used as such in the Houston area. Covenants that would have restricted the sale of houses to blacks were sometimes included in deeds prior to 1948. In that year they were ruled unenforceable by the U.S. Supreme Court in the case of *Shelley* v. *Kraemer.* Despite this, black segregation has continued largely unabated.

The situation is similar as regards past practices of the Federal Housing Administration (FHA). A decade ago, a report of this Commission noted that for about 15 years the FHA Underwriting Manual warned against movement of members of a different race into neighborhoods. Whatever impact FHA practices may have had was presumably eliminated by President Kennedy's famous stroke of a pen in 1962. Yet, it is difficult to discern any marked changes in the intensity or patterns of black segregation since that time.

Site selection for public housing, for freeways, and for other public improvements is said to produce black residential segregation. I know of no systematic study to document the effects of such actions. One can well imagine, however, that public officials might use the building of a new freeway or an urban renewal project as an opportunity to demolish structures of which they might want to be rid. Although these structures may well have been black occupied, it is by no means obvious that their former residents must be relocated in segregated black areas. Similarly, one can imagine local housing authorities or city councils choosing sites in black areas for public housing projects. One suspects, however, that if they do so because of their own desires rather than the wishes of the electorate, they would be in danger of losing their offices.

Zoning and other regulations of local governments are also frequently said to maintain segregation of suburban areas. Regulations setting minimum lot sizes and construction standards make it more difficult for lower income families to acquire housing in such areas. Such regulations may well have the effect of excluding black families from some areas. The principal reason for such regulations, however, is probably to reduce the tax burden on higher income families who reside in such areas. For, with local taxes based to an important degree upon the value of property inhabited, homeowners would have the incentive to seek to exclude anyone who would live in less valuable housing than they, regardless of race. Many goods and services produced by local governments, education being a particularly important example, provide benefits for residents of the community that are essentially independent of income. Thus, if a family of below-average income for the community moves into it, the expenditures of the community must rise relative to taxes collected. This increases taxes on other residents of the community.

A More Defensible Explanation

Many of the practices discussed in the preceding section, whether of persons in the private sector or in government, may well occur. Without exception, however, I am convinced that they are but symptoms of the problem. All too often they have been viewed as the root of the problem, hence a likely target for legislation aimed at eliminating black residential segregation. That such legislation has had little success is not due solely to a lack of enforcement. Rather, I believe that the legislation is not directed to the real cause of black residential segregation.

In this section, I wish to state what I believe is the root cause of residential segregation in the U.S. I will then suggest other, similar phenomena with which this explanation is consistent. I will also explain practices that are said to contribute to black segregation and were discussed earlier in light of what I believe to be the root cause of segregation. I will also inquire into the matter of the location of black residential areas. Finally, I will inquire into the probable consequences of their residential segregation on house rentals and prices paid by blacks.

The basic reason for black residential segregation in my judgment is that whites are willing to pay more for housing in segregated white residential areas than

blacks are. Stated differently, whites prefer and are willing to pay more for segregation than blacks are willing to pay for integration. The willingness of whites to pay enough to outbid blacks for dwellings in largely white residential areas may well result from what I earlier called prejudice. Prejudice would imply that whites have an absolute aversion to living among blacks. However, whites may merely have an absolute preference for living among other whites. Whichever is the case, the housing market result would be the same—the development of segregated white and black residential areas.

To see why segregation occurs, consider the situation that would result from a random assignment of households to dwelling units without regard to race. Contrary to popular belief, a random assignment would not result in perfect uniformity in the distribution of white and black households. Rather, concentrations of varying intensity of white and black households would exist. Given such concentrations, if whites are willing to pay more for housing in the vicinity of other whites than are black households, it would be mutually profitable for some white and black households to exchange locations, for black households living in predominately white areas could sell the occupancy rights to dwellings they inhabit to white households and receive a larger sum than these rights are worth to them.

Now, of course, moving to a new location can be costly. The different valuations placed upon a dwelling in a predominately white area by white and black households may not be sufficiently large to lead blacks to sell out to whites. However, whites and blacks move for a variety of reasons other than the character of their neighbors. Among these are changes in the composition of the household, which can result from aging, death, or children leaving home, and changes in job location. When vacancies come about in predominately white residential areas, white households would typically offer more for the occupancy rights to these than would blacks. Over time, then, concentrations of white households would tend to become exclusively white; similarly, concentrations of black households would tend to become exclusively black.

In my judgment, it is not enough to argue merely that white sellers do not wish to sell to black buyers. In the first place, such an assertion does not provide any reason for the existence of segregated white and black residential areas. Nor does it explain segregation in areas of rental housing. Moreover; if some white sellers were averse to dealing with blacks, they might merely delegate the transaction to someone else without these aversions. Alternately, some persons not averse to dealing with blacks would buy from white sellers and sell to black buyers.

The explanation outlined above is consistent with a wide variety of phenomena other than black residential segregation in the U.S. Among these are the segregation of other ethnic groups in the U.S., segregation of religious groups outside the U.S., and the separation of various kinds of nonresidential land uses from each other and from residential uses. Let me explain why each of these occurs.

It has been widely observed that members of a variety of ethnic or racial groups have, at various times, tended to reside together in various U.S. cities. These have consisted in particular of immigrants into the U.S. It seems not unreasonable to believe that immigrants would tend to prefer and pay a premium to live among those of similar background and experience. In part this is because of language, in part because of proximity to particular institutions—churches or businesses such as food stores which sell items that might be otherwise difficult to obtain. Since there is little reason to believe that the native U.S. population would offer a premium for housing in the vicinity of such facilities, segregated ethnic areas would tend to develop. Once assimilated into the culture of this country, however, the premium offered for housing in ethnic neighborhoods would tend to decline, and such neighborhoods would tend to break up.

It has often been observed that black segregation is different from the segregation of other racial or ethnic groups. It would appear to be much more persistent over time, for example. Moreover, it does not appear to me that blacks are self-segregated in the sense that they offer more for housing in segregated black areas. Indeed, the only study of which I am aware that has tried to estimate the effect of one's neighbors on the prices blacks pay for housing has concluded precisely the opposite. Bailey (1966) concludes from examining the sale prices of houses in the Hyde Park area of Chicago that blacks would appear to prefer integration with whites, since the prices of black houses adjacent to white neighbors are higher than otherwise.

Not only have segregated areas of ethnic groups tended to develop in the U.S., but segregation among religious and other groups in other countries

is not at all uncommon. As we have been made aware by television coverage of the "troubles" in Northern Ireland, Protestants and Roman Catholics tend to live in separate residential areas of Belfast and other cities there. Given historic animosity between the two groups, to say nothing of recent violence, one would expect that both Protestants and Catholics would be willing to offer more for a given dwelling unit if one's neighbors were of the same religious group than otherwise. The situation is quite similar in Lebanon, where in Beirut and other cities, Christians and Muslims live in spatially separate residential areas.

There are many examples of segregated areas of nonresidential land users in U.S. cities. One of the best known is the garment district of New York City. The manufacture of women's garments involves a high degree of specialization by firm. It is quite common to see racks of semifinished garments being rolled down the street, presumably to the next stage of production, in the district. Because of this specialization, it is advantageous for a garment manufacturing firm to be located in the vicinity of other such firms, and garment firms would offer a premium for loft or other space in the vicinity of other garment firms. It would be to no particular advantage for nongarment firms to be located adjacent to garment manufacturers, however. The amount offered for space by nongarment firms would presumably be unrelated to location adjacent to garment firms. Thus, a segregated garment district would tend to develop.

Many other examples of such phenomena could be cited. Automobile dealers are frequently located near other such dealers along major streets or highways. Since people usually "shop" when looking for a new auto, the sales of any given dealer will tend to be higher if located in the vicinity of other auto dealers. Much the same kind of phenomenon exists as regards retail stores in shopping centers. In either case, firms of a given kind will offer a premium for retail space adjacent to dealers of a similar kind. To mention but one other example, most major U.S. cities have entertainment districts, of which North Beach in San Francisco and Rush Street in Chicago are, or were when I was last there, good examples. People frequently visit more than one establishment when enjoying a "night on the town." Consequently, the sales of any given establishment will be higher in the vicinity of other purveyors of entertainment. It is of no particular advantage to other nonresidential land users to be adjacent to entertainment firms, and doubtless annoying to the inhabitants of residential real estate. Consequently, market rental or price offers lead to segregation of entertainment firms.

Most of the kinds of behavior discussed above under the heading of inadequate explanations become quite understandable in the light of the hypothesis about segregation offered in this section. Consider the refusal of landlords or managers of white-occupied rental property to show vacant units in an apartment building to blacks. I argued earlier that, if this refusal were due to a unique aversion not shared by the rest of the white community, such action would reduce the income from the building. However, if white tenants prefer to live among other whites and will offer higher rentals to do so, the rents white tenants would offer would fall if a black tenant were to move into the apartment building. Either rentals would have to be reduced, or as white tenants move from the building, units would remain vacant. In either case, the rental income from the building would fall.

In light of the hypothesis offered here, the alleged behavior of real estate agents and mortgage lenders discussed earlier similarly becomes understandable as an income-maximizing response to conditions they face. Real estate agents who show properties to blacks in white residential areas might well be faced with the loss of future listings from residents of the area. Mortgage lenders might well expect that the length of time a black would stay in an all-white area would be shorter than average, reducing the length of time over which the fixed costs of making a loan could be amortized. Lenders might also expect that turnover of residents in integrated housing projects would be greater than in other projects, making lending in these more costly.

The behavior of governmental officials similarly becomes more understandable if whites offer more for dwellings in segregated white areas than in integrated ones. Consider public housing projects. Local housing authorities could receive more in rentals from the projects they manage by segregating white and black tenants. Higher rentals would support larger staffs and operating budgets, hence provide greater prestige for local housing authority officials. These same authorities would also face opposition to the location of projects in white neighborhoods if white residents judge they would be occupied by blacks, for black residents in the area

would reduce the market values of adjacent residential units. Local officials concerned over reelection would doubtless seek to avoid antagonizing voters by taking actions that would reduce the value of their properties.

It is tempting to argue that market forces will tend to produce segregated areas of disjointed land users whose shapes are such as to minimize the perimeters of these areas; for, along the boundaries separating different segregated land users, the rentals or sales prices of parcels of real estate will differ from those in parts of the segregated area that are more remote from the boundary. Consider the case of segregated white and black residential areas. If whites prefer segregation from blacks, the prices of white-occupied dwellings will be higher in areas that are remote from the black residential area than in blocks adjacent to it. Minimizing the length of the boundaries separating black and white areas would minimize the aggregate discount in values incurred by the owners of white-occupied dwellings adjacent to the black residential area or maximize the value of all white-occupied properties. Minimizing the length of boundaries would thus provide opportunity for profit to residential developers or to others.

There are at least two difficulties with this hypothesis. Earlier I described how segregation itself is the outcome of market processes. I know of no market process of which segregated areas with minimum perimeters would be the result, however. One would have to suppose that institutions such as life insurance companies would buy up large tracts of a city and relocate site users so as to increase the aggregate of property values, yet I know of no instances of such actions. Second, in many cities with with which I am familiar, segregated white and black areas tend to be radial or wedge shaped in nature. Yet, it has been shown, by Loury (1978), that perimeter-minimizing areas in an idealized city are lens shaped, bounded by the urban-rural border and another circle.

A possible explanation for the radial nature of segregated residential areas is the historical growth process. Just as white households will typically offer more for housing in the vicinity of other whites, so higher income households typically offer more for housing in the vicinity of other higher income households. As a city grows, areas of high- and low-income households expand most readily outward in the same direction from the center as existing neighborhoods. This is because it is easier to build on the periphery of existing areas than to convert existing buildings along the boundary separating neighborhoods of different income groups. People of a given income group tend to occupy dwellings of similar size and value. For this reason, residential structures tend to be of similar value along given radials from the center of the city.

Black residential areas tend to expand outward along their boundaries as well. One reason for this is the fact that prices of white-occupied dwellings tend to be lower along the boundary of the black residential area, as was noted earlier. Another is that information for the black population is probably more readily available on conditions adjacent to the black area than in areas remote from it. The specific direction taken by the black expansion, however, is likely to be dependent upon that for which the existing housing stock is most suitable. Brueckner (1977) found that factors related to the character of the existing housing stock, such as average rent and age, are important determinants of residential succession. If dwellings of similar character are located along given radials from the city center, one would thus expect the expansion of a black residential area to proceed radially from the center.

It is frequently said that black segregation increases the cost of housing to blacks. The hypothesis offered here suggests, however, that the opposite would be the case. I argued earlier in this section that the prices of white-occupied dwellings would be lower along the border separating white and black residential areas. In like manner, if blacks would pay more for housing in the vicinity of whites, black-occupied dwellings would be higher priced along the white-black border than in areas remote from whites. When the relative sizes of white and black areas remain unchanged and neither is encroaching upon the other, the prices of white- and black-occupied housing along the border separating the two groups would have to be the same. Otherwise, it would be profitable for property owners to convert from white to black occupancy or the reverse. If prices in the white interior—those parts of the white area that are remote from black residences—exceed those along the boundary, and vice versa in the black residential area, then prices in the white interior must exceed those in the interior of the black area.

Of course, earlier in the post-World War II period, black residential areas were growing relative to white areas. This growth would suggest that

prices of black-occupied properties along the boundary exceeded those that were white occupied. Under these conditions, housing prices for blacks may well have exceeded those for whites. A variety of studies has been done on the relation of housing prices paid by blacks to those paid by whites. I have examined what I believe are the better studies bearing on this question earlier, Muth (1974). Of these, all of which refer to conditions in the 1960s, three showed essentially no difference in the prices paid by members of the two groups. Two showed that blacks paid rentals that were of the order of 10 percent higher than paid by whites. One showed that the values of single-family homes were lower in the interior of the black residential area than in the white area. Taken as a whole, these studies fail to show that blacks pay appreciably more for housing of comparable quality than whites.

Measures to Reduce Black Segregation

No paper on a problem of public policy as important as that of black residential segregation would be complete without some comment on means of dealing with the problem. I very much wish that my analysis would suggest new, imaginative, and potentially useful ways of dealing with black segregation. It is with considerable regret that I must emphasize that it does not. If my analysis implies anything, it is that current attempts to deal with the problem are misdirected and bound to fail.

My understanding—and I must stress that I am an economist and not an attorney—is that the principal device currently being used for ending the residential segregation of blacks is Title VIII of the Civil Rights Act of 1968. The latter would appear to be aimed almost entirely at preventing the kind of private practices I discussed under the heading of inadequate explanations of segregation. I have already indicated there and in the following section that I believe that these actions are but symptoms of the real problem. Advocates of integration frequently allege that little progress has been made under Title VIII because its provisions haven't been enforced strongly enough. In my judgment, however, although stronger enforcement might well lead to a reduction in the incidence of the proscribed actions, it would have little impact upon the extent of black segregation.

Let me explain why. Consider real estate agents who refuse to show houses for sale in white neighborhoods to black buyers. If the penalties for refusing were great enough, real estate agents might well act differently, and some black families might buy houses in white neighborhoods who would otherwise not have. However, nothing in Title VIII, nor, indeed, in any legislation that I might imagine, would keep white families in areas into which the black families moved from selling their houses and moving. Even if current residents of the area were to judge the costs of moving to be sufficiently high to prevent them from doing so, people move occasionally for reasons quite unrelated, such as divorce, retirement, or change in job location. At such times, the price potential white buyers would pay for the house on the market would be influenced by the presence of black families and the judgment of buyers as to the future character of the neighborhood.

Now, there are many instances of one or a few black families living in what are essentially white neighborhoods. Similarly, there are many instances of a few white residents of largely black residential areas. What one does find, however, is that most blocks or neighborhoods are either largely white or largely black. There are few instances of genuinely mixed areas, and these may be in the process of transition from one state to the other. For an area that is integrated by enforcement of Title VIII, it would be necessary for whites to move into dwellings that are vacated by other whites in these integrated areas. Yet, if white families were willing to do so in significant numbers, the problem of black segregation wouldn't exist. Nor does it seem at all reasonable to me that white buyers could be forced to do so by legislation similar to Title VIII.

In my judgment, there are only two things that might be done to reduce black segregation. These are (1) to subsidize black families to live in white areas or (2) to subsidize white families to live in black areas. To a strict amateur in the ways of politics such as I am, the latter in particular would not seem very palatable politically. Yet, black segregation arises, I believe, because whites pay more for segregation than blacks would pay for integration. To counter this situation, one or both groups would have to be made willing to pay more for integration.

One means of doing so would be in the housing payment program proposed by the President's Commission on Housing. I understand that the Department of Housing and Urban Development has recommended a pilot program to test the proposal.

Under the program, lower income families would receive certificates or vouchers that could be used along with their own funds to purchase housing on the private market. Housing purchased with funds from the program would have to meet certain standards of quality. By making the value of the certificates larger for blacks who rent housing in largely white neighborhoods, some black families doubtless would be induced to move to white neighborhoods who would not otherwise do so. In like manner, some white families might be induced to move to largely black or truly integrated neighborhoods.

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The Residential Segregation of Blacks from Whites: Trends, Causes, and Consequences

By Reynolds Farley*

Here is a large group of people—a city within a city—who do not form an integral part of the larger social group. This in itself is not altogether unusual; there are other unassimilated groups. . .and yet in the case of the Negroes the segregation is more conspicuous, more patent to the eye, and so intertwined with a long historic evolution, with peculiarly pressing social problems of poverty, ignorance, crime and labor, that the Negro problem far surpasses in scientific interest and social gravity, most of the other race or class equations.

W.E.B. DuBois
The Philadelphia Negro, 1899

The future of our cities is neither something which will just happen nor something which will be imposed upon us by an inevitable destiny. That future will be shaped to an important degree by choices we make now. . . .
Within two decades, this division could be so deep that it would be almost impossible to unite:
a white society principally located in suburbs, in smaller central cities and in the peripheral parts of large central cities; and
a Negro society largely concentrated within large central cities.
The Negro society will be permanently relegated to its current status, possibly even if we expend great amounts of money and effort in trying to "gild" the ghetto. . . .
Report of the National Advisory Commission on Civil Disorders, 1968

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The Emergence of Racial Residential Segregation

The patterns of black-white residential segregation that are found in many metropolitan areas today date from the late 19th or early 20th century. Urban historians who describe northern cities in the post-Civil War era note that blacks were one of many groups concentrated in low-income areas, but that blacks who wished to do so and were financially able could live throughout the city. Spear (1967:7), for instance, asserted that a black ghetto did not exist in Chicago prior to the great migration of World War I. George Haynes, who thoroughly chronicled the growth of Detroit's black population, argued that no ghetto could be found in that city in 1908 and, as late as 1915, blacks lived throughout Detroit.[1] Constance Green (1967:127), in her history of black Washington, reported that for several decades after the Civil War, blacks lived in all parts of the city, even in the northwest quadrant.

Censuses were taken in such southern cities as Augusta, Charleston, and Jacksonville in the decades after the Civil War that provide detailed data about the residences of blacks and whites.[2] Although there were large racial differences in the type and quality of housing, measures applied to data from these censuses reveal that segregation levels were low compared to the present.

In the closing years of the 19th century, a Jim Crow system of segregation developed based on the premise that intimate social contact between the races was undesirable and would eventually weaken or destroy both races. Residential segregation was an important component of this systematic effort to isolate blacks and whites. It was accomplished in large part through a combination of real estate practices, intimidation, and legal regulations.

Real estate agents came to realize that their white clients did not want black neighbors so they turned black customers away. Green (1967:127) describes the situation in Washington. Mary Terrell, a black woman who was a linguist, an author, an Oberlin graduate, a member of the city's school board, and married to a *cum laude* graduate from Harvard, sought housing for her family in a white section of the city. No agent would sell or rent a house to them or to any other black unless the neighborhood already had a large black population. W.E.B. DuBois (1899:348–49) reports that by the early 1890s, Philadelphia real estate agents knew that blacks were confined to a small segment of the housing market, so they charged them excessive rents. Both Spear (1967:23–24) and Zunz (1982:375) describe the practices of real estate agents in Chicago and Detroit during World War I. Realizing that there was a growing black population confined to limited areas, they took units occupied by whites and raised rents precipitously. Once whites had been driven from these units, they were subdivided into small enclaves and rented to blacks. Different strategies were used by several real estate firms during the first decades of this century to define Harlem as a black ghetto.[3]

Violence or intimidation were frequently directed toward those blacks bold enough to enter or remain in white areas. DuBois (1899:349), for example, documents the hostility directed toward a black former foreign service officer who moved into a white Philadelphia neighborhood and toward a bishop of the AME church who moved into a house owned by the Episcopalian diocese but located in a white section. In Chicago, quite a few blacks lived in the Hyde Park community on the south side at the turn of the century, but neighborhood organizations intimidated blacks and removed them from the area.[4] Similar strategies were used to confine blacks to the ghetto in Detroit during World War I.[5] In both Cleveland[6] and Detroit, some prosperous blacks tried to move into white communities during the 1920s, but they often met violence, the confrontation involving Dr. Ossion Sweet being the most well-known event of this era.[7]

Jim Crow laws mandated segregation in almost all areas of public life, so it was only a small extension to legislate where people might live. In 1912 the Virginia Legislature gave cities the right to designate neighborhoods as either black or white.[8] Several Virginia cities and Atlanta[9] used laws of this type to isolate blacks and whites. Baltimore and Greenville passed a different type of segregation ordinance that designated individual blocks as avail-

[1] Zunz, 1982: 374–75.
[2] Taeuber and Taeuber, 1965: 45–53.
[3] Osofsky, 1963: chapters 7 and 8.
[4] Spear, 1967: 21–23.
[5] Zunz, 1982: 374.
[6] Kusmer, 1976: 167.
[7] Shogan and Craig, 1964: 20–21; Vose, 1959: 50–51; Conot, 1974: 300–303.
[8] Johnson, 1943: 173.
[9] Preston, 1979: 96.

able only to whites or to blacks. Since many areas in southern cities were racially integrated, problems developed in drawing up laws of this type. Richmond and Winston-Salem, for example, effected *de jure* residential segregation when city councils defined the racial composition of a block on the basis of which race was a majority on the block. The minority race did not have to move away, but no additional members of the minority group could move into the block.[10]

In 1917 the Supreme Court overturned laws of this type.[11] The specific case involved a Louisville statute that specified that only whites could live in a certain neighborhood. A white homeowner sold his property to a black, and the Court upheld the sale on the basis of property rights, not civil rights; that is, on the grounds that such ordinances denied owners the prerogative of disposing of their property as they wished.

Southern cities attempted to pass acceptable Jim Crow laws, but they generally failed to pass court tests. Eventually, the preferred method became the use of restrictive covenants. Around the turn of this century, as developers began to build several blocks or entire neighborhoods, they would include clauses in deeds saying that the property could never be owned or occupied by blacks, Asians, Jews, or any other group deemed to be undesirable. The Supreme Court viewed these as private agreements between buyers and sellers and, in a 1926 decision, claimed they involved no violation of civil rights.[12]

The NAACP and many civil rights organizations employed a litigation strategy to oppose residential segregation.[13] A major victory was achieved in 1948 when the Supreme Court ruled that neither Federal nor State courts could enforce restrictive covenants,[14] a precedent for other challenges to residential segregation. In the 1960s, the National Association of Real Estate Boards changed its code of ethics, which had supported residential segregation by suggesting that it was unethical to introduce a minority group to a neighborhood where they were not already resident. During President Kennedy's administration, those regulations that called for residential segregation in federally funded housing were removed, and many municipalities adopted open housing laws.[15] The greatest legal change occurred in 1968 when Congress passed the Fair Housing Act, which bars racial discrimination on the part of any parties involved in the sale, rental, or financing of most housing units.[16]

Trends in Residential Segregation

The absence of racial data at the city block or census tract level makes it difficult to measure segregation trends precisely for many cities or metropolitan areas prior to 1940. Stanley Lieberson (1963) was able to investigate trends in 10 northern cities between 1910 and 1950. He distinguished the native-born white population, the foreign-born white population, and blacks. In 1910 blacks were somewhat more segregated residentially from native-born whites than were foreign-born whites. Over time, the segregation of foreign-born whites from native-born whites decreased substantially, while blacks became more segregated from both foreign- and native-born whites.[17] The Taeubers (1965:54) summarized trends for the first part of this century:

> The most consistent findings in these historical investigations for various cities is a sharp increase in residential segregation between 1910 and 1930 in every city, both northern and southern, for which we have data.

Since 1940 the decennial censuses have given us information about the racial composition of local areas that permits a fine-grained analysis of trends in segregation. The findings reveal a high level of racial segregation with no more than modest changes in recent decades. Outside the South, black-white residential segregation reached peak levels in 1950; in the South, in 1960. Since these dates, there have been small declines in segregation in most cities in all regions of the country.[18]

We might expect substantial reductions in residential segregation during the 1970s because the Fair Housing Act was effective for the entire decade, because of the improved economic status of some blacks (Farley, 1984) and because of more liberal

[10] Johnson, 1943: 174.
[11] Buchanan v. Warley, 1917.
[12] Corrigan v. Buckley, 1926.
[13] Vose, 1959.
[14] Shelley v. Kraemer, 1948.
[15] Helper, 1960: chapter III.
[16] Lamb, 1984.
[17] Lieberson, 1963: table 38; 1980: p. 291.
[18] Taeuber and Taeuber, 1965: chapter 3; Sorensen, Taeuber, and Hollingsworth, 1975: table 2; Van Valey, Roof, and Wilcox, 1977: table 2; Taeuber, 1983.

racial attitudes on the part of whites, especially with regard to social contact with blacks.[19] Table 1 shows information indicating change in segregation for those 17 metropolitan areas that had one-quarter million or more black residents in 1980. These locations included approximately three-fifths of the Nation's metropolitan black population in 1980.[20] The measure of segregation is the index of dissimilarity, which takes on its maximum value of 100 when all blacks and whites live in racially homogeneous areas. Were individuals randomly assigned to their residences, this measure would approach its minimum value of zero. The value of this index is unaffected by the relative size of the two groups.[21] The numerical value indicates the minimum proportion of either blacks or whites who would have to move from one area to another to eliminate racial residential segregation. Data for city blocks were used in both computations. Separate residential segregation scores are shown for the entire metropolitan area and for the central city.

As the average index of dissimilarity in 1980 was about 80, a pattern of extensive residential segregation can be observed in these locations. Cleveland, Detroit, and Chicago have unusually thorough patterns of black-white isolation, since the segregation scores in those metropolitan areas approached 90 in 1980. Scores were lower than average in the San Francisco and Washington metropolitan areas.

The expectation of substantial decreases in segregation during the 1970s was not fulfilled. It is difficult to specify what constitutes a major decline, but a drop of 10 points during the decade was recorded in only two metropolises and three central cities. In five metropolitan areas and six cities, the residential segregation of blacks either increased between 1970 and 1980 or fell by less than three points. Comparable segregation scores available for these central cities in 1960 reveal that the average change in the 1960s was a decline of three points compared to the five-point drop in the 1970s.[22]

Between 1970 and 1980, the black population of central cities grew at a low rate, while in suburban rings, the black population was increasing at a rate about three times that of the white population.[23] The proportion black in the suburban rings increased from 4.8 to 6.1 percent; in the cities, the change was from 20.6 percent to 23.4 percent.[24] In 1980, 20 percent of the black population, compared to 42 percent of the nonblack, lived in the suburbs. Is this suburbanization of blacks leading to residential integration?

A definitive answer awaits more complete exploitation of the 1980 census data. There is considerable evidence showing that blacks who moved to the suburbs during this decade entered houses and neighborhoods largely occupied by whites in 1970.[25] Nevertheless, an investigation of racial change in some 1,600 individual suburbs in 44 metropolitan areas found that black-white residential segregation in suburban rings in 1980 was just about as great as in 1970.[26]

These seemingly contradictory findings may be reconciled by considering the process of black suburbanization. A very detailed analysis of changes in New Jersey in the 1970s found that many blacks were moving into the suburbs; however, they were generally entering neighborhoods that either already had black residents or were close to concentrations of black populations.[27] Thus, a process of racial transition was occurring in New Jersey suburbs as blacks—often of middle-class status—replaced whites, a process similar to that which occurred in many central cities after World War II.

The uniqueness of black-white residential segregation may be seen by analyzing segregation patterns for two other racial or ethnic groups who have come to the United States recently: Hispanics and Asians. They differ from blacks in that their population have grown more rapidly and they have entered most cities in large numbers since the 1960s. During the 1970s, the black population grew 17 percent while the corresponding figures were a 61 percent rise for Hispanics and 142 percent for Asians.[28] About one-third of the Hispanic population was born outside the United States, and more than one-half of the Asians are foreign born; indeed, one-

[19] Sheatsley, and Greeley, 1978.
[20] U.S. Bureau of the Census, 1983a: tables 38 and 69.
[21] Zoloth, 1976.
[22] Data are available for most of these cities going back to 1940. See, Taeuber and Taeuber, 1965: table 4.
[23] Long and DeAre, 1981: table 1.
[24] These numbers and proportions refer to a constant set of metropolitan areas; namely, those defined on the basis of the census of 1970. For further information, see: Long and DeAre, 1981.
[25] Spain and Long, 1981.
[26] Logan and Schneider, 1984: table 1.
[27] Lake, 1981.
[28] U.S. Bureau of the Census, 1983a: tables 38 and 41; 1973: table 190.

TABLE 1
Measures of Racial Residential Segregation in 1970 and 1980 for Those Metropolitan Areas Containing 250,000 or More Blacks in 1980*

	Black population in 1980 (thousands)	Metropolitan areas 1970	1980	Change	Central city 1970	1980	Change
Atlanta	499	82	77	–5	92	86	–6
Baltimore	557	81	74	–7	89	86	–3
Chicago	1,428	91	86	–5	93	92	–1
Cleveland	346	90	88	–2	90	91	+1
Dallas-Fort Worth*	419	n.a.	76	n.a.	96	83	–13
Detroit	891	89	87	–2	82	73	–9
Houston	529	78	72	–6	93	81	–12
Los Angeles	944	89	76	–13	90	81	–9
Memphis	364	n.a.	n.a.		92	85	–7
Miami	280	86	77	–9	n.a.	n.a.	
New Orleans	387	74	70	–4	84	76	–8
New York	1,941	74	73	–1	77	75	–2
Newark	418	79	79	0	76	76	0
Philadelphia	884	78	77	–1	84	88	+4
St. Louis	408	87	82	–5	90	90	0
San Francisco-Oakland**	391	77	68	–9	70	59	–11
Washington	854	82	69	–13	79	79	0
Average	679	82	77	–5	86	81	–5

*These indexes were computed from block data and compare the distribution of blacks to all nonblacks in 1980 or blacks to whites in 1970. The measure is the index of dissimilarity, which equals 100 if all blacks and all nonblacks live in racially homogeneous blocks.
**Segregation indexes refer to the central city with the larger black population: Dallas and Oakland.
Sources: Karl Taeuber, "Racial Residential Segregation, 28 Cities, 1970–1980," University of Wisconsin-Madison, Center for Demography and Ecology, CDE Working Paper 83–12, table 1; Karl Taeuber, Arthur Sakamoto, Jr., Franklin W. Monfort, and Perry A. Massey, "The Trend in Metropolitan Racial Residential Segregation," paper presented at the 1984 meetings of the Population Association of of America, Minneapolis, May 5, 1984.

quarter of the Asians counted in the census in 1980 had entered the country in the last 5 years.[29]

We might expect that many Hispanics and Asians would settle in immigrant enclaves and thereby be highly segregated from the non-Hispanic white population just as blacks are, but this is not the case. Levels of Asian-white and Hispanic-white segregation are quite low compared to that of blacks. This comparison is shown in table 2, which refers to those metropolitan areas that had 250,000 or more black residents in 1980. For this investigation, the non-Hispanic white population was defined as people who specified their race as white and then indicated they were not of Spanish origin. Hispanics are people who said they were white or "other" by race and that their origin was Mexican, Puerto Rican, Cuban, or other Spanish. Asians are people who selected an Asian or Pacific Islander response to the race question.[30] These calculations were made with data for census tracts, which are urban areas

[29] U.S. Bureau of the Census, 1984a: tables 253 and 254.

[30] The census of 1980 included one question asking people to identify their race, another asking them whether they were of Spanish origin, and a third question, asked of a 19 percent sample, requested that they identify their ancestry or ethnic origin. Information from the race and the Spanish-origin questions was used to classify the population into four distinct groups:

Non-Hispanic Whites—white by race not Spanish by origin
Hispanics—white or "other" by race and Spanish by origin
Blacks—black by race, including some few individuals who identified their origin as Spanish
Asians—Asian or Pacific Islander by race, including some few individuals who identified their origin as Spanish

TABLE 2
Measures of the Residential Segregation of Blacks, Hispanics, and Asians from Non-Hispanic Whites, Metropolitan Areas in 1980*

	Segregation of three groups from non-Hispanic whites		
	Blacks	Hispanics	Asians
Atlanta	77	31	39
Baltimore	74	38	44
Chicago	88	64	46
Cleveland	88	55	42
Dallas	79	49	43
Detroit	88	45	48
Houston	75	49	45
Los Angeles	81	57	47
Miami	78	53	34
New Orleans	71	25	54
New York	81	65	49
Newark	82	65	35
Philadelphia	79	63	47
St. Louis	82	32	44
San Francisco	74	41	47
Washington	70	32	31
Average	79	48	43

*These are indexes of dissimilarity which were calculated from census tract data. Data are shown for all metropolitan areas with 250,000 or more black residents in 1980, except Memphis.
Source: U.S. Bureau of the Census, *Census of Population and Housing: 1980*, Summary Tape File 3.

containing about 5,000 people. Since they are larger than city blocks, they are more likely to include a heterogeneous population and, as a result, segregation indexes based upon tract data are generally smaller in value than those calculated from data for city blocks.[31]

In the Nation's largest metropolis—New York—the segregation score comparing the residences of blacks and whites was 81, and that comparing Hispanic and whites was only 65. The residential segregation of Asians was much less, with an index of 49. In the Washington metropolitan area, the index of black-white segregation, 70, was more than double the level of white-Hispanic or white-Asian segregation. In all 16 metropolises, blacks were much more residentially segregated from whites in 1980 than were the other two large minorities.

These indices also suggest that a continuation of the trends of the 1970s will leave blacks highly segregated in the forseeable future. That is, if the average black-white segregation score declines by about five points each decade, it will take about six decades for black-white residential segregation to fall to the current level of Asian-white or Hispanic-white segregation.

The Causes of Racial Residential Segregation

There are three popular explanations for the persistence of black-white segregation. One might be identified informally as the "birds of a feather" hypothesis. A second explanation focuses on economic differences between blacks and whites and

[31] For these 16 metropolitan areas, the black-nonblack residential index of dissimilarity calculated from city block data averaged 86 (K.S. Taeuber et al., 1984: table 1). The average value of the black-nonblack index of dissimilarity calculated from census tract data for the same 16 metropolises was 77.

contends that it is financially impossible for many blacks and whites to share the same neighborhoods. A third explanation argues that discrimination in the housing markets contributes to the continuing segregation of blacks from whites.

The Ethnic Homogeneity View

According to this perspective, metropolitan communities are tesselations of ethnically identifiable subareas and the isolation of blacks from whites is typical, not unusual. Supposedly, ethnic groups prefer to live in homogeneous areas where they will find church, social clubs, synagogues, bakeries, restaurants, and grocers serving their special needs.

In many cities we can identify areas in which one ethnic group predominated or, in some cases, still predominates. The census of 1980 facilitates the analysis of ethnic patterns, since it was the first to ask individuals about their ancestry. This was an open-ended question allowing respondents to report any ethnic origin they wished, although they were encouraged not to give a religious response or answer that they were "Americans." This allows us to compare ethnic and racial residential segregation in 1980. Table 3 presents data for those metropolitan areas that had one-quarter million or more black residents in 1980. The residential distribution of blacks and of the 11 largest ethnic groups is compared to that of people who said they were English; that is, the earliest of the European groups to arrive and the group that contributed most heavily to our political system and culture.

There were moderate levels of ethnic residential segregation in these metropolitan areas in 1980. Descendants of those groups coming to the United States prior to the Civil War were least segregated from the English, as illustrated by an average segregation score of 22 for Germans, 23 for Irish, 29 for French, and 30 for people of Scotch ancestry. Descendants of groups arriving later in the 19th century—Italians, Poles, and Hungarians—were more segregated from the English. Apparently, the longer an ethnic group lives in the United States, the less their residential segregation from the English. The group most segregated from the English were Russians, an ethnic group whose residential choices were once severely limited by restrictive covenants, since many of them are Jewish.[32] Nevertheless, even Russians were much less segregated from the English than were blacks.

In many cities, we now can locate neighborhoods in which the new immigrant groups, Hispanics and Asians, predominate. As we indicated in table 2, these groups are residentially segregated from the non-Hispanic white population, but the degree of their segregation is approximately equal to the extent of English-Hungarian or English-Greek ethnic segregation.

These statistical measures suggest that residential segregation, to some extent, affects all large racial and ethnic groups. There are, however, two distinctive aspects of black-white segregation. First, blacks are more isolated from whites than are the other racial and ethnic minorities. Second, black-white segregation has persisted at high levels for decades, while the segregation of ethnic minorities from native whites declined over time.[33] Even the newest minority groups to arrive in our cities in large numbers are less segregated from whites than are blacks.

The Economic Argument

Quite often it is assumed that racial residential segregation is the result of the economic difference that distinguishes the races. Certainly, there are large differences in the financial status of blacks and whites. In 1983, 36 percent of the black population lived in households below the poverty line compared to 12 percent of the white. Black families had median incomes only 56 percent those of white families. Fourteen percent of the white families had incomes exceeding $50,000 compared to only 4 percent of the black.[34]

If racial residential segregation was entirely dependent upon a household's economic status, we would expect that poor blacks and poor whites would live together in some neighborhoods, middle-income blacks with middle-income whites in other neighborhoods, while rich blacks and whites would share the most exclusive and prestigious residential areas. Instead, we find that blacks of every economic level are highly segregated from whites of the same economic level.

We considered those metropolitan areas that had one-quarter million or more black residents in 1980

[32] The assumption that a high proportion of people who claim Russian ancestry are Jewish is based upon data from the census of 1910. In that census, 96 percent of the first- and second-generation Russians had Hebrew or Yiddish as their mother tongue (Carpenter, 1927: 111–12).

[33] Lieberson, 1963: 132; 1980: chapter 9.

[34] U.S. Bureau of the Census, 1984b: tables 5 and 15.

TABLE 3
Measures of the Residential Segregation of Blacks and Selected Ethnic Groups from the English Ethnic Group, Metropolitan Areas in 1980*

	Blacks	Germans	Irish	French	Scots	Swedes	Dutch	Italians	Poles	Hungarians	Greeks	Russians
Atlanta	75	19	12	22	26	38	26	34	37	n.a	n.a	63
Baltimore	73	24	21	30	32	n.a.	37	34	45	48	56	73
Chicago	80	28	35	33	32	30	52	49	52	44	55	64
Cleveland	83	24	27	35	33	n.a.	n.a.	41	47	33	55	60
Dallas	77	16	14	23	27	33	28	33	37	n.a.	n.a.	n.a.
Detroit	85	21	20	27	28	36	37	45	42	44	52	66
Houston	73	17	17	22	31	35	33	29	35	n.a.	n.a.	n.a.
Los Angeles	78	14	17	24	28	25	34	25	37	41	46	55
Miami	71	18	17	27	29	32	37	29	50	48	44	61
New Orleans	63	27	23	31	n.a.	n.a.	n.a.	37	n.a.	n.a.	n.a.	n.a.
New York	67	39	43	40	n.a.	n.a.	n.a.	55	52	52	64	49
Newark	77	25	26	36	30	33	39	41	44	42	48	48
Philadelphia	77	27	32	35	32	n.a.	41	41	40	44	62	64
St. Louis	78	26	20	24	35	35	31	39	35	44	n.a.	75
San Francisco	71	15	21	26	25	25	32	30	28	41	45	43
Washington	68	15	17	25	27	36	33	25	29	41	46	51
Average	75	22	23	29	30	33	35	37	41	44	52	59

*These are indexes of dissimilarity calculated from census tract data. Data are shown for all metropolitan areas with 250,000 or more black residents in 1980 except Memphis. Each group is compared to the residential distribution of those who gave English as their only ancestry. Blacks are defined by the race question. Ethnic groups consist of individuals who reported one specific ancestry such as German or Irish.

n.a. = Indexes not calculated if the group size was less than 10 times the number of census tracts.

Source: U.S. Bureau of the Census, *Census of Population and Housing: 1980*, Summary Tape File 3.

TABLE 4
Measures of Racial Segregation, Controlling for Income or Education, Metropolitan Areas in 1980

	Black-white segregation in 16 areas*	Segregation in three metropolitan areas**	
		Black-white	Asian-white
Family income in 1979			
Under $5,000	76	77	66
$5,000 to 7,499	76	77	71
$7,500 to 9,999	76	78	69
$10,000 to 14,999	75	76	59
$15,000 to 19,999	75	78	58
$20,000 to 24,999	76	77	57
$25,000 to 34,999	76	78	53
$35,000 to 49,999	76	78	53
$50,000 or more	79	79	56
Educational attainment of persons 25 and over			
Less than 9 years	76	77	57
High school, 1 to 3 years	77	79	56
High school, 4 years	76	77	50
College, 1 to 3 years	74	74	48
College, 4 years or more	71	69	47

*These residential segregation scores are average values for the 16 metropolitan areas listed in the previous table. They were computed from census tract data. The index shown for $20,000 to $24,999, 76, compared the residential distribution of black families in this income category to that of whites in the identical category.
**These segregation scores are average values for those three metropolitan areas which contained both one-quarter million blacks and one-quarter million Asians: Los Angeles, New York, and San Francisco.
Source: See table 3.

and computed measures of black-white residential segregation, controlling first for family income and then for educational attainment of people age 25 and over. Average values for these segregation indexes for all 16 areas are shown in table 4. For example, in the Washington metropolitan area, the segregation score comparing black families with $10,000 to $14,999 of income in 1979 to that of similar white families was 70; for families with $35,000 to $49,999 in income, the segregation score was also 70. For all 16 metropolitan areas, the average segregation score for families with $10,000 to $14,999 was 75; for families with $35,000 to $49,999, 76. The lower panel of table 4 presents similar residential segregation scores using educational attainment as the measure of economic status or social class.

Blacks are thoroughly segregated from whites regardless of how much income they obtained or how many years they spent in school. The segregation score for families in the $50,000 and over range is just as high as the segregation score for poverty-level families. Residential segregation scores decreased only a bit with increases in educational attainment.

We might expect that the new and highly educated black elite would face few barriers in locating housing and would frequently live in the same neighborhoods as extensively educated whites. The census of 1980 reports that they do not. The segregation scores comparing black and white college graduates were 80 in Detroit, 76 in Chicago, and 72 in New York. The corresponding residential segregation scores for blacks and whites who dropped out of high school were 77 in Detroit, 80 in Chicago, and 68 in New York.

The uniqueness of the black pattern is once again evident through an examination of Asian-white segregation. Three metropolitan areas—Los Angeles, New York, and San Francisco-Oakland—had both one-quarter million black and one-quarter million Asian residents in 1980. In these locations we can compare the segregation of both blacks from whites and Asians from whites, controlling for income and educational attainment. These segregation indexes are shown in the right-hand column of table 4.

First, at every income and educational level, black-white residential segregation was substantially greater than Asian-white segregation, even though many Asians arrived in the United States recently. For example, in Los Angeles, the score comparing the distributions of Asians and whites with more than $50,000 in family income was 58; for blacks and whites with similarly high incomes, 83.

Second, in contrast to the situation among blacks, as income or education increased, Asian-white residential segregation declined. This implies that social and economic factors account for some of the residential segregation of Asians, since segregation levels varied by status. Asians with high incomes or extensive educations apparently could move into neighborhoods of similar whites much more easily than could blacks.

Racial Attitudes and Practices of Discrimination

A third explanation for persistent racial residential segregation focuses upon the attitudes of whites and blacks and the discriminatory real estate practices that such attitudes may foster. Writing almost 90 years ago, W.E.B. DuBois (1899:389) asserted:

> The undeniable fact that most Philadelphia white people prefer not to live near Negroes limits the Negro very seriously in his choice of a home and especially in the choice of a cheap home. Moreover, real estate agents knowing the limited supply, usually raise the rent a dollar or two for Negro tenants if they do not refuse them altogether. . . .

Allan Spear's (1967:26) investigation of racial isolation in Chicago during the first periods of this century led him to conclude:

> The development of a physical ghetto in Chicago, then, was not the result chiefly of poverty; nor did Negroes cluster out of choice. The ghetto was primarily the product of white hostility. Attempts on the part of Negroes to seek housing in predominantly white sections of the city met with resistance from the residents and from real estate dealers. Some Negroes, in fact, who had formerly lived in white neighborhoods, were pushed back into black districts. As the Chicago Negro population grew, Negroes had no alternative but to settle in well-delineated Negro areas.

Is it likely that racial animosity is responsible for the current high levels of residential segregation? On the one hand, we have convincing studies which demonstrate that almost all whites in all regions of the country endorse the idea that minorities should be able to live in whatever housing they can afford. In 1976, 88 percent of a national sample of whites said that whites did not have a right to keep blacks out of their neighborhoods. Furthermore, no more than a small fraction of whites claim they would be disturbed if a black with an income and education similar to their own moved into their block.[35] These surveys demonstrate that white attitudes about racial mixing in neighborhoods are very different now from what they were 40 or 80 years ago.

On the other hand, many whites apparently hold other perceptions that may have the consequence of encouraging segregation. I refer here to findings from an investigation of residential segregation in the Detroit area.[36] These results come from a location that is more polarized by race than many other areas (see segregation indexes in tables 1 and 2), and they are almost a decade old. White residents, we found, generally held three beliefs about racial change in neighborhoods. First, they felt that stable interracial neighborhoods were rare. Once a few blacks entered an area, they thought that more would come and that, eventually, the neighborhood would become largely black. Second, many whites presumed that property values were lowered by the presence of black residents so it was seen as risky to hold property in an area undergoing racial change. Third, there was agreement among whites that crime rates are usually higher in black neighborhoods than in white ones. In particular, if whites are a minority in a black area, they may be exposing themselves to a very high risk of victimization.

These attitudes have several consequences. Whites were extensively reluctant to purchase housing in neighborhoods that blacks were entering. In Detroit and, I presume, in other metropolises, areas

[35] Schuman, Steeh, and Bobo, 1985: table 3.1; Taylor, Sheatsley and Greeley, 1978; Pettigrew, 1973: table 1.

[36] Farley et al., 1978; Farley, Bianchi, and Colasanto, 1980.

were clearly coded by color, and individuals seeking housing or marketing it knew with great certainty which neighborhoods were pretty much "open" to blacks and which were closed to them.[37]

A significant fraction of whites reported that they would be uncomfortable if blacks were represented in their neighborhoods. If blacks made up as little as 7 percent of the population in an area, one-quarter of the whites said they would be uncomfortable and more than one-quarter said they would not enter such a neighborhood were they searching for housing. In a situation in which blacks were one-fifth of the population, more than 40 percent of the whites would be uncomfortable and one-quarter would try to move away. In other words, the presence of even modest numbers of blacks in an area is very disturbing to a significant fraction of whites.[38]

This reluctance of whites to enter areas that are attracting blacks or even to remain in areas where blacks are represented provides motivation for real estate dealers to steer blacks and whites to distinct locations. Many of these practices violate the Fair Housing Act of 1968 but, if commonly practiced, they help to account for the persistence of racial residential segregation.

Is racial steering still a common practice? The most extensive study of this was conducted by the Department of Housing and Urban Development (1979) in 1977. Prospective black customers were matched with prospective white customers, and they sought advertised housing in a sample of 40 large metropolitan areas. Despite presidential decrees, court rulings, local open housing ordinances, and Federal laws, black customers were often treated differently from their white peers. If blacks contacted four real estate agents, there was a 72 percent chance of experiencing discrimination if they sought rental housing; 48 percent, if they were buying. Making assumptions about the normal search process, the HUD report concluded that 70 percent of the whites and blacks who sought rental housing that was advertised in these metropolitan areas in the late 1970s were steered into their own neighborhoods. Among those who sought to purchase a home, 90 percent were steered.

These findings are consistent with earlier studies and experiences. In the late 1960s, HUD supported a thorough investigation of the causes of racial residential segregation conducted by the National Academy of Sciences.[39] Its authoritative report contended that it was impossible to specify one cause for the persistent isolation of blacks from whites. Rather, there was a pervasive "web of discrimination" involving the actions and inactions of local governmental officials, Federal agencies, financial institutions, and real estate marketing firms, which had the consequence of limiting housing opportunities for blacks and thereby creating the segregated patterns of metropolitan America.

Among the Secretaries of Housing and Urban Development, George Romney was unusual in his attempts to guarantee equal opportunities to minorities in the housing market. He developed innovative programs that sought to open the suburbs to blacks through a carrot and stick approach that would reward communities that guaranteed equal opportunities and terminate funding in those that did not. Very strong opposition to such Federal policies came from suburban communities, especially Warren, Michigan. This led President Nixon to withdraw his support for the program and it was subsequently terminated.[40]

The attitudes of blacks are also important in accounting for residential segregation. For more than two decades, national samples of blacks have been asked whether they prefer a racially mixed or largely black neighborhood.[41] Consistently, two-thirds to three-quarters of the black respondents have selected the integrated neighborhoods. In the Detroit study, we asked blacks if they would be comfortable in residential areas of different compositions and whether they would be willing to move into racially mixed areas. Most blacks would be comfortable in any neighborhood except those in which they were the only black resident. Almost all blacks were willing to be the third black to move into a formerly white area, and many were willing to be the second black. However, blacks expressed great reluctance to be the first black on a white block. Some expressed a fear that crosses would be burned on their lawns or their windows would be stoned. Much more common was a feeling that their white neighbors would be unfriendly, would scruti-

[37] Molotch, 1972; Taub, Taylor, and Dunham, 1984; Rieder, 1985: 79–85.

[38] Farley et al., 1978: figure 7.

[39] Hawley and Rock, 1973.

[40] Dimond, 1985: 183–84.

[41] Pettigrew, 1973: table 5.

nize their behavior, and would make them feel unwelcome and out of place.[42]

These survey data from the Detroit area point out one of the serious problems that may impede residential integration. Whites strongly endorse the ideal of equal opportunities for blacks, but would be uncomfortable if more than token numbers of blacks entered their neighborhoods. Blacks desire to live in mixed areas, but are reluctant to be the pioneers. It appears that whites are saying that integration is acceptable as long as black representation is minimal. Blacks, on the other hand, see integration as desirable, but think the ideal neighborhood is one with a 40 percent black population—a representation that will not only make whites uncomfortable, but will terminate white demand for housing in the neighborhood.

The Consequences of Racial Residential Segregation

The consequences of residential segregation may be more difficult to assess than the causes. Certain aspects of the residential concentration of blacks may be beneficial to the interests of some. To the extent that voters prefer candidates of their own race and are hesitant to cast ballots for candidates of the other race, residential segregation has—at least in the short run—the effect of increasing black political representation. However, it may simultaneously permit white politicians to narrow their appeal if they concede the black vote to black candidates. Undoubtedly, the geographic concentration of blacks is beneficial to those businesses, social welfare organizations, and churches that focus upon the specific needs of a black clientele.

A number of writers and investigators have identified five adverse effects of racial residential segregation. First, if blacks are denied the opportunity to compete for a significant fraction of the housing market, they will be restricted to one portion of the market and may have to pay more than whites for equivalent housing. Courant (1978) argues that if only a few whites discriminate against blacks, it will lead to a long run stable equilibrium in which blacks pay more. That is, in the presence of discrimination, the cost of searching for housing increases for blacks. It then becomes economically rational for blacks to look for housing in largely black areas, which has the effect of driving up housing prices in such neighborhoods. Investigations published in the 1960s and early 1970s found that in many of the large metropolitan areas, blacks paid more than whites for comparable housing. Kain and Quigley (1975)[43] showed that blacks in St. Louis had to pay more than whites to obtain housing comparable in size and quantity to that of whites. King and Mieszkowski (1973) reported that in the late 1960s, New Haven blacks paid 6 to 13 percent more than whites for comparable housing. There have been few recent investigations of these racial differences in housing costs, and the finding may differ because of the general decline in the demand for housing in many of the older metropolitan areas.

A second adverse effect of residential segregation is that blacks typically live in lower quality housing than whites, occupy older housing, and are much less likely to be owners than whites. Indeed, the proportion of black households who were owners in 1980—44 percent—was lower than the proportion of white households who owned their homes in 1890—48 percent. In 1980, 68 percent of the white households owned their residences.[44] What remains open to dispute is whether blacks obtain lower quality housing and have low rates of homeownership because they are poorer, on average, than whites or because they face discrimination in the housing market. Some analysts, such as Richard Muth (1969; 1974), stress the racial difference in economic status and presume that this is the most important determinant of racial differences in housing quality. Others demonstrate that if you take racial differences in income and demographic composition into account, you find a remaining or net racial difference in quality or tenure.[45] For example, the 1977 Annual Housing Survey found that 52 percent of the black households and 68 percent of the white lived in housing units built since World War II—a difference of 16 percentage points. Demographic and economic differences could account for 11 of those 16 points, suggesting that blacks were more likely than whites to live in old housing even after economic differences were taken into account. There was a 25 percentage point racial difference in the proportion of households who were homeowners. Economic and demographic factors accounted for 18 of those points, suggesting once again

[42] Farley et al., 1978: 332.

[43] Table 7-1.

[44] U.S. Bureau of the Census, 1963: table H; 1983: table 7.

[45] Jackman and Jackman, 1980.

that there was a new racial difference in tenure, a difference that may reflect discrimination in the housing market.[46]

Third, several analysts have argued that racial residential segregation helps to explain the persistence of high unemployment rates among blacks. Supposedly, in the post-World War II period, manufacturers often shifted their production from older cramped plants in central cities to spacious new plants in the suburbs. Many shopping malls and service centers opened in the suburban ring, and these cities rapidly expanded their payrolls by hiring teachers, policemen, maintenance workers, and municipal officials. At this time, racial discrimination confined blacks to central city ghettoes, which put them at a great disadvantage with regard to jobs.[47] Empirical investigations have provided no more than mixed support for this hypothesis.[48] Racial residential segregation has measurable negative consequences for the occupational achievement and income of blacks,[49] but suburban blacks have unemployment rates almost as high as those of blacks who live in central cities.[50]

Fourth, there can be no doubt that residential segregation is the major cause of racial segregation in public schools. If the constitutional mandate for integrated schools is to be fulfilled, it will be necessary either to integrate neighborhoods or to transfer a large proportion of metropolitan area students away from their neighborhood schools. Ann Schnare (1978) observed:

> Residential segregation by race may then reduce the educational opportunities of blacks and perpetuate existing income and class differentials by depriving minority children of the chance to compete on an equal footing with white children.

Finally, there are the psychological consequences of residential segregation. The isolation of blacks in American cities during the late 19th and early 20th centuries was accomplished to fulfill the desire of whites that there be no social equality with blacks. This desire, of course, was rooted in Social Darwinism, particularly in the assumption that close social contact with an inferior race would weaken or destroy the culture of whites. What are the implications of this for blacks? W.E.B. DuBois argued that blacks in the United States were strangers in their own land. They were, he said, born with a veil because they had to perceive themselves and their world through the stereotypes imposed on them by whites, stereotypes that stressed their physical inferiority, their lack of morals, and the poverty of their culture.[51]

Segregated neighborhoods continue to limit the social contacts of whites and blacks. Quite likely, high proportions of blacks and whites in metropolitan areas now reach adulthood without ever having a close friend of the other race. Many may complete their education without ever attending a school that enrolled students of the other race and without living in a neighborhood where the other race was represented. This isolation may perpetuate stereotypes among both blacks and whites, stereotypes that reinforce the idea that one race is superior to the other.

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[46] Bianchi, Farley, and Spain, 1982: table 2.

[47] Kain, 1968.

[48] Mooney, 1969; Masters, 1975: chapter 4.

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[50] Westcott, 1976: table 1.

[51] Toll, 1979: 3.

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Residential Segregation in American Cities

By William A.V. Clark*

Introduction

The attempt to understand the extent and causes of racial residential segregation has developed a voluminous literature. It ranges from reports on the levels of segregation to explanatory models of the patterns of residential separation in the major cities of the United States. At least some of the research has been stimulated by the comment in a Supreme Court ruling that the causes of racial residential segregation are unknown and perhaps unknowable.[1] Even in 1974 we knew much more about the extent and causes of residential separation than is suggested by Justice Stewart's casual comment, and since that time, in the succeeding dozen years, the research literature has provided us with a much clearer picture of the relevant variables and their explanatory contribution to understanding the patterns and causes of residential segregation.

This overview paper will first examine the present pattern and recent temporal changes in racial residential segregation, and then focus on the state of our present knowledge about the causes of racial concentration in cities. The paper will draw on the published literature, research analyses presented at trial, and survey evidence gathered nationally and for specific cities.

Urban Differences and Temporal Changes in Residential Segregation

Before we discuss the extent of residential segregation, a word is in order about measures of segregation. Currently, two measures, the dissimilarity index and the exposure index, are widely used in measuring racial residential segregation. The dissimilarity index computes the difference between the numbers of blacks and whites in some geographic unit, usually a census tract, of the city or metropolitan area. The dissimilarity index indicates the minimum proportion of blacks (or whites) who would have to change their subarea of residence to obtain an even distribution of that race across all subareas of the city. It has been used widely, and its interpretation is quite straightforward. The second index, the exposure index, is a measure of how actual racial composition is seen from the perspective of a typical black or white person. The exposure measure is a description of one group's isolation from, or potential for interaction with, another group. Under complete separation, blacks (or nonblacks) would meet only other blacks (or nonblacks). Under complete balance, they would encounter members of the other race at a rate equal to the citywide proportion of that group. The exposure index can be computed for whites, for blacks (both are absolute measures),

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[1] Milliken v. Bradley, 1974.

and as a relative exposure index that takes into account the racial composition of the city. (The precise formulas are given in appendix A.) The particular difference between the relative exposure index and the dissimilarity index is that the dissimilarity index can remain quite high even when there is a very low proportion of a minority race. Yet that minority race might frequently come into contact with members of the nonminority race. Both indices have a range from 0 to 1 (or 0 to 100) where 0 is no separation and 1 is total separation. Note that we would never expect values of 0, and even a random distribution of the population would not yield values of 0.

There are several extensions of these indices, and alternatives have been proposed by Jakubs (1981), and Lieberson and Carter (1982). They have, of course, been criticized, particularly by Winship (1978) and Zelder (1977); but this is not the place to evaluate the pros and cons of the indices, and because they have been used so widely, they will be utilized here as *general* measures of the degree of segregation. However, the debate about the level of measurement is more than a technical issue. If we are to make specific public policy decisions that are based on measures of the level of segregation, we must be sure that the tests are measuring exactly what we intend them to. To illustrate, if index A indicates that city *X* is twice as segregated as city *Y*, and we choose or we are ordered by a court system to remedy the levels of separation in both cities, should we carry out twice the remedy in the second city? An alternative index may suggest lesser differences. Thus, Baltimore is almost twice as segregated as San Jose on the dissimilarity index, but the exposure index suggests that San Jose has little if any segregation.

It is immediately apparent from the index values (table 1) that there is extensive separation of the races.[2] It is clear that black or minority households are separated and concentrated throughout the major metropolitan areas of the United States. The indices conform to our intuitive knowledge about the location of minority populations. However, there is wide variation in the levels of separation across cities, and some cities do not have significant levels of separation at all. It is also worth noting that the indices for 1980 are calculated for black versus nonblack and (although comparable with 1970 black versus white indices) do not reflect the increasing percentages of Hispanics, many of whom are classified as white. The increasing triethnic (or multi) structure of U.S. society is not captured by these indices.

The need for two indices is illustrated by a comparison of the indices for cities with low percentages of minorities. Both Minneapolis and San Diego have dissimilarity indices of 0.7 in 1970, but exposure indices of 0.4. This suggests that we must be careful in specifying the exact levels of separation with only one index. It reflects the fact, noted earlier, that with lower percentages of minority households, there is greater opportunity for contact or exposure.

Temporally, there is a confused pattern of change between 1960 and 1970. Most cities increase the levels of the indices but some do decline. However, between 1970 and 1980 there are declines in the levels of separation for all cities. Twenty-five SMSAs (standard metropolitan statistical areas) had a decrease in the levels of separation of 5 percentage points or more (table 1). The continuation of this trend will lower levels of separation across all large cities. At least part of the explanation for the decrease in levels of separation from 1979–80 is related to the increasing black suburbanization, and this in itself requires a descriptive comment.

Black Suburbanization

One of the significant trends of the 1970s and continuing into the 1980s has been the movement of the black population from central cities to nearby suburbs (table 2). For a long time, studies of minorities and minority segregation focused on the Nation's central cities—it was there that the minority populations were concentrated. Until 1970 there was little suburbanization of the black population.[3] The increase since 1970 is dramatic, and there are now large percentages of the black population outside the central city (table 3). Even so, black suburbanization is not new; there have always been black communities in suburban locations. Now there are more than 6 million blacks in the suburbs, and they constitute a little more than 6 percent of the Nation's suburban population. However, it is not a consistent pattern. In some metropolitan areas, the

[2] Although the indices are described as measures of segregation, they are more properly identified as measures of separation. The term segregation often has connotations of enforced separation.

[3] Van Valey, et al., 1977.

TABLE 1
Comparison of the Degree of Segregation in the 38 SMSAs over 1 Million Persons

	1980 Population (SMSA) (millions)	% Black	Dissimilarity index 1960	1970	1980	Exposure index 1960	1970	1980
New York	9.12	21.3	0.744	0.738	0.728	0.538	0.526	
Los Angeles-Long Beach	7.48	12.6	0.892	0.885	0.764	0.654	0.712	N
Chicago	7.10	20.1	0.912	0.912	0.863	0.814	0.832	o
Philadelphia	4.72	18.8	0.771	0.780	0.770	n.a.	0.625	t
Detroit	4.35	20.5	0.871	0.889	0.871	0.686	0.758	
San Francisco-Oakland	3.25	12.0	0.794	0.773	0.682	0.500	0.541	A
Washington	3.06	27.9	0.777	0.811	0.693	0.665	0.712	v
Dallas	2.98	14.1	0.812	0.869	0.762	0.673	0.757	a
Houston	2.91	18.2	0.805	0.784	0.719	0.661	0.615	i
Boston	2.76	5.8	0.808	0.793	0.758	0.480	0.574	1
Nassau-Suffolk NY	2.61	6.2	—	—	0.754	—	—	a
St. Louis	2.36	17.3	0.859	0.865	0.815	0.718	0.727	b
Pittsburgh	2.26	7.8	0.744	0.745	0.728	0.433	0.514	1
Baltimore	2.17	25.6	0.824	0.810	0.741	0.693	0.723	e
Minneapolis	2.11	2.4	0.833	0.799		0.314	0.390	
Atlanta	2.03	24.6	0.771	0.817	0.768	0.650	0.725	
Newark	1.97	21.3	0.728	0.788	0.786	n.a.	0.617	
Anaheim-Santa Ana	1.93	1.3	—	0.723	0.404	—	0.162	
Cleveland	1.90	18.2	0.896	0.902	0.875	0.765	0.790	
San Diego	1.86	5.6	0.795	0.762	0.586	0.392	0.482	
Miami	1.63	17.2	0.895	0.857	0.771	0.772	0.725	
Denver	1.62	4.8	0.846	0.847	0.678	0.551	0.607	
Seattle	1.61	3.6	0.833	0.781	0.656	0.472	0.444	
Tampa-St. Petersburg	1.57	9.3	0.836	0.845	0.773	0.593	0.678	
Riverside-San Bernardino	1.56	5.0	—	—	0.495	—	—	
Phoenix	1.51	3.2	0.811	0.754	0.565	0.392	0.366	
Milwaukee	1.40	10.8	0.904	0.895	0.834	0.643	0.719	
Cincinnati	1.40	12.4	0.832	0.818	0.779	n.a.	0.624	
Kansas City	1.33	13.0	0.874	0.833	0.784	n.a.	0.714	
San Jose	1.30	3.4	0.656	0.511	0.403	0.037	0.046	

TABLE 1 (continued)
Comparison of the Degree of Segregation in the 38 SMSAs over 1 Million Persons

	1980 Population (SMSA) (millions)	% Black	Dissimilarity index 1960	1970	1980	Exposure index 1960	1970	1980
Buffalo	1.24	9.2	0.868	0.857	0.796	0.586	0.691	
Portland	1.24	2.7	0.813	0.802	0.680	0.401	0.412	
New Orleans	1.19	32.6	0.650	0.742	0.704	0.518	0.610	
Indianapolis	1.17	13.5	0.787	0.838	0.786	0.612	0.664	
Columbus	1.09	12.3	0.761	0.809	0.727	0.528	0.596	
San Antonio	1.07	6.8	0.768	0.740	0.545	0.413	0.492	
Ft. Lauderdale-Hollywood	1.02	11.2	—	0.949	0.833	—	0.858	
Sacramento	1.01	6.0	0.721	0.661	0.525	0.235	0.235	

— Indicates not an SMSA in that year.
Sources:
Exposure indices from Schnare (1977), *Residential Segregation by Race in U.S. Metropolitan Areas: An Analysis Across Cities over Time.* Washington, D.C., The Urban Institute.
Dissimilarity indices for 1960 and 1970 from Van Valey, Roof and Wilcox (1977), "Trends in Residential Segregation 1960–1970," *American Journal of Sociology,* 82, pp. 826–44, for 1980. The data are from Taeuber et al. (1984), "The Trend in Metropolitan Racial Residential Segregation," Paper to the Population Association of America.

TABLE 2
Black Suburbanization, 1950–80

Year	Number of blacks in suburbs	Percent of suburban population	Percent of black population in suburbs
1950	1,737,000	5.0	21.9
1960	2,504,000	4.6	20.5
1970	3,630,000	4.9	21.6
1980	6,170,000	6.0	28.7

Source: U.S. Bureau of the Census, *Historical Statistics of the U.S. Colonial Times to 1970,* Washington, D.C., 1975, and U.S. Bureau of the Census, *Statistical Abstract of the U.S. 1982–83,* Washington, D.C., 1982.

suburban black proportion has actually decreased because of extensive white migration into areas where there were formerly black populations. And the black suburbanization is concentrated in a number of large cities—Los Angeles, New York, Washington, Chicago, Baltimore, St. Louis, San Francisco, Philadelphia, Newark, and Detroit (table 3). As Rose (1976) has noted, it is in the older and larger metropolitan areas that most of the black movement to the suburbs has taken place. It was in these cities that there was a large core black population and it is from these black cores that the suburbanization has been occurring.

In the discussion of black suburbanization, there has been a debate as to whether black suburbanization is largely a spillover activity, that is, the spread of a central city core to nearby communities, and is

TABLE 3
Percent of Black SMSA Population Outside the Central City

	1980 SMSA population (millions)	Percent black in SMSA	Percent of black population in suburbs (outside central city)
New York	9.12	21.3	8.2
Los Angeles-Long Beach	7.48	12.6	42.2
Chicago	7.10	20.1	16.2
Philadelphia	4.72	18.8	27.8
Detroit	4.35	20.5	14.8
San Francisco-Oakland	3.25	12.0	37.3
Washington	3.06	27.9	47.5
Dallas	2.98	14.1	15.6
Houston	2.91	18.2	16.8
Boston	2.76	5.8	21.2
Nassau-Suffolk NY	2.61	6.2	n.a.
St. Louis	2.36	17.3	49.4
Pittsburgh	2.26	7.8	42.2
Baltimore	2.17	25.6	22.6
Minneapolis	2.11	2.4	16.4
Atlanta	2.03	24.6	43.3
Newark	1.97	21.3	54.2
Anaheim-Santa Ana	1.93	1.3	52.9
Cleveland	1.90	18.2	27.3
San Diego	1.86	5.6	25.0
Miami	1.63	17.2	68.9
Denver	1.62	4.8	24.3
Seattle	1.61	3.6	19.1
Tampa-St. Petersburg	1.57	9.3	28.1
Riverside-San Bernardino	1.56	5.0	63.0
Phoenix	1.51	3.2	21.0
Milwaukee	1.40	10.8	2.7
Cincinnati	1.40	12.4	25.3
Kansas City, Mo./K.	1.33	13.0	5.3
San Jose	1.30	3.4	34.2
Buffalo	1.24	9.2	16.5
Portland	1.24	2.7	15.7
New Orleans	1.19	32.6	20.3
Indianapolis	1.17	13.5	2.7
Columbus	1.09	12.3	7.5
San Antonio	1.07	6.8	21.4
Ft. Lauderdale-Hollywood	1.02	11.2	67.5
Sacramento	1.01	6.0	39.4

Source: Calculated from U.S. Bureau of the Census, *Statistical Abstract of the U.S. 1982–83*. Washington, D.C. 1982 (original data in 000s).

thus the continuing expansion of black concentrations of central cities to surrounding suburbs,[4] or whether it is movement to areas that are largely white neighborhoods.[5]

During the 1970s at least two studies showed that black movers to the suburbs are younger, more affluent, and better educated.[6] These observations are consistent with arguments by Spain and Long (1981) who use 1970 census and Annual Housing Survey data to show that recent black movers to the suburbs are relocating in white areas. In their study, over 40 percent of the city-suburban black movers in the mid-1970s went to tracts that were less than 10 percent black in 1970, and another 27 percent to neighborhoods that were between 10 and 40 percent black. They note that not only are blacks moving to predominantly white neighborhoods, the economic status of the black movers is higher, and there are clear differences in the destination choices by socioeconomic status. (Blacks are more likely than whites to be concentrated, however, at the lower end of the socioeconomic scale.) At the same time, the expansion of a black core across a central city boundary would fulfill the above criteria, but would not be true movement to white suburbs.

The argument in favor of spillover seems to apply to the black suburbanization process up until the early 1970s, but the recent evidence is that although spillover still occurs, there is also substantial movement to all-white residential areas. The fact that there is now significant black suburbanization, with long term implications for the levels of segregation as a whole, seems to be well established. A recent paper by Frey (1985) holds that black gains in social status will improve black-white relations, and will be shown in an increased suburban destination selectivity amongst black movers of all ages of the life cycle. Late 1970s movers' destination propensity rates are significantly more suburban directed than those of earlier decades in all of the metropolitan areas examined by Frey (1985). Even so, there is likely to be continued white outmigration from central cities, and thus, even though there will be black suburbanization, the central cities as a whole are likely to become more minority impacted as time passes. Suburbanization levels for blacks are still lower than those of whites, and the black suburbanization is still the elite subsegment of the black population.[7]

[4] Rose, 1976; Lake, 1981.
[5] Spain and Long, 1981.
[6] Clay, 1979: Nelson, 1979.
[7] Nelson, 1979.

Causes of Residential Segregation

Introductory Comment

When we turn to the attempts to explain the patterns of residential segregation, almost all the studies, both analytic and descriptive, recognize the multiple causal structure underlying racial residential segregation. However, there is an impression, at least in part of the literature, that of the factors which might explain residential patterns, including the impacts of economics, preferences, urban structure, and discrimination, it is discrimination (and principally public or government discrimination) that is the major explanatory variable. The debate is over whether it is a single factor, discrimination, or a whole set of factors, of which discrimination is one, that act in concert to generate the residential patterns of our metropolitan areas. The single factor view is illustrated in a report to the court in the St. Louis desegregation case.[8] "The racial patterns of metropolitan St. Louis are no accident, they are the result of generations of public and private discrimination, discrimination which has included direct government decisions, which have shaped vast sections of the urban landscape and determined where many thousands of families, both in the private market and in subsidized housing could or could not live." (p. 17). In contrast, the multiple view is suggested by Leven, who writes of neighborhood change and residential selection—in the long run, neighborhood income and socioeconomic levels subsume the whole complex of conscious explicit preferences in generating residential patterns.[9] Even more explicitly Becker (1957) and Muth (1969) state, "the fact of residential segregation need not imply discrimination, or higher prices [to blacks] for housing of comparable quality."[10]

The varying emphases on the factors cry out for a relative ranking of the variables that have generated residential patterns. Thus, the remainder of this section will try to bring together the evidence that now exists on the ranking of factors generating racial residential segregation. Much of the literature, unfortunately, is comment rather than analysis. The review that follows will emphasize analysis rather than opinion.

[8] Orfield, 1981b.
[9] Leven, 1976, p. 144.
[10] Muth, 1969, p. 109.

TABLE 4
A Comparison of Black and White Household Economic Data for the U.S. and Selected SMSAs

	National		Atlanta		Cincinnati		Kansas City	
	Black	White	Black	White	Black	White	Black	White
Income ($)								
Median household	10,943	17,680	11,232	20,654	10,652	19,020	12,162	19,948
% <$10,000/year	47	27	45	20	46	24	42	22
% >$35,000/year	6	14	6	19	5	15	7	16
Housing								
% owner-occupied	44	68	42	67	35	67	52	69
Median house value ($)	27,200	48,600	29,200	51,000	36,600	48,300	19,100	45,800
Median gross rent ($)	208	251	201	279	163	220	193	248
Assets* (not including housing equity)	678	8,082	*	*	*	*	*	*
Housing/income relation								
House value as a % of annual median income	249	275	260	247	344	254	157	230
Monthly rent as a % of median monthly income	23	17	21	16	18	14	19	15

*National data only.
Sources: U.S. Bureau of the Census, *Census of Population and Housing, Census Tracts, 1980,* Washington, D.C., and Bureau of Labor Statistics Consumer Expenditure Survey Series, 1972/73, Bulletin 1985, U.S. Department of Labor, Washington, D.C., August 1978, tables 24/25.

Economic Factors

Residential patterns certainly reflect the forces of economics. The debate can only be over the relative strength of economics as a force that creates residential patterns. At the outset, it is important to recognize that economics, or economic factors, is a code for a complex set of factors including incomes, the cost of housing, the extent of household wealth (assets), equity (in housing), and varying expenditure patterns by different population compositions. A table for selected cities compares median household income, the percentage below the poverty level, the percentage of wealthier households, median house value for minority and nonminority households, as well as measures of economic assets. (Unfortunately, the measures of assets are available only for the Nation as a whole.) The differences between black and nonblack households are striking (table 4). A commonsense view is that the income differences shown in the table must have effects on the ability of black households to purchase and rent housing. However, it is not just income that is of critical relevance. The downpayment required for ownership has always been a barrier to black homeownership (more blacks are renters than owners), and it has become an even larger barrier in the inflationary spiral of the late 1970s. Household wealth is often ignored in debates about the role of economic factors, but it may be the most critical explanation for the lack of larger numbers of black households in the suburbs. The suburban areas are (largely) made up of owner housing, and it is therefore difficult for minorities to purchase housing. Also militating against black ownership are large families (higher costs) and female heads (lower incomes).

In order to put the economic variables into a formal analytic framework, Pascal (1967) utilized a multiple regression technique with a set of variables that measured relative access to jobs, the proportions of single- and two-family structures, average gross monthly rents for renters, and a monthly equivalent for owner occupiers, to predict the fraction of black families by census tracts. The analysis was applied to both Detroit and Chicago,

and he found that between 33 and 46 percent of the variation in the proportion of all households headed by blacks could be explained by affordability of housing and accessibility to jobs.[11]

In contrast to the economic expenditure, assets, and equity argument, and the statistical confirmation that at least part of the variation in the proportion of blacks is explained by housing costs and accessibility, Hermalin and Farley (1973) used income as a single measure of economic status and projected that 55 percent of black families should be found in the suburbs if economic causation was dominant, whereas only 17 percent of these families were actually found in the suburban rings. A later study by Farley (1977) showed that only taking income into account would still require 25 percent of the population within a metropolitan area to relocate from one census tract to another to ensure a uniform socioeconomic distribution of the population (a most unlikely outcome in any society). This is less than the 70 percent movement required to achieve a uniform racial distribution, but it is still a substantial amount of movement. A similar single factor approach by Kain and Quigley (1975) analyzed the distribution of white households with incomes under $3,000 and over $10,000 and how many lived in the suburban rings of 11 specific metropolitan areas. In essence, they argued that if low median income is an explanation of the concentration of blacks in central cities, it should be true that many low-income whites also live in the central cities. They observed, of course, that proportionately more low-income whites live in the suburbs than in the central cities, and that there are few high-income blacks in the suburbs. They concluded that the explanation was, therefore, not economics. Teacher (1975) also analyzed rents in the central city and suburbs and concluded that economic factors are not a significant element in the explanation for racial residential patterns: "economic explanations for racial residential segregation in summary are of limited truth, even if accepted at face value."[12]

To take only a single economic factor, rental values or incomes, and to examine the expected distributions reduces the analysis to a single factor approach, and at that a single factor (income) among the numerous economic variables that make up the economic forces influencing residential patterns. It is absolutely essential to recognize that we live in a complex environment, and it is the combination of events, plus the tendency for black households to have different consumption preferences (to be addressed later) than whites, that must be seen as a totality in the explanation.

To provide some empirical estimation of the complex impact of economics, Pascal (1978) used a simulation approach in which he reallocated the black population from central Atlanta throughout the six-county region of the SMSA, assuming that only income would constrain their mobility (and using their current housing as an indicator of the housing that they could afford). Clearly, this does not take into account the issues of assets and equity or of preferences that we will discuss later. This reallocation produced a significant increase in the proportion of the population that would be reallocated to suburban areas outside the central city. It significantly increased the number of blacks in outlying counties. Pascal then added a second step based on his earlier regression model. He allocated black households to suburbs only according to the number of black households that would move to the suburbs. Because blacks are disproportionately employed in the central city, he argued that an important fraction of these black households would not undertake the long commute from suburbs to central city. To accomplish this, the model allocated blacks to suburban tracts such that the proportion of blacks commuting to the central city was the same as the proportion of whites commuting to the central city. The effect of this step was to maintain a significant number of black households in the central city, households that might, on housing and income grounds alone, have been expected to live in the suburbs. The actual level of segregation under the dissimilarity index, 0.86, and exposure index, 0.77, was reduced to 0.65 and 0.54 when black households are redistributed and white households remain in place. When the less plausible assumption, that black households are redistributed outside Atlanta and are replaced by white households, is made, the indices dropped to 0.60 and 0.38 (table 5). Under either scenario, economics and commuting are clearly an important factor in understanding the patterns of residential separation. Between 49 percent (.38/.77) and 70 percent (.54/.77) of the segregation is attributable to economic factors. Clearly, this discussion of housing costs and work distance alone yields

[11] Pascal, 1967.

[12] Taeuber, 1975, p. 836–37.

TABLE 5
Changes in Dissimilarity and Exposure Indices Assuming Redistribution of Black Households in the Atlanta SMSA*

Assumption	Dissimilarity index	Exposure index
Actual level of segregation	0.86	0.77
Atlanta black households distributed outside City of Atlanta	0.65	0.54
Atlanta black households distributed outside City of Atlanta and replaced by displaced white households	0.60	0.38

*Six counties, including Cass, Clayton, Cobb, DeKalb, Douglas, and Fulton.

a significant explanation for the current residential patterns.

Evidence in support of the Pascal position is also provided by Muth (1969). He notes that "housing quality improves dramatically as the incomes of the lower income groups increase" (p. 278). Other evidence is also provided in a specific study of neighborhood change which concluded that "the results of our analysis are somewhat surprising. Namely that achieving racial integration may be substantially easier than achieving integration by economic class at a neighborhood level."[13] Of course, to the extent that minorities are poor, there will be continuing separation of the races. The options exercised by moving families appear highly consistent with the view that it is not racial prejudice that is at work, but issues of class and economic differences. It also reflects the attitudes of blacks:

> . . .a former serious barrier to achieving racial integration in neighborhoods is posed by the far greater instance of low income and poverty among black families than among white families. . . .While our research can hardly be regarded as the final word on the subject, it strongly indicates that except for the genuinely poor, all people white and black, rich and not so rich, are willing to pay and substantially, to avoid class integration. This should hardly surprise us. Rising above humble origins to make it in the new and better neighborhood is central to our societal tradition. Without passing judgment on it we must acknowledge the tradition, and we certainly do not seek policies to destroy it.[14]

As part of the argument about incomes and housing costs, it is often argued that had public housing been distributed equitably throughout the city, there would be much wider integration. But even this seemingly plausible argument has not proven to hold up in any analytic scrutiny. In most cities, the amount of public and subsidized housing is somewhere in the range of 3–7 percent of the housing stock. (There are, of course, exceptions in some metropolitan areas.) But, given this relatively small amount of housing, the redistribution of that housing throughout the city and allocating minority households to that housing would have negligible effects on the levels of segregation. Thus, the current siting of public housing cannot be blamed in any substantial way for the segregated housing patterns. For example, as part of the case of *Goldsboro City Board of Education* v. *Wayne County Board of Education,* an allocation of public housing was carried out from Goldsboro City to the surrounding Wayne County area. Public housing with black residents was reallocated (statistically) from tracts in the city to tracts in the county. The indices of segregation for Goldsboro City increased from 0.35 to 0.36 (dissimilarity) and from 0.18 to 0.22 (exposure). The Wayne County indices changed from 0.22 to 0.18 and 0.07 to 0.05. The indices actually increased in Goldsboro and decreased only marginally in the county. The overall conclusion is that even if all the public housing had been con-

[13] Leven, et al. 1976, p. 202.

[14] Leven, et al., 1976, 202–03.

structed in the county, it would have had negligible effects on the levels of segregation. Thus, the current siting cannot be seen as the cause of the segregated housing patterns.

There have also been discussions of the issue of whether blacks pay more for housing, but Berry (1979) is able to show that, even after controlling for housing characteristics and income differences, price levels of single-family homes in Chicago in the period 1968–72 were highest in the peripheral white areas, dropped in threatened white neighborhoods, showed a modest increase in zones of black expansion, and collapsed to their lowest levels within the traditional ghetto.[15] Whites are willing to pay a bonus to live in white areas that blacks see no reason to pay. In other words, blacks do not pay more for housing if housing quality and income levels are held constant. Their patterns are explicable in economic terms.

To close this section, it is worth reiterating that there is a vast difference between expected distributions if income is the only causal variable and the patterns to be expected under the influences of income, equity, assets, and consumer tastes and preferences of black and white households.

Preferences

Although income is a useful explanatory factor, it does not act in and of itself as a single cause. Indeed, the greatest weakness of the critics of economics as a factor in explaining residential patterns is the continuing discussion of it as a single variable. As economists, geographers, and sociologists have noted, it is economics in association with preferences that bears much of the explanatory weight of the present residential patterns. Both Becker (1957) and Muth (1969) postulate that if whites have a greater aversion to living among blacks than do other blacks, then whites will offer more for housing in predominately white neighborhoods than blacks will, and separation of the residential areas of the two groups will result.[16] Thus, segregation can be explained in terms of the preferences of consumers. The importance of preferences cannot be underestimated, and in combination with economics and the urban structure (to be discussed in the next section) gives the first part of a balanced explanation for the patterns that we see within the cities. It has been expressed as an underlying dynamic shared by all households of whatever status that they be able to live in a stable neighborhood where acceptable standards of upkeep and conduct are maintained.[17] The preference for particular kinds of neighborhood structures, including population and racial composition, is a powerful force in the patterning of metropolitan areas.

When we examine survey evidence, including both national and local studies, of the preferences of both black and white households, we find that although whites prefer neighborhoods ranging from 0 to 30 percent black, blacks clearly prefer neighborhoods that are 50–50, half black and half white. Utilizing the data from national and specific surveys (Detroit, Kansas City, and Cincinnati), it is clear that the preferences for blacks are overwhelmingly for neighborhoods that are 50–50 (table 6). Whites, on the other hand, have clear preferences for much lower percentages of minorities in their neighborhoods. Even in the Cincinnati survey, which is of the central county of the SMSA and thus is more like a central city, the percentages are not dissimilar. (In general, central cities have much higher proportions of minorities who may express higher preferences for all-black neighborhoods.)

Earlier, Pettigrew (1973) had pointed out that these preferences were changing from levels where whites were unwilling to have blacks in their neighborhoods to much more "accepting" responses, and suggested that this was an indication of the increasing opportunity for integration. However, it appears from recent studies that the preference structure has stabilized (table 6). There has been little change in those preferences over the past 10 years. The preferences of blacks and whites are quite different and do generate a gap in the desired level of integration in neighborhood settings. The documentation of this difference in preferences, when combined with a study of the random effects of only slight differences in expressed preferences for levels of racial integration, yields powerful evidence of the critical role of preferences in generating residential patterns. Schelling (1971, 1978) has shown in some hypothetical situations that even mild racial preferences can produce extreme degrees of segregation. Thus, as long as there is a fair amount of mobility in the city, and as long as some blacks and whites value

[15] Berry, 1979, p. 464.

[16] Becker, 1957.

[17] Leven, 1976, p. 144.

TABLE 6
Summary of Recent Neighborhood Preference Studies*

	All black	Mostly black	Half & half	Mostly white	All white
Black preferences					
National 1978	5.0%	7.0%	85.0%	3.0%	***
Detroit** 1977	12.0	14.0	62.0	10.0	
Kansas City 1982	4.0	3.0	87.0	6.0	***
Cincinnati 1983	7.0	8.0	69.0	7.0	***
White preferences					
National 1978	***	1.0	36.0	29.0	34.0
Kansas City 1982	***	0.0	25.0	39.0	36.0
Cincinnati (Hamilton County) 1983	***	6.0	34.0	34.0	26.0

*"No difference" responses allocated proportionately to other choices.
**Central cities only; suburbs excluded.
***Not asked.
Sources: National and Detroit studies, *Armour* v. *Nix*, Defendants' Exhibit No. 22, prepared by David J. Armor for *Jenkins* v. *State of Missouri*; and Cincinnati from survey by W.A.V. Clark for *Bronson* v. *Board of Education of the City School District of the City of Cincinnati.*

racial homogeneity in their neighborhoods, integrated neighborhoods are likely to be exceptional, and not the rule.[18] Moreover, given the high level of mobility that is characteristic of American cities, it is unlikely that even the most zealous application of open housing laws will bring about integrated neighborhoods with any rapidity.

In an attempt to provide some empirical evidence of the actual impact of preferences on racial residential segregation, several attempts have been made at simulation-reallocation approaches. In these situations, the black households are distributed across the city by tract, according to their residential preferences, and the indices of dissimilarity and exposure are calculated after this reallocation. Such a reallocation carried out as part of the *Armour* v. *Nix* case in Atlanta showed that the existing level of segregation dropped from a dissimilarity index of 0.86 to an index of 0.71. (The exposure index dropped from 0.77 to 0.42.) If the index level also took into account white responses to black preferences, that is, the whites who said they would move if significant numbers of blacks came to live in the neighborhood, the dissimilarity index returned to 0.78, and the exposure index to 0.54. Examples of white response for two recent surveys are given in table 7. Thus, although there is a reduction in the index, the level of reduction in the index indicates that the prefer-

[18] Schnare, 1977.

TABLE 7
Response of Whites to Changes in Neighborhood Composition

If neighborhood became:	Percent of whites who would try to move out	
	Kansas City	Cincinnati
20% black	11	8
30% black	25	14
40% black	40	25
50% black	47	36
60% black	58	48
70% black	63	53

Source: Surveys of Kansas City by W.A.V. Clark and David Armor for *Jenkins* v. *State of Missouri*, and for Cincinnati by W.A.V. Clark for *Bronson* v. *Board of Education of the City School District of the City of Cincinnati.*

ences *are* explaining a significant proportion of the existing level of segregation.[19] A similar analysis of segregation carried out for Kansas City[20] yielded comparable results. Between 60 and 90 percent of the existing patterns of separation are accounted for by preferences.[21] Again, the reallocation of households according to their preferences and then taking into account the white response to those preferences indicates that there would be significant levels of separation even *if preference alone* were evaluated. We live, it seems, in a world in which private preferences—some might call it private racial prejudice—account for a substantial fraction of the observed racial separation. The effect of government action is thus limited.

The Urban Context and Information Availability

Although we can go some distance toward explaining the end result of residential separation with the examination of both economics and preferences, and clearly, in concert they provide a compelling story of the way in which residential separation can be understood, they are, of course, variables that are acting within a wider urban structure. It is important that we identify the way in which this urban structure has an impact on the outcomes of residential choices and residential behavior.

Perhaps one of the most important points to make about the urban context is that the housing market is a dynamic system in which hundreds of thousands of decisions and tens of thousands of moves are made each year. An analysis of turnover in four example cities (table 8), drawn from the Annual Housing Survey, indicates that in any one city there are several hundred thousand residential changes in a 5 to 10-year period. As we will argue later, to see collusive activity in so many decisions is unnecessary to explain the patterns that have arisen.

One piece of evidence that reflects the urban structure shown is a table of the distances moved by black and white households (table 9). It shows that both black and white households move quite similar distances in their relocation behavior. It is correct that black households move somewhat shorter distances than white households, but overall, the average distance moved and the table of distances is more similar than different. Indeed, the urban context provides a situation in which we can understand these shorter distance moves of black households. Many black families (both from anecdotal records and the research literature) have identified the importance of family, churches, and neighborhood social institutions in their day-to-day life course. The church in particular has long played a much greater role for ethnic communities than for the later generation white communities. Indeed, a plot of recent relocations into major metropolitan areas indicates that black households of all income levels are much more likely to choose neighborhoods in black areas than they are white neighbor-

[19] Armour v. Nix, 1978, Defendants' Exhibit 24.

[20] Jenkins v. State of Missouri.

[21] Personal communication from David J. Armor.

TABLE 8
Estimated Turnover of Owner and Rental Units for Selected SMSAs

	ATLANTA				CINCINNATI				KANSAS CITY			
Year	Total owner units	Turn-over	Total rental units	Turn-over	Total owner units	Turn-over	Total rental units	Turn-over	Total owner units	Turn-over	Total rental units	Turn-over
1982	374,200	29,100	176,600	106,000	316,500	13,700	188,800	67,700	329,300	17,100	158,600	63,000
1981*		32,450		105,675		17,375		66,400		22,400		63,550
1980*		35,800		105,150		21,050		65,100		27,700		64,100
1979*		39,150		104,625		24,725		63,800		33,000		64,650
1978	329,800	42,500	159,800	104,100	305,500	28,400	181,100	62,500	303,800	38,300	156,300	65,200
1977*		38,233		100,567		25,876		62,867		32,400		65,468
1976*		33,967		97,033		23,333		63,233		26,500		65,734
1975	295,300	29,700	144,400	93,500	276,400	20,800	169,200	63,600	276,500	20,600	146,100	66,000
Total		280,900		816,650		175,259		515,200		218,000		517,702

*Estimate.
Source: U.S. Bureau of the Census, *Annual Housing Surveys: Atlanta, Cincinnati and Kansas City.* Washington, D.C. Government Printing Office.

hoods (figures 1 and 2). Certainly, in the last 10 years, with the enforcement of open housing laws, it is unlikely that these choices can be seen as constrained relocations. Combined with preferences for 50–50 neighborhoods, it may lead to black relocation patterns which involve choosing neighborhoods that are 50–50, but the end result of the choice process is, of course, that these neighborhoods undergo a transition to mostly black.

The urban structure is also reflected in people's mobility behavior. A voluminous literature on residential mobility has clearly established that people move for reasons related to the life cycle. As they pass through the aging process, getting married, having children, and increasing their incomes, they make relocation behaviors to satisfy their housing needs (table 10). This conceptualization, originally identified by Rossi (1955), and reiterated and modified by numerous other authors,[22] is at the heart of the relocation behavior of households within metropolitan areas.

Although the many studies of reasons for moving do not distinguish the two kinds of responses for moving—decisions for leaving a house and decisions for choosing another house (such decisions are often inextricably linked)—most researchers agree that there is little evidence in the responses of movers, in either the local or national studies, that schools are a central cause in the continued movement of populations within cities. Examining Spain's (1980) report, or the summary of many studies,[23] it is clear that although schools can be elements for individual choices, in the overall decisionmaking of families, cost and quality of housing, and to some extent the location of jobs, are much more critical elements than individual school responses. It may well be that in particular situations, especially where mandatory busing has been a critical element, schools do play a much larger role in the decisionmaking of individual households, but there is little evidence in national studies and from the survey literature that schools are a critical element in the relocation behavior of households. As Orfield (1981) notes, several surveys have shown that Americans are profoundly dissatisfied with cities in general as places to raise children.

Although the reason for the move is related to the life cycle expression of housing needs, the actual choice of *where* to move is governed to a large extent by the information that individuals have about the urban area. And the information that individuals have is spatially biased; that is, households are more familiar with the areas in which they

[22] Clark and Onaka, 1983.

[23] Clark and Onaka, 1983.

TABLE 9
Intraurban Migration Distances by Race for Omaha, Nebraska (1978)

Distance moved (miles)	White		Black	
	Number of movers	Percent of movers	Number of movers	Percent of movers
0–1	27	18.6	54	35.8
1–2	36	24.9	56	37.1
2–3	26	17.9	16	10.6
3–4	17	11.7	14	9.2
4–5	11	7.6	2	1.4
5–6	10	6.9	6	3.9
6–7	5	3.5	1	0.7
7–8	6	4.2	2	1.3
8–9	3	2.1		
9–10	2	1.4		
10–11	2	1.4		

Source: Clark (1980).

already live than areas at some distance from them. That familiarity, and the comfortableness that comes with it, is an important element of what is called the neighborhood effect, and which is a partial explanation for the spatially proximate relocation behavior.

In examining people's moving behavior, we must consider how they go about searching for housing. How a household does its housing search is important in its choice of geographic area. To put it simply, where a household searches has a direct influence on where it will move. The evidence is that housing searches are conducted within quite limited geographic areas. Households looking for housing are much more likely to be aware of available dwelling units near their current residence than they are to be aware of housing at distances farther away.[24] This is particularly true of low-income households, renters, and minorities, who rely on informal sources of information, especially friends and relatives.[25]

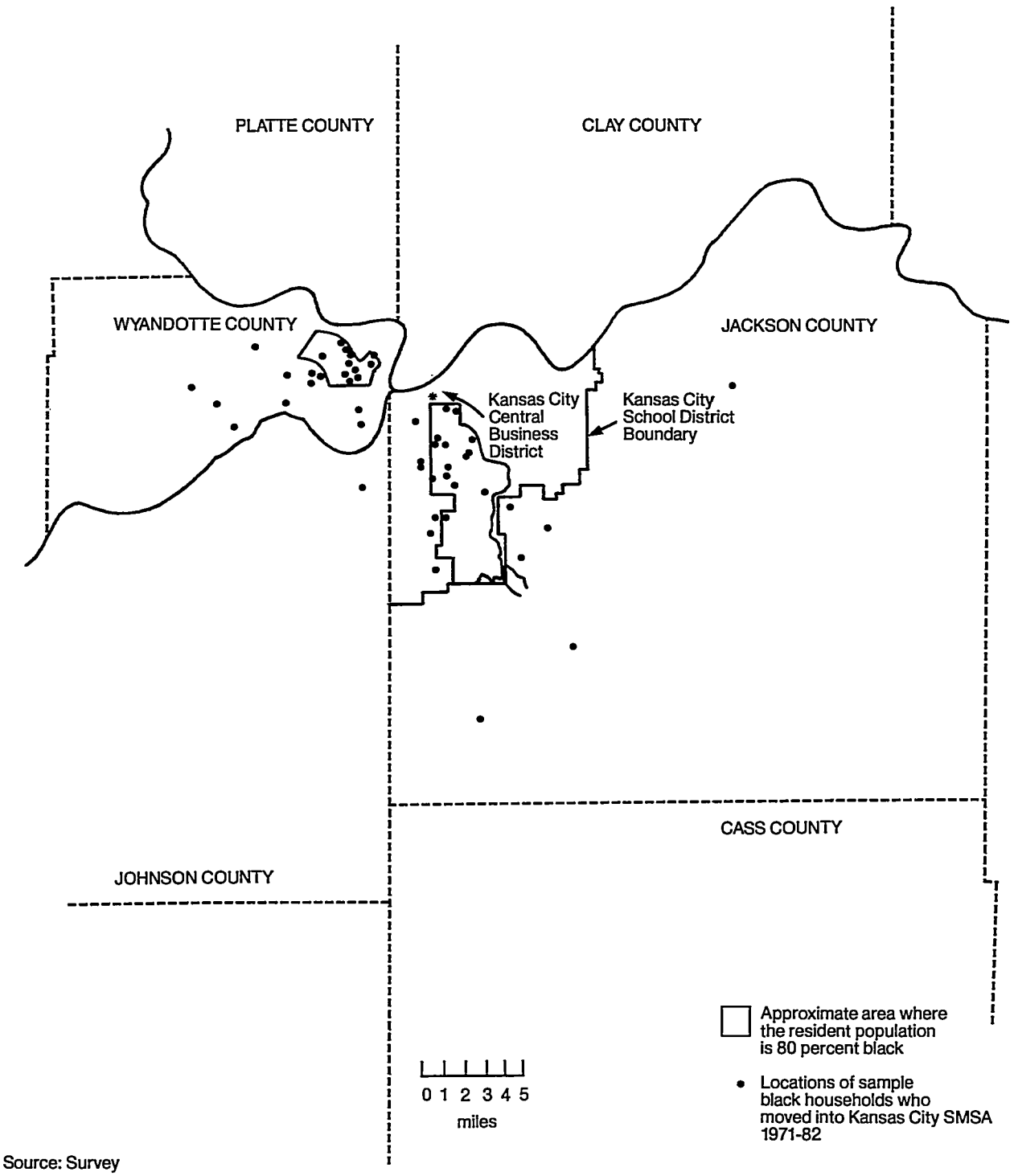
Goodman (1978) also found that premove location was the most critical variable in determining locational choice. He concluded that movers have a strong bias toward selecting nearby units.[26] This choice of nearby units is also established by Clark in a study of Milwaukee, where he shows that the income characteristics of the destination tract are very similar to the tract of origin.[27] A survey of 1,500 households from 43 metropolitan areas in the mid-1960s showed that one-third of all intrametropolitan moves were from one dwelling unit to another in the same neighborhood. Over two-thirds of the moves were less than 5 miles in distance. Among low-income households, nonwhite central city residents, and the elderly, the average distance of moves was found to be even lower than for the sample overall.[28]

This information, which has been well established in the economic, geographic, and sociological literature on moving behavior, was further confirmed in the Department of Housing and Urban Development's Housing Allowance and Housing Supply Experiments. These experiments attempted to establish what would happen if cash payments were made to households in lieu of housing subsidies. The study in the demand experiment focused on what families would do when they were given such allowances. The argument under a housing allowance approach

[24] Huff, 1982.
[25] Cronin, 1982.
[26] Goodman, 1978.
[27] Clark, 1976.
[28] Goodman, 1978.

FIGURE 1

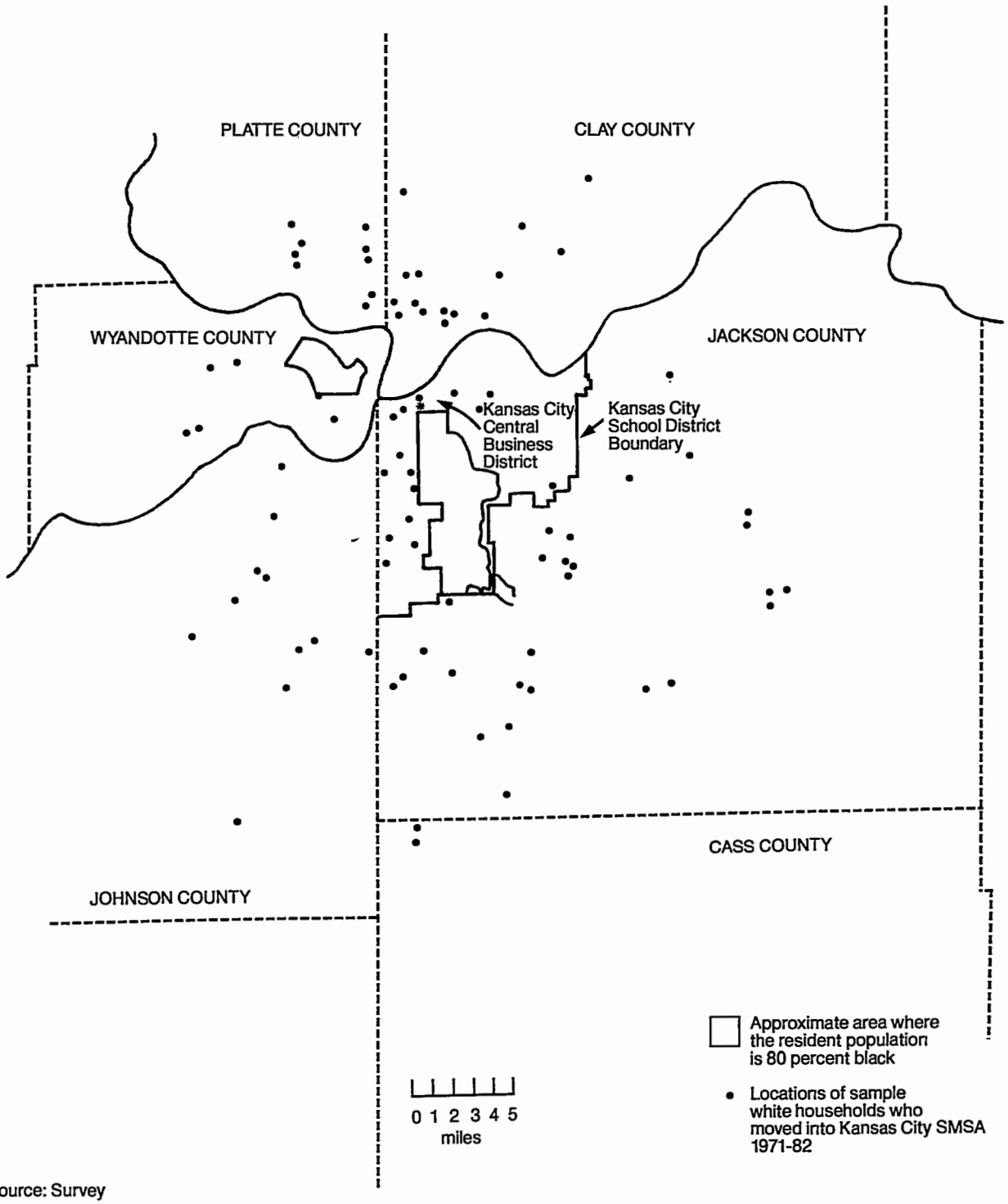
New Black Residents (1971-82) in the Kansas City Standard Metropolitan Statistical Area



Source: Survey

FIGURE 2

New White Residents (1971-82) in the Kansas City Standard Metropolitan Statistical Area



Source: Survey

TABLE 10
Reasons for Moving

Reasons for moving	Speare et al. (1975)	McCarthy (1978)	Goodman (1978)	Spain (1979)
Study region	**Rhode Island**	**Brown County**	**U.S.**	**U.S.**
Move interval	**1 year**	**5 years**	**1 year**	**1 year**
Sample size	**2,140**	**2,039**	**—**	**22,564**
Adjustment moves	50.9	63.9	54.0	52.1
Housing characteristics	45.0	49.6	45.0	41.1
Space	13.6	23.6	15.0	12.8
Quality design	9.4		12.0	10.6
Cost	4.7	6.5	7.0	7.1
Tenure change	17.3	19.5	11.0	10.6
Neighborhood characteristics	5.9	9.6	5.0	6.9
Neighborhood quality	—	—	—	4.9
Physical environment	—	—	—	0.7
Social composition	—	—	—	0.7
Public services	—	—	—	0.6
Accessibility	—	4.7	4.0	4.1
Workplace	—	—	4.0	3.2
Shopping, school	—	—	—	—
Family & friends	—	—	—	0.9
Other	—	—	—	—
Induced moves	34.5	26.8	21.0	30.2
Employment	4.4	—	—	4.4
Life-cycle change	30.1	—	21.0	25.9
Household formation (split)	—	—	9.0	10.9
Change in marital status	26.1	—	12.0	11.1
Change in household size	—	—	—	1.2
Other	4.0	—	—	2.7
Forced moves	10.5	9.3	5.0	5.2
Other moves	4.1	—	12.6	3.7
TOTAL	100.0	100.0	100.0	100.1

Adjustment moves reflect a household's desire to bring their housing consumption into line with their housing needs and are more volitional than induced moves which are created more directly by life-cycle changes.
Source: Clark and Onaka (1983).

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is that low-income households who received cash payments (provided they were able to meet certain housing requirements) would perhaps be able to move to better neighborhoods and so alter existing patterns of the concentration of low-income or minority households. Indeed, the question of whether or not there would be dispersal of these households with the supplementary funds was one of the critical questions of concern.[29] The results of this study as reported in Holshouser (1976) noted that black movers usually remained within black or transitional areas, and even when they did move to more integrated neighborhoods, they maintained their contacts in the neighborhoods of origin. The results suggest that the preference for living in black areas is extremely strong even if economic subsidies are provided. The results are consistent with other information that we have established in this review about the importance of neighborhood attachment. They are in clear contradiction to the belief that subsidies will lead to low-income families relocating long distances to suburban areas.

Although the actual relocation behavior of households is best described as an expression of preference, there are elements of the urban context that are important in identifying the way in which the urban area grows. Cities have not developed in a homogeneous plane, but rather in locations that have rivers and valleys, and along coasts and around lakes. As they have developed, there have been areas of industry and commerce that residential areas have tended to avoid. The urban structure has created a situation in which the patterns of the urban development respond to these natural barriers. Although they are certainly not determinative of the urban structure, they have had an influence on the way in which cities have changed and grown over time. In some instances, the initial locations of minority areas, near the downtown, have been especially impacted by elements of the urban structure. To ignore these urban structural factors in trying to understand the particular spatial expressions of minority residential areas would be shortsighted. Thus, the fact that the black population has grown in a consistent, coherent, and particular direction may well be related to significant geographic forces such as a major river, or the associated industrial land use of major railroads, which has in turn influenced the direction of residential expansion.

The role of urban structure is often couched in terms of central city decline, inner-city crime rates, and deteriorating housing as an explanation for white migration from central cities to suburbs. Frey (1979) shows that black movers and white movers have similar mobility rates, but the destination choice of black movers tends to be central city rather than suburb, and although Goodman (1979) interprets these low rates of outmigration (or the retention of blacks in the central city) as an effect of actual or anticipated housing market discrimination, in fact, it could also simply be that blacks are choosing or preferring to remain in the central city in housing that is economically attractive to them and close to their job and present housing locations. In other words, instead of seeking housing at some distance, they seek that housing vacated by outmigrating whites rather than moving long distances to the suburbs.

In several studies of patterns of black relocation, Frey (1978, 1979, 1985) concludes that the demographics are unlikely to solve the problems of metropolitanwide integration. Even the complete elimination of racial discrimination in suburban entry (assuming that it exists, which Frey does) would fall short of achieving metropolitanwide racial integration.[30]

Discrimination

In any discussion of discrimination, it is important to distinguish between public or government discrimination, discrimination by publicly sanctioned or licensed bodies, and the acts of individuals—private discrimination. It is the former that has been of major concern.

In attempting to evaluate the difficult issue of the level of government discrimination, it is useful to begin by citing two recent survey studies that have attempted to measure, from interview questions, the level of housing discrimination and housing segregation that affects black households. As part of the Pulaski County-North Little Rock desegregation case,[31] a survey asked black respondents the extent to which they suffered discrimination by government agencies. Only 3 percent of all black parents reported that they had experienced housing discrim-

[29] Atkinson and Phipps, 1977.

[30] Frey, 1978.

[31] Little Rock School District v. Pulaski County Special School District.

TABLE 11
Survey Responses on Discrimination

	No. of respondents	% Reporting private discrimination*	% Reporting government/public discrimination**
Kansas City	500	7.0	0
Little Rock	495	6.3	3.2

*Discrimination because of race by private individuals.
**Discrimination by public or publicly sanctioned individuals.
Sources: Kansas City, *Jenkins* v. *State of Missouri*, Case No. 85–1974WM Tr at 19460; Little Rock. Armor, D. (1984) Analysis of desegregation remedies for Pulaski County School Districts. Defendants' Exhibit 43.

ination by government or government-regulated agencies (Defendants' Exhibit 43).[32] The obvious conclusion is that housing violations play only a small role in producing the concentration of blacks in Little Rock (table 11). Similarly, in a study carried out in Kansas City, no one identified government discrimination as a factor in their search for housing.[33] Clearly, these recent survey results conflict with many assertions in the literature about the extensive effect of government or government-sanctioned discrimination.

The comments in the literature often focus on the past use of racially restrictive covenants by State-regulated industries, especially real estate agents and mortgage bankers, including redlining and racial steering, the use of restrictive zoning ordinances, the provision and location of public housing, and the discriminatory practices of the real estate industry. Other specific discrimination practices have also been mentioned. However, the attempts to measure the effects of discriminatory actions have been less than successful. Some authors have concluded[34] that "the preponderance of the evidence is that these discriminatory forces account for residential patterns." But, given the powerful evidence on economics, preferences, the urban structure, and the additional evidence from two surveys that black households do not see themselves as having been discriminated against, it does not appear reasonable to place all of the weight on the government discrimination argument. That is not to say that there has not been discrimination, but to argue that because individual experiences of discrimination have clearly occurred, all real estate transactions are guided by discriminatory intent is unrealistic.[35]

There is a side issue that is more difficult to grasp—the issue of intent. There have been instances of redlining (denying loans to low-income and black households), and although clearly discriminatory, the intent was not necessarily racial. Rather, the intent was to protect capital investment.

Racially restrictive covenants have often been cited as one of the major forces influencing residential patterns, and on the one hand, it is possible that covenants may have had some influence, particularly on indicating which areas blacks should not consider in their relocation behavior. But, on the other hand, time and again, the areas that had covenants have become black. Moreover, it needs to be reiterated that these covenants were ruled unconstitutional in 1948,[36] and the anecdotal evidence suggests that the covenants did not have any significant impacts beyond the 1940s.[37]

In analyses of the discriminatory effects of lending, Wilson (1978) argues that the economic position of minorities is "more important than race in determining black life chances in the modern industrial period." Birnbaum and Weston (1974), who obtained asset data from the Survey of Economic Opportunity, used this measure as well as income in a multiple regression equation to confirm that although race was still a significant influence, its importance was much reduced when assets as well as income were entered into the regression model.

[32] This survey was conducted by Dr. William Samspon of Northwestern University.
[33] Jenkins v. State of Missouri, Case No. 85–1974WM, Tr. at 19563–64).
[34] Taeuber, 1965.
[35] Muth, 1969.
[36] Shelley v. Kraemer.
[37] Jenkins v. State of Missouri.

In the analysis of mortgage lending and rates, even a very thorough attempt to investigate, via survey data, the effect of racial discrimination yields no marginal effects of discrimination. When all the economic factors (income, assets, house purchase price, and loan to value ratio) are included (that is, when all the economic variables are controlled), the disposition of loans (that is, the effect of discrimination) does not vary significantly by race.[38] An alternative model showed only slight race effects, "that at best, whites' acceptance rate for mortgage loans is about 6 percent higher than the non-white acceptance ratio."[39] Such a small discriminatory effect best illustrates that although there are effects, they are minor when the other, more powerful forces (and in this case only economics was taken into account, not preference or urban structure) are allowed to play a role in the explanation of housing patterns. For each study that argues the role of government discrimination, other studies emphasize the absence of it.

Courant and Yinger (1977) and Yinger (1976, 1978) have attempted to provide theoretical formulations that account for discrimination. They argue that given racial prejudice, any equilibrium in the housing market is unstable unless supported by exclusionary practices by whites.[40] However, Smith (1982) shows that the workings of the urban housing market in the light of preferences regarding the race of one's neighbors will continue to promote separation even without exclusion (p. 167).

In an attempt to provide an empirical base of the level of discrimination, the Department of Housing and Urban Development (HUD) commissioned an audit study of the role of discrimination in housing selection. It was both a national and SMSA study with the aim of identifying the level of discrimination in each metropolitan area. In an audit study, matched auditors, white and black, pose as real estate purchasers or renters, and are sent to individual real estate offices. Their treatment on a wide range of variables is measured on a survey instrument after the visit. (Detailed instructions were given to the auditors on how to behave in different situations.) Among the issues examined were the number of units shown to the respondees, the way in which the respondee was treated at the visit, the length of the interview, the kinds of information collected (by the real estate agent) about income, occupation, and other characteristics.

The tables report three possible outcomes—no difference (in treatment), white favored, or black favored. The difference between white favored and black favored was listed as a measure of discriminatory treatment. The results show that blacks encountered discrimination about 15 percent of the time, and the study concludes that a 15 percent level of discrimination would have considerable impact on a black household's housing search.

Unfortunately, the study can give us only general measures at the national level. The number of office contacts for individual cities varied between 15 and 119 contacts for rental housing, and for the sales market, most of the contacts were in the range of 30–50. With such a small number of individual contacts, it is difficult to say anything specific about individual metropolitan areas. Indeed, as the study itself notes, the range of possible responses could vary as much as 30 points around the reported value. Thus, even though the reported discrimination was 30 percent, the true estimation of discrimination could be as low as zero. In addition, depending upon your viewpoint, it can be read as either a relatively negative or positive document. That in many of the characteristics the "no difference" between blacks and whites was very high suggests there is *not* a pervasive climate of discrimination.

The aim of the study was to match two individuals such that any difference in treatment would be because of race, but in fact, there are a number of difficulties with this approach. First, it is not clear that the individuals were greeted by exactly the same respondent at the real estate office, and different individuals can have different responses to an individual, and the *failure to control* for exact contact with the same individual is a potential source of error. Second, the very small number of the audits, when in fact, there are thousands of contacts a month (see table 8), further emphasizes doubts about the validity of such small samples. Third, there is a problem with the time between the visit and the recording of the data. The form is particularly detailed with a great deal of information to be recorded. Obviously, it cannot be filled out at the time of the interview; it has to be done completely from recall, and recall is notoriously unreliable.

[38] Listokin and Casey, 1980.

[39] Listokin and Casey, 1980, p. 139.

[40] Smith, 1982.

Fourth, and perhaps most important, there is the assumption that the differences between a test situation (an auditor or tester) and a real situation cannot be detected by the real estate agent. In fact, the manual recognizes this issue and gives appropriate responses when an auditor "is discovered." Finally, there is the problem that many auditors went alone, when husbands and wives would be together for the important decisionmaking related to housing choice. Clearly, there is a difference between a real situation and a test situation, and even if the buyer experiences some form of discrimination, these experiences cannot be used to infer that because a black met prejudice in a particular situation, a real buyer in that office in that region looking for a house would be discriminated against. It is perhaps artificial to raise prejudice in those situations.

In concluding these comments, it is worth noting that in the courtesy measures, there was a great deal of similarity, and except for the length of time before the interview, there seemed to be little difference over the categories. Similarly, for measures of service, the differences seem small. The longer interview was the only issue in which whites were truly favored. The other differences range between 2 and 6 percent. There were larger differences in questions about income, debts, and occupation (which seem to be requested more of blacks than whites). Although such questions may be evidence of stereotyping, it may be the attempt by real estate agents to determine the seriousness of the black buyers, particularly in real estate offices where there may not have been frequent contacts by blacks. It is certainly possible that agents are maximizing the ratio of sales to selling time, and not discriminating against blacks per se.

In trying to analyze the effects of discrimination, the Commissioners may be forgiven for throwing up their hands at the contradictory results that are presented with respect to the level of discrimination and its effect on the patterns of segregation. There is no doubt that discrimination, particularly in the past, has played a role in influencing housing patterns. The issue is its force now and the effects it is having on residential patterns. This analysis suggests that the effect seems much less pervasive than suggested by the broad-brush comments of Taeuber (1979) and Orfield (1981).

The Links Between Housing and Schools

In the past half-dozen years, there have been a number of assertions that integrating schools will lead to residential integration, that the experience of minority children and their parents in integrated schools will lead to residential relocation to those school neighborhoods. The central thrust of these arguments is that school integration (guaranteed by *Brown* v. *Board of Education)* will open up the cities to residential relocation. Although Taeuber (1979) suggests in an anecdotal fashion that there is evidence from one situation that an open transfer system was followed by residential relocation (leapfrogging over intervening white residential areas), to a large extent, the housing and school link is based on an assertion rather than any evidence that there are impacts of one on the other. It is simple to assert that school and housing policies have an impact on each other,[41] but much more difficult to offer any quantitative or analytic evidence for that statement. It is quite clear that levels of school segregation, where neighborhood schools are used, are quite dependent on the levels of housing segregation. But whether or not changes in levels of school integration will in turn influence housing patterns is much less clear.

The usual way the argument is presented is in terms of racial identifiability. A school is identifiable as black, and this influences neighborhood change. Whites leave and blacks move in. Thus, it follows that if the school board alters the composition of schools, it can influence neighborhood composition. The unwillingness to act to prevent a school from becoming more minority is, then, a violation of the Constitution. In fact, Orfield (1981a) follows this logic to suggest ways of using schools to maintain integrated neighborhoods. Unfortunately, the research literature shows that integrated neighborhoods and schools tend to resegregate rapidly. Most major U.S. cities have no census tracts that have ever been stably integrated. "Left alone, the market almost invariably resegregates. . . ."[42]

In a specific attempt to evaluate these kinds of roles, a study by Pierce (1980 and 1981) argues that metropolitan school desegregation leads to housing desegregation. Segregated schools provide a way for housing agents to convey information about race, and thus influence choices along racial lines—even though it may be unconscious or unintended.

[41] Orfield, 1981.

[42] Orfield, 1981c, p. 28.

Desegregated schools make it difficult to base choices on race. The argument follows the logic outlined above—that schools are signals for people making choices. Again, there are difficulties with the design and the conclusions of this study. It is flawed methodologically and in its analysis of the data.

Two approaches were used: First, she sampled 50 advertisements from the newspapers and coded all the information for those ads. There were no differences in the way houses were advertised. Second, she coded *all* of the newspaper ads for housing in terms of whether specific schools were named. The table that she uses shows that schools were mentioned significantly more often when there was no metropolitan school desegregation. But only between 0.4 and 4 percent of the ads had *any school information.* Only for Tulsa was the number above 10 percent. Therefore, out of thousands of ads, only 20 or 30 ads mention schools. It is hard to base a conclusion of *substantive significance,* as *distinct from statistical significance,* on this result. It is important to note that it is often possible to show a difference that is statistically significant, but that is substantively of little importance.[43]

Even more important than the statistical issues are the issues of whether or not the schools are named for racial purposes. There is no control for the quality of the schools. The ad does not say, "This house is in a white neighborhood with a white school." It is most likely that the ad is saying that this is a high quality neighborhood with a high quality school. Without a control for school scores, there is no way of knowing whether the ads are being used to identify quality of school or racial characteristics.

She concludes that where schools are segregated, schools are used as a signal. All of the argument rests on the mistaken assumption that schools are an important part of the decisionmaking process, and that households make locational decisions *primarily* on the basis of schools. But we have already demonstrated that, in general, the choices are based on housing and neighborhood characteristics that certainly may include *quality* of schools, but they are not conditioned by school location and school racial composition.

Taeuber has suggested that we should be looking for:

> housing integrative effects of school desegregation. . .particularly in the case of countywide and metropolitan school desegregation where little white or black flight occurred. . . .We should ascertain whether there has been any reduction in the sharp differential channeling of white and black housing demands, formerly stimulated by school racial attendance policies [1979, p. 166].

Putting aside for the moment the assumptions and built-in assertions of the statement, several direct tests have been attempted, by Wilson and Taeuber (1978), Klaff (1982), and Clark (1984). The test by Wilson and Taeuber (1978), which attempted to link residential and school segregation, recognized at the end that it is in a complex situation, and it is not possible to disentangle the mutual causality between housing segregation and school segregation. They concede that white avoidance of black areas may well be a large element in the explanation for why housing segregation remains even when school desegregation has been achieved. But a more specific test was carried out by Klaff (1982).

In the Klaff (1982) study, the focus was on the changes that have occurred as a result of a metropolitan desegregation case in Newcastle County, Delaware. Klaff finds that there was still high residential segregation even with metropolitan school desegregation, and that it was not necessarily the result of discrimination. Her results are similar to those of Wolf (1977) and Kantrowitz (1980), who concluded that desegregating the schools in Tarrytown, N.Y., has not desegregated housing. As Klaff notes, there appears to be a pattern of black suburbanization not dissimilar to that reported from a number of other studies. Even given a metropolitan desegregation case, there was significant movement of white families into private schools and of middle-income blacks to suburban schools. In fact, there was only a small amount of retention of white pupils (a little more than 100 students) in inner-city schools. It is clear that there are strong tendencies toward racial residential separation. This may have been from the general attractiveness and gentrification associated with the policies of developing central city areas, thus attracting white families to move back to the central city areas.

The most detailed demographic analysis of school neighborhood links was carried out within the

[43] As total advertisements were coded, significant tests are not appropriate.

context of the mandatory busing program in Los Angeles, California.[44] In this analysis, it was possible to show that many of the changes that occurred in schools were the result of ongoing demographic changes in the city as a whole, and little if any of the changes had to do with busing, except for exacerbating the trend of white movement away from schools with extensive busing. Indeed, the neighborhood changes were almost solely the response of demographic changes rather than changes in the levels of school integration.

In effect, in discussing all of the issues connected with housing patterns in school desegregation, it is important to recognize that we are dealing with a larger dynamic system than just that of residential patterns and levels of school integration. We are, in fact, dealing with the dynamic of a total urban system—a system that includes housing markets, labor markets, and the distribution of populations. This system is driven by forces that are much greater than the simple buying and selling of real estate or the attendance areas of school children. In fact, in the late 20th century, decisions on the location of multinational corporations, the relocation behavior of individual industries, and the demographic changes brought about by large numbers of foreign migrants will be more critical in the long run than simple decisions about the siting of schools and their racial balance. For example, in California, it is estimated that 50 percent of the State will be minority Hispanic or Asian by the year 1990. Clearly, this demographic force is much more important in terms of the provision of schooling and its impact on levels of public education and levels of segregation than any simple interplay between schools and housing. Demographic processes tend to be stronger than social intervention, and it is demographic processes that we must address if we are to understand continuing change and the outcomes of social patterns in the future.[45] There is no firm evidence that integrating schools will lead to neighborhood integration. If it is correct that there is a desire for neighborhood integration, it will "require more draconian measures than the simple busing of children from one school to another."[46]

Concluding Comments

The review of social science evidence demonstrates that there are multiple causes of the patterns of racial residential separation in U.S. metropolitan areas. There is strong evidence from simulation analyses that we can provide reasonable quantitative assessments of the relative role of the various forces that cause racial residential separation. Even though these quantitative assessments will be refined in the future, for now the most secure principle is that there is no single causative factor that dominates the generation and maintenance of residential separation. It is certainly a principle in all research, and particularly in complex systems, that there are a number of interrelated and interlocking forces that are at work in generating those patterns. Clearly, there is enough evidence on economic values, personal preferences, urban structure, and neighborhood inertia that, overall, any attribution to discrimination as a single cause is unwarranted. Most of these forces, economics, preferences, and urban structure, are largely outside of the control of authorized government or government bodies.

At the same time, it is clear that there has been discrimination in the past, and there is no evidence that there is not continuing prejudice (as distinct from discrimination) in current urban life. However, the specific instances of discrimination by neighbors, real estate agents, and banks, although clearly documented in individual instances, do not appear to be part of a massive collusion to deny opportunities to minorities. Although this may not have been true 30 years ago (and even that is not clear), it is certainly not true in current urban markets in the 1980s. Assertions that discrimination is a major factor causing the segregation of housing patterns in metropolitan areas must be treated as assertions, neither more nor less, until further analysis is conducted in a research design framework. The concern with housing patterns, as evidenced in Orfield's recent discussion (1981), is a discussion of a strategy for integration. He argues for significant intervention in housing markets by governments in order to combat segregated housing patterns and to establish integrated neighborhoods. However, it is difficult to see such a fundamental change in the way in which government operates being accepted by the American people if, indeed, it could meet the

[44] Clark, 1984.

[45] Morrison, 1978.

[46] Lowry, 1980.

constitutional tests. As Schnare (1977) has so aptly put it:

> Beyond insisting on equal opportunity, does government have a legitimate role to play in influencing the location decision of households? If so, how could government intervene in the housing market for the benefit of the general public without conflicting with what many individual citizens perceive as their right to choose their own neighbors and neighborhoods? Even if affirmative action could overcome this apparent contradiction with the freedom of choice principle, what forms could it take to become feasible and effective? [P. 28.]

Lest these findings be seen as totally negative, it is clear that we are on a long course of achieving racial equality in this society. It is not likely to happen with particular social interventions or with particular public programs. It will only occur with the achievement of economic equality. There is some evidence that the incomes of blacks as a percentage of incomes of whites have improved.[47] At least as important as the black-white segregation issue that has dominated the literature in recent years is the increasing multiethnic structure of the U.S. population as it moves into the late 20th century, and its implications for the composition of school populations and residential separation in general.

An overview of the trends and causes of urban segregation raises difficult but compelling questions. For the present we must concede that there are multiple causes of the residential patterns, and these multiple causes, which include economics, preferences, urban structure, and discrimination, require further unbiased evaluation in concert.

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[47] Farley, 1984.

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Appendix A

(1) Dissimilarity index (D)

$$D = \tfrac{1}{2} \sum_{i=1}^{n} \left| \frac{W_i}{TW} - \frac{B_i}{TB} \right|$$

where

TW = total whites
TB = total blacks
W_i = number of whites in tract i (or other residential subarea)
B_i = number of blacks in tract i (or other residential subarea)

(2) Relative Exposure index (E)

$$E = 1 - \frac{Wx}{m}$$

where

$$Wx = \frac{1}{TW} \left| \sum_{i=1}^{n} W_i \left(\frac{B_i}{TP_i} \right) \right|$$

and

TW = total whites
W_i = number of whites in a tract (or other residential subarea)
B_i = number of blacks in a tract (or other residential subarea)
TP = total population in a tract (or other residential subarea)

The Causes of Residential Segregation: A Historical Perspective

By Arnold R. Hirsch*

It is now 20 years since the black neighborhood of Watts erupted in a devastating riot that dramatized not only the racial tension in Los Angeles, but the "urban crisis" of the 1960s. If the perceived depth and nature of that crisis have varied with the ebb and flow of changing political currents, it is certainly true that it seems, at least, of interminable duration. But in historical terms, the rise of the urban ghetto—a massive, geographically continuous, isolated place of almost exclusively black residence and institutional life—is a relatively recent phenomenon. Scattered black enclaves and clusters of freemen, fugitives, and slaves existed on the peripheries and in the less desirable regions of antebellum southern cities, and the Civil War hastened the growth of such areas as refugees uprooted from the countryside sought sanctuary and a new life in the city. But nowhere in the United States—certainly not in the North, nor in the war-ravaged South—could anything remotely resembling the modern ghetto be found by 1880. The emergence of the modern ghetto appeared in stages, the first occurring in the half-century between 1880 and 1930, and the second—after a decade's respite caused by the slow growth of the Great Depression—running from 1940 to at least 1970.

This pattern of ghetto development stemmed from a series of dramatic, almost revolutionary, demographic shifts. The movement of black population from rural to urban areas, from the South to the North, and the evolution of American cities and the rise of the suburbs each played an instrumental role. Roughly 90 percent of America's blacks lived in the South when Abraham Lincoln signed the Emancipation Proclamation, and there was little change for nearly a half-century more. A notable spontaneous migration of southern blacks, however, did occur between 1879 and 1881 when some 60,000 caught "Kansas fever"; and although that did little to alter the overall picture, it did mark the beginning of a massive black exodus from the rural South.[1]

Rapidly industrializing cities in the North such as New York and Chicago registered the most spectacular gains in black population in the late 19th and early 20th centuries. Between 1890 and 1930, New York's black population increased from 36,000 to 328,000; Chicago's grew from 14,000 to 234,000. And these two metropolitan giants were just the vanguard of a much broader movement.[2] The coming of World War I, the subsequent cutoff of European immigration, and the northern cities' seemingly insatiable demand for unskilled labor

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[1] Nell Irvin Painter, *The Exodusters: Black Migration to Kansas after Reconstruction* (New York: Alfred A. Knopf, Inc., 1976).

[2] Gilbert Osofsky, *Harlem: The Making of a Ghetto; Negro New York, 1890–1930* (New York: Harper and Row, 1966); Allan H. Spear, *Black Chicago: The Making of a Negro Ghetto, 1890–1920* (Chicago: University of Chicago Press, 1967).

fueled a black migration that continued at an accelerated pace through the 1920s.[3] By 1940 the South claimed only 77 percent of the Nation's blacks, and it was poised on the brink of still greater losses. The United States' mobilization for World War II and the postwar economic boom later provided an even stronger impetus for movement, and the largest decennial black outmigration from the South occurred between 1940 and 1950; moreover, the flight from the South continued at consistently high levels for the next 20 years. Between 1940 and 1970, some 4 million blacks left the region, largely for the cities of the Northeast and Midwest. When the exodus apparently came to an end in the 1970s, the South's share of America's black population had stabilized at 53 percent.[4]

This movement was part of an even larger phenomenon that encompassed the South as well as the North—the urbanization of America's blacks. In 1880 only 12.9 percent of the blacks in the United States lived in "urban" areas; 28.3 percent of whites did so. By 1920 a majority of whites had become urbanized, while barely one-third of the black population could make that claim. In 1950, however, the United States' black population became a predominantly urban one, and 10 years later blacks were more highly urbanized than whites. The underside of this process was the near disappearance of blacks from agricultural America. Between 1920 and 1981, the black farm population declined by 96 percent, and by 1981 only 1 percent of the Nation's 26.5 million blacks could be counted as farm residents.[5]

The 20th century movement of blacks from the farms into American cities coincided with a white exodus out of the city to the suburbs. These parallel parades meant that residential segregation has been increasing for most of the modern era. By 1970 Washington, D.C., and Atlanta held black majorities; the next census added Detroit, Baltimore, and New Orleans to that list. At the same time, throughout the post-World War II era, the suburbs of our largest cities remained overwhelmingly white. New York's suburbs were 4.8 percent black in 1960 and 7.6 percent black 20 years later; Chicago's black suburban population stood at 2.9 percent and only 5.6 percent in those same years. Indeed, as late as 1980, an examination of 14 of the Nation's largest cities (those with a black population of at least 200,000) reveals that none of the industrial cities of the Northeast and Midwest had even a 10 percent black suburban population.[6]

The latest census reveals some overall modification in these demographic trends, but the meaning of those figures is by no means clear. One finding of the 1980 census is that the 100-year black migration out of the South has been reversed.[7] This does not represent any new massive movement from the North, and simply reflects the continued urbanization of rural blacks and the accelerated pace of urban development in the so-called "Sunbelt" during the past generation. Our cities and the black presence within them are still growing—it is just that the most significant urban growth of the 1970s occurred not in the tier of Northern industrial States that stretches from the Great Lakes to the East Coast, but rather took place in the South and West.

Perhaps even more significant (if also more ambiguous) is the revelation by the 1980 census that, for the first time, the increased black presence in the suburbs affected the group's overall distribution. In 1970, 58.2 percent of all blacks lived in central cities; the latest findings show a net drop to 55.7 percent.[8] Undoubtedly, there are thousands of black individuals—part of a growing nonwhite middle class—who are making the traditional trek to suburbia in search of better homes and schools, a more congenial environment, and expanded opportunities for their children. It would be a mistake, however, merely to assume that the black movement of the 1970s and 1980s necessarily, or even primarily, reflects the white experience of the 1950s and 1960s; and it would certainly be rash to presume that such figures represent the imminent dispersal of densely concentrated inner-city black populations. That the five cities with the most notable black suburban populations ranging from 10.9 percent to 21.0 percent are

[3] There are, of course, "push" and "pull" factors at work during any migration. Some of those forces "pushing" blacks out of the South included the spread of lynching and the sense of racial oppression that accompanied the passage of Jim Crow legislation, changes in southern agriculture, and natural disasters such as flooding and the appearance of the boll weevil. See, for example, Florette Henri, *Black Migration: Movement North, 1900–1920* (Garden City, N.Y.: Doubleday, 1976).

[4] Harry A. Ploski and James Williams, eds., *The Negro Almanac: A Reference Work on the Afro-American,* 4th ed. (New York: John Wiley and Sons, 1983), p. 446.

[5] Ibid., pp. 445–55.

[6] Ibid.

[7] Ibid.

[8] Ibid.

all southern (or Border State) metropolises indicates, indeed, that other explanations are in order.[9] In these instances, at least, it seems quite possible that the recent spurt of metropolitan Sunbelt growth has swept over and around older, poorer, peripheral black enclaves that bordered the smaller southern towns of the 19th century. Isolated and poor in earlier years, the residents of such areas have recently been subjected to a surrounding flood of white migrants and have found themselves magically transformed into "suburbanites" by the census. That Houston, New Orleans, Memphis, and Dallas all show dramatic proportionate drops in their still significant black "suburban" populations seems to suggest this possibility.[10] It is also likely that some of the black "suburbanites" detected by the 1980 census are simply those in the vanguard of traditional ghetto expansion as it spills over immobile city boundaries. Black occupation of an older, inner ring of suburbs and the "whitening" of the "exurbs" (those counties added to the fringes of metropolitan areas between 1970 and 1980) points to this possibility.[11] At the very least, a number of detailed case studies must be conducted before any definitive conclusions can be drawn about the recent "suburbanization" of blacks in the United States.

It is evident, however, that the years between 1880 and 1980 did witness a massive and sustained process of black urbanization. In those same years, racial issues ceased being matters of merely local southern concern and became national in scope. The period also witnessed the emergence and maturation of the modern urban ghetto in the United States. The vast demographic shifts of that century assembled the raw materials that presaged such a development. The actual fashioning of those ghettos, however, was neither a "natural" nor an "automatic" process; the uncounted decisions of uncounted individuals and institutions—both willful and inadvertent—contributed mightily to that outcome.

The upsurge in urban black population in the United States meant, universally, an increase in residential segregation. The process began in the post bellum South where blacks frequently represented 40 percent or more of the urban populations. No southern city possessed a single, all-encompassing ghetto, but many towns had multiple clusters of black residents, frequently located on the urban periphery, surrounding a largely white core. Antebellum neighborhoods that contained significant numbers of blacks and their institutional supports (such as churches and schools) and the camps established for the freed slaves during the Civil War often served as the bases for future black territorial expansion. A leading student of southern cities during this era has subsequently concluded that by 1890 separate black and white neighborhoods "dominated the urban landscape."[12] It is important to note, however, that even though the trend towards increasing segregation was unmistakable, some racial mixing could still be found in many of these clusters and that the pattern of racial separation showed itself most clearly when small units of measurement such as "linear blocks" were used. The vast urban expanses of almost exclusively black settlement that propelled themselves into the national consciousness during the 1960s were 20th century northern creations. In the end, 19th century southern ghettoization was limited by economic, technological, and spatial constraints. Not yet feeling the full weight of the industrial revolution, these generally small, compact southern towns simply lacked the capacity to disperse and sort out their populations either by class or race.

On the eve of the Great Migration of southern blacks, the rapidly industrializing northern cities, proportionately, held infinitesimal black populations.[13] Generally, as was the case in the South, they lived in scattered clusters. With the gradual—and then the accelerated—increase in black population that characterized the years between 1880 and 1930,

[9] The five cities are St. Louis, New Orleans, Atlanta, Washington, D.C., and Memphis. See table 3.

[10] See table 3.

[11] Ploski and Williams, *Negro Almanac,* p. 453.

[12] Howard Rabinowitz, *Race Relations in the Urban South, 1865–1890* (New York: Oxford University Press, 1978), pp. 97–124; see also James Borchert, *Alley Life in Washington: Family, Community, Religion, and Folklife in the City, 1850–1970* (Urbana, Ill.: University of Illinois Press, 1980).

[13] The striking percentage increases in northern urban black populations between 1910 and 1920, for example, were due to the addition of significant, but not overwhelming, numbers of black migrants to existing, modest black communities. Detroit added only slightly more than 36,240 individuals to its black population in those years, but that represented an increase of more than 611 percent; Cleveland added 34,000 to a base of less than 8,500, for an increase of nearly 308 percent; Chicago's 65,500 new black residents represented a gain of 148 percent, and New York's increase of 61,400 represented a rise of 66 percent. See Henri, *Black Migration,* p. 69, and Kenneth Kusmer, *A Ghetto Takes Shape: Black Cleveland, 1870–1930* (Urbana, Ill.: University of Illinois Press, 1976), p. 10.

however, a rapid progression toward larger, more densely compacted black neighborhoods became evident. The process proceeded most noticeably and quickly in the region's metropolitan giants: New York and Chicago. Other northern cities—Philadelphia, Detroit, Cleveland, and Pittsburgh, for example—followed at their own pace, but all proceeded in the same direction; in every case blacks gathered first in blocks, concentrated their residences in small clusters, and shared their larger neighborhoods with whites. As early as the 1890s in Chicago, however, the trend toward increasing segregation and white movement out of these areas of black concentration was clear. Indeed, in compiling indexes of residential segregation (indexes of dissimilarity) in 10 northern cities between 1910 and 1930, Karl and Alma Taeuber discovered a marked, dramatic increase in the separation of blacks and native whites in every case. Using an index of dissimilarity where the value zero represents perfect integration (each block possessing a proportional share of blacks and whites) and 100 signifies total segregation (each block contains only whites or blacks, but not both), they found that the segregation indexes ranged between 44.1 and 66.8 in 1910, and that they ballooned to a low of 61.4 and a high of 86.7 by 1930 (those numbers represent the minimum percentage of nonwhites who would have to move to achieve complete integration).[14]

The forces behind the rapid separation of blacks and whites were many, and not all were related to race. The overwhelming majority of black southern migrants, for example, was poor, and the brute facts of economic life greatly restricted the housing opportunities available to them. Poor people clustered in poor neighborhoods with others like themselves. But if economic realities alone operated, the poor of all backgrounds and colors would share the same areas. Such was not the case. Whites of literally dozens of nationalities did mix in our cities' streets, but blacks increasingly found themselves excluded from those neighborhoods. The cultural cauldrons of urban America did produce identifiably "ethnic" colonies, but the most recent scholarship has convincingly demonstrated that the immigrants' communities were nowhere homogeneous, and that their "ghettos" were temporary way stations that oversaw the ultimate dispersal—not increasing concentration—of their residents. Indeed, according to one recent study, blacks, when compared to the European immigrants, lived history in "reverse."[15]

Another partial explanation can be found in the argument that at least some of the clustering was voluntary, that it represented an expression of cultural affinity and that these strangers in a strange land sought neighbors of like backgrounds to ease their transition into urban, industrial America. There is something to this, but, again, the comparison to European immigrants is instructive. The "new" immigrants from Southern and Eastern Europe who flooded America at the turn of the 20th century sought the solace of ethnic familiarity and built institutions and evolved behavioral patterns to preserve and sustain their cultures. But everywhere, in time, their narrowly ethnic institutions eroded, and their behavior adapted to the opportunities and choices America laid before them. They dispersed residentially, and if the desire for "community" remained strong, they later found that the telephone and the automobile could overcome the need for geographical proximity. As powerful as their cultures and desires were, they could not withstand the lure of "Americanization."[16]

As far as blacks are concerned, however, the most that can be said is that their "cultural affinities" have never been put to the same test. During the initial period of ghetto formation (1880–1930), blacks—whatever their economic status—lacked the same choices (residential and otherwise) laid before the immigrants and their children. In the absence of such free choice, any conclusions concerning the degree of "voluntary" black segregation must necessarily remain speculative and, potentially, misleading. Any assumption that centripetal forces within the black community outweighed external pressures in producing the degree of residential segregation

[14] Karl E. Taeuber and Alma F. Taeuber, *Negroes in Cities* (New York: Atheneum, 1969), p. 54.

[15] Olivier Zunz, *The Changing Face of Inequality: Urbanization, Industrial Development, and Immigrants in Detroit, 1880–1920* (Chicago: University of Chicago Press, 1982), p. 398 and passim.; see also Thomas Lee Philpott, *The Slum and the Ghetto: Neighborhood Deterioration and Middle Class Reform, Chicago, 1880–1930* (New York: Oxford University Press, 1978), pp. 136–44; Humbert Nelli, *Italians in Chicago, 1880–1930* (New York: Oxford University Press, 1970), pp. 23–28; Sam Bass Warner, Jr., and Colin B. Burke, "Cultural Change and the Ghetto," *Journal of Contemporary History* 4 (October 1969): 173–88; and John Bodnar, Roger Simon, and Michael P. Weber, *Lives of Their Own: Blacks, Italians, and Poles in Pittsburgh, 1900–1960* (Urbana, Ill.: University of Illinois Press, 1982).

[16] Kathleen Neils Conzen, "Immigrants, Immigrant Neighborhoods, and Ethnic Identity: Historical Issues," *Journal of American History* 79 (December 1979): 603–15.

that was visible by the Great Depression is dangerously off target.

A final, crucial complex of "nonracial" factors, however, involves the timing of both the black migration and the economic development of the cities that received them. The technological advances and mechanized production associated with industrialization gave rise to the modern corporation, mass markets, and large-scale economic enterprises that altered the face of urban America. Combined with the rapid accumulation of wealth, the seemingly acute visibility of alarming class, ethnic, and racial differences, and the appearance of mechanized forms of mass transit, they led to the rapid specialization of urban land use. It was not simply that blacks were being separated from whites, but that industrial districts were now being kept separate from commercial ones, and that both of those existed quite apart from the purely residential areas that appeared; and the latter were divided not only by race, but by class, ethnicity, and the age of the residents as well. Economic and technological advances permitted urbanization on a scale never before possible, and revolutionized the internal structure of our industrial cities. The old, preindustrial "walking city"—a compact settlement that could be crossed easily on foot and contained all manner of residents and enterprises cheek by jowl—was no more.[17]

But even here, it must be noted, the pattern of black settlement within the context of the industrial revolution was unique. If job location and class status determined the residential choices of most urban workers, a host of recent historical studies indicates that race, not occupation, was still the best predictor of black residence. If Irish shoemakers lived closer to German shoemakers than their ethnic brethren by the early 20th century, the black shoemaker could still be found in an emerging all-black ghetto. Industrialization, it seems, permitted a greater degree of segregation (of all kinds) than was heretofore possible; but the economic imperatives and technological possibilities of that process affected blacks in a distinctive manner that set them apart from all other city dwellers.[18] In sum, the "nonracial" forces contributing to black residential segregation before the Great Depression were real, contributory, but not determinative; they alone could not have produced the high segregation indexes discovered for 1930.

There were other forces at work that were not themselves products of malicious racial intent, despite the overt racial context of the age.[19] Local conditions and what can perhaps best be called historical "accidents" further conditioned the development of these embryonic urban ghettos and provided the peculiar twists that, ultimately, must be examined in each individual case. Two examples should suffice to illustrate the point.

In Chicago, several small black enclaves on the near south side were devastated by a fire in 1874 that forced their resettlement. The survivors moved further south and consolidated themselves into what became the core of Chicago's famous "black belt." The coming of the World's Columbian Exposition in 1893 also contributed greatly to this development as speculators purchased south side property and hastily erected cheap rooming houses, apartments, and hotels for the tourists along the major transit arteries leading to the fair. The closing of the exposition and the onset of the grim depression that gripped the Nation in the mid-1890s left the speculators holding thousands of costly vacancies. The location of these accommodations along South State Street and Michigan and Wabash Avenues, their proximity to the existing core black settlement, the simultaneous arrival of large numbers of southern black migrants,

[17] Sam Bass Warner, Jr., *The Urban Wilderness: A History of the American City* (New York: Harper and Row, Publishers, 1972), pp. 85–112 and passim.

[18] There is currently a lively debate between those who emphasize ethnicity in housing choice and those who stress the importance of job location in the 19th century; both sides agree, however, that blacks constitute a special case and that their experience differed fundamentally from that of white immigrants. Zunz, *The Changing Face of Inequality,* pp. 129–76 and passim.; Stephanie W. Greenberg, "Industrial Location and Ethnic Residential Patterns in an Industrializing City: Philadelphia, 1880," and Theodore Hershberg, Alan N. Burstein, Eugene P. Ericksen, Stephanie W. Greenberg, and William L. Yancey, "A Tale of Three Cities: Blacks, Immigrants, and Opportunity in Philadelphia, 1850–1880, 1930, 1970," both in Theodore Hershberg, ed., *Philadelphia: Work, Space, Family, and Group Experience in the 19th Century* (New York: Oxford University Press, 1981); see also Kusmer, *A Ghetto Takes Shape,* pp. 45–47.

[19] See, for example, George Frederickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (New York: Harper and Row, 1971); John W. Cell, *The Highest Stage of White Supremacy: The Origins of Segregation in South Africa and the American South* (Cambridge: Cambridge University Press, 1982); Joel Williamson, *The Crucible of Race: Black-White Relations in the American South Since Emancipation* (New York: Oxford University Press, 1984).

and the unavailability of "black" housing elsewhere led to the emergence of a major black colony.[20]

In New York, land speculation also played a similar role in the appearance of the Nation's best known black metropolis, Harlem. Located 8 miles from city hall, Harlem remained a "village of shanties and huts" through the mid-19th century. A burst of growth triggered by New York's modernizing economy led to Harlem's annexation in 1873, and between 1878 and 1881 three elevated railroad lines extended as far north as 129th Street. Speculators who had earlier followed the tracks of New York's horsecars sparked a frenzy of development until the bubble of inflated land values popped in 1904–05. Those who erected apartments in advance of anticipated railroad extensions found themselves with unrentable vacancies, and even after mass transit provided access, property owners found a glut of accommodations producing the same effect. Enterprising black real estate agents, especially Philip A. Payton and his Afro-American Realty Company, stepped into the soft market, capitalized on the massive turn of the century black migration to New York, provided a steady income to the desperate white property owners from whom they leased buildings, and facilitated the turnover to black occupancy. By 1920 Harlem's midsection was predominantly black, and the increasing stream of southern migrants completed the transition before the decade was out.[21]

Such rapidly developing poor black neighborhoods produced a host of social problems, and even the attempts to alleviate them further solidified the emerging pattern. Progressive reformers did not ignore the needs of an urbanizing black population, and although their numbers included those who fully supported the "color line" as it appeared, there were those who chafed under its restrictions. All, however, worked with it and lacked either the inclination or the power to challenge it effectively. Settlement houses in working-class neighborhoods, thus, catered to their surrounding immigrant communities, and—whether the impetus came from the immigrants themselves or a sympathetic staff—they usually discouraged black participation in their programs. Those houses set up to serve blacks generally did so on a segregated basis in predominantly black blocks or neighborhoods. The provision of their social services attracted and held more black settlers and discouraged continued white residence around them. Even attempts at reform consequently accelerated and reinforced the move towards residential segregation.[22]

Despite all of these pressures and forces, however, the simple fact remains that many blacks—especially those in the developing middle class—made frequent, repeated attempts to move beyond the confines of identifiably "black" neighborhoods. They were rebuffed not by invisible, impersonal, or anonymous forces, but by the overwhelming application of explicitly racial restrictions that reflected the desires of the dominant white majority. No other group had to face such an onslaught; it was the distinguishing characteristic that separated the black ghetto from the ethnic slum.[23]

The first club often picked up in the battle to maintain the homogeneity of white neighborhoods involved the use of legal restrictions and attempts to enlist the power of the state. With southern cities feeling the first wave of black migration most sharply, it is not surprising that the movement for legalized residential segregation appeared as part of the broader surge of turn of the century Jim Crow legislation. The movement of a black lawyer and his school teacher wife into a white neighborhood in Baltimore in 1910 triggered the movement to pass racial zoning ordinances that would racially divide American cities block by block. Baltimore's ordinance, which served as a model for many of those that followed, was soon succeeded by similar laws in Norfolk, Ashland, Roanoke, and Portsmouth, Virginia; Winston-Salem, North Carolina; Greenville, South Carolina; and Atlanta, Georgia. Moving westward, between 1913 and 1916 racial zoning laws were adopted by Louisville, St. Louis, Oklahoma City, and New Orleans. Finally, a legal showdown sponsored by the National Association for the Advancement of Colored People (NAACP) in Louisville resulted in a U.S. Supreme Court decision *(Buchanan* v. *Warley)* that invalidated such laws in 1917. There were several attempts to resurrect these ordinances in the 1920s in Norfolk, New Orleans, and Dallas; Winston-Salem even made a last gasp attempt as late as 1940. But in each case lower courts

[20] Philpott, *The Slum and the Ghetto,* pp. 115–45; David A. Wallace, "Residential Concentration of Negroes in Chicago" (Ph.D. dissertation, Harvard University, 1953).

[21] Osofsky, *Harlem,* pp. 71–149.

[22] Philpott, *The Slum and the Ghetto,* pp. 273–342.

[23] It is precisely that distinction that serves as the major theme of Philpott's *The Slum and the Ghetto.*

struck them down. Almost exclusively a southern approach, these laws were occasionally debated in northern cities such as Chicago, but never passed, save for the lone exception of Klan-controlled Indianapolis in 1927.[24]

Northern cities took a different tack and, indeed, most cities in the wake of *Buchanan* v. *Warley* opted to limit black residential movement through the use of private agreements—racially restrictive covenants. These contracts prohibited property owners from selling or renting their homes to "undesirables." Especially popular in the 1920s and 1930s, these covenants were ultimately used against a wide range of racial, ethnic, and religious minorities. It was always clear, however, that blacks remained their primary targets; in St. Louis, for example, 99 percent of the covenants executed specified blacks alone as the group to be proscribed. And when, in the course of city growth and suburban expansion, entire new subdivisions were placed under such covenants, blacks found themselves legally excluded from vast stretches of the urban landscape. Unlike the racial ordinances of the South, the U.S. Supreme Court gave its tacit approval to lower court rulings that held such covenants valid and enforceable in 1926 *(Corrigan* v. *Buckley).*[25]

Informal, unspoken, day-to-day business practices further buttressed such formal, legalistic restrictions and, ultimately, were probably even more instrumental in creating and maintaining the pattern of residential segregation. Local real estate boards and companies acted as so many "gatekeepers," "steering" blacks into all-black areas and preserving the racial homogeneity of white neighborhoods. Even in such a city as Milwaukee, with its comparatively small black population, real estate agents supplemented a network of restrictive covenants (90 percent of the plats filed after 1910 contained some restrictions banning the sale of property to blacks) with "gentlemen's agreements" not to rent or sell to blacks outside a "sharply delineated area." Where black numbers were far more substantial, as in Chicago, local real estate boards were more outspoken. There, in 1917, the CREB (Chicago Real Estate Board) acknowledged the need to provide more black housing, but hoped to prevent "promiscuous" sales by advising its members first to fill in existing areas of black concentration and then furnish accommodations only in blocks contiguous to the ghetto. The St. Louis Real Estate Exchange went even further. It simply established "unrestricted colored districts" in which property might be transferred to blacks and declared the rest of the city "off limits" to them. And if any blacks should press their interest in purchasing property in white neighborhoods, they almost invariably ran up against the reluctance of financial institutions to provide the capital for such transactions.[26]

Prior to the Great Depression, the private housing industry's position on race was perhaps best exemplified by Nathan William MacChesney, a lawyer of national reknown who was also general counsel to the National Association of Real Estate Boards (NAREB) and author of a widely accepted text on real estate law. Not only did MacChesney draft a model restrictive covenant for general use (blacks alone were singled out in the document as they were in his text), but he also added to NAREB's Code of Ethics an amendment in 1924 that prohibited the introduction of "members of any race or nationality" into neighborhoods where they threatened property values. He also subsequently drafted a model real estate licensing act (one eventually adopted by 32 States) that permitted State commissions to revoke the license of any agent who violated the national association's code—and the failure to discriminate on racial grounds now constituted a breach of professional ethics. A NAREB publication, *Fundamentals of Real Estate Practice* (1943), summarized the housing industry's attitude toward and classified those blacks who pursued the American dream:

> The prospective buyer might be a bootlegger who could cause considerable annoyance to his neighbors, a madam who had a number of Call Girls on her string, a gangster who wants a screen for his activities by living in a better neighborhood, a colored man of means who was giving his children a college education and thought they were entitled to live among whites. . . .No matter what the motive or character of the would-be purchaser, if the deal

[24] Roger L. Rice, "Residential Segregation by Law, 1910–1917," *The Journal of Southern History* XXXIV (May 1968): 179–99.

[25] Herman H. Long and Charles S. Johnson, *People vs. Property: Race Restrictive Covenants in Housing* (Nashville, Tenn.: Fisk University Press, 1947).

[26] Ibid., pp. 56–72; Kusmer, *A Ghetto Takes Shape,* p. 46; Philpott, *The Slum and the Ghetto,* p. 163; Joe William Trotter, Jr., *Black Milwaukee: The Making of an Industrial Proletariat, 1915–1945* (Urbana, Ill.: University of Illinois Press, 1985), p. 71.

would instigate a form of blight, then certainly the well-meaning broker must work against its consummation.[27]

Supplementing the activities of real estate agents and lenders who refused to facilitate black purchases in white areas were the actions taken in the neighborhoods themselves. Local improvement associations conducted covenant-writing campaigns, tried to inculcate a sense of communal solidarity, and frequently served as vehicles for those rallying against the black "invasion" of their neighborhoods. When pressed, they exerted considerable social pressure on those within their reach and turned to intimidation of both potential white sellers and black buyers if all else failed.[28]

Ultimately, however, violence served as a last resort that underscored the general determination to confine the growing black population. The racial tension generated by demographic change and the strains accompanying World War I culminated in a series of racial explosions in 1919. Between April and October of that year, at least 25 cities and towns suffered serious rioting that produced more than 100 fatalities. Violence, it seemed, dogged the black movement from the country to the city, striking both New Orleans and New York in 1900, Atlanta in 1906, and two Springfields—Ohio in 1904 and Illinois 4 years later; and the eruption of East St. Louis, Illinois, in 1919 was a harbinger of what the postwar years had to offer. The worst urban rioting of 1919, in chronological sequence, struck Charleston; Longview, Texas; Washington, D.C.; Chicago; and Omaha. Although many racial factors contributed to the violence, the confrontation over housing was an important component in many cases, and in the single worst conflagration—the Chicago riot where 38 people died and more than 500 were injured—it was a central issue.[29]

The 1919 Chicago riot itself occurred within the context of a broader wave of housing-related violence. Between July 1, 1917, and March 1, 1921, 58 homes were bombed—an average of one bombing every 20 days for nearly 4 years—by those trying to restrict black areas of residence. Invariably, homes owned by blacks in fringe or "white" areas were targeted, as were the homes and offices of the real estate agents (white and black) who handled such properties. And under the cover of the riot itself, white gangs roamed the edges of the black belt committing, according to the State commission that investigated the riot, "premeditated depredations" against black individuals and property found outside the popularly conceived boundaries of the ghetto. In but a single case, nine black families in the 5000 block of Shields Avenue had their homes vandalized and torched by such mobs; blacks were driven out of the area, and it was 28 years before anyone sold or rented a home on that block to blacks again. And when, in 1947, another black family moved to that street, it took but a week for them to find their garage mysteriously ablaze. The "chilling effect" of such actions was manifest; there was no more direct method of declaring certain white neighborhoods off limits to blacks.[30]

If Chicago represents perhaps an extreme example, it was by no means alone. Cleveland also experienced attacks by white gangs on black homes during the World War I era, beginning in 1917 and continuing through the 1920s. The violence directed at blacks attempting to move into suburban or outlying areas was especially brutal, and when one such victim appealed to the mayor of Garfield Heights for help, he was told simply that "colored people had no right to purchase such a nice home." With the metropolitan frontier guarded by the well-to-do, black Clevelanders also found their housing choices restricted by the presence and hostility of inner-city ethnics who jealously patrolled their own "turf."[31] Detroit similarly experienced house bombings in 1917, saw such attacks escalate in the spring of 1919, and found them "frequent" occurrences in the 1920s. The most publicized incident of the decade arose, in fact, when Detroit physician Ossian Sweet and his family repelled a white mob from their doorstep by shooting into it; Sweet was tried

[27] Philpott, *The Slum and the Ghetto,* pp. 190–91; Long and Johnson, *People vs. Property,* p. 58 and passim.

[28] Chicago Commission on Race Relations (CCRR), *The Negro in Chicago* (Chicago: University of Chicago Press, 1922), pp. 115–22; William M. Tuttle, Jr., *Race Riot: Chicago in the Red Summer of 1919* (New York: Atheneum, 1970), pp. 173–80, 251; Zorita Wise Mikva, "The Neighborhood Improvement Association: A Counter-Force to the Expansion of Chicago's Negro Population" (M.A. thesis, University of Chicago, 1951).

[29] The best discussions of the Chicago riot are found in CCRR, *The Negro in Chicago,* and Tuttle, *Race Riot.*

[30] CCRR, *The Negro in Chicago,* p. 122; Tuttle, *Race Riot,* pp. 157–83; Philpott, *The Slum and the Ghetto,* pp. 170–80; Spear, *Black Chicago,* pp. 221–22.

[31] Kusmer, *A Ghetto Takes Shape,* pp. 165–72.

for murder, and it took Clarence Darrow to get him off.[32]

Once a substantial black presence and the pattern of segregation had been established, additional forces came into play. In the North particularly, city after city created dual housing markets, one for whites and another for blacks. Given the blacks' rapid population increase and the limited housing made available to them, their market was characterized by scarcity. The cost of black housing rose sharply, and nonwhites not only had to pay more than whites for equivalent quarters, but also had to devote a proportionately greater share of their incomes to housing. Large units were divided into numerous small ones, and a host of urban problems—particularly those related to poverty, overcrowding, and high population densities—appeared in aggravated form. From the late 1920s to the late 1940s, the dual housing market, the cost of black housing, restrictive covenants, and a severe housing shortage stabilized ghetto borders; modest Depression-era population increases and more substantial war-related ones were simply, and necessarily, absorbed within them. The appearance of post-World War II suburban alternatives for whites, however, ended the shortage, destabilized the inner-city racial frontier, and transformed the dual housing market into a powerful engine promoting neighborhood change. Ghetto building proved profitable. The blacks' pent-up demand for new accommodations, the increased ability of many to pay for them, and the higher prices they could be charged produced a massive postwar movement of central city blacks who rushed into the vacancies left by suburban-bound whites. The postwar era consequently witnessed the rapid expansion and reconstitution of new ghetto boundaries. It was this second wave of black migration after 1940, this second era of ghetto formation, that produced the vast geographical concentrations of urban blacks that generated the "long, hot summers" of the 1960s.[33]

The establishment of substantial, segregated urban black communities also gave rise to economic, social, and political forces within those communities that had a vested interest in their persistence. Whether it was black businesses catering to a concentrated black clientele, ministers tending their flocks, or politicians shepherding their voters, it is clear that the ghetto of the early 20th century produced among its leaders a class that could view the dispersal of urban blacks with only misgivings, and one that, at times, depended on the ghetto's very creators for their own sustenance. But the ghetto also produced more than a claque of self-serving manipulators or the "tangle of pathology" that has so long been associated with it. It was also a self-sustaining institutional and cultural entity that nourished the social and intellectual networks that made the flowering of a Harlem Renaissance possible; and it provided the personal freedom that permitted blacks to organize, coalesce, and pursue their own strategies in coping with modern America. Ideologically, the movements for self-help, race pride, and black nationalism found a natural home in the black metropolis; although certainly in no way responsible for the rise of the ghetto, they had quickly pushed roots down into the fresh soil of these new communities and were very much a part of them. Alone, the forces emanating from within these increasingly complex black settlements could not determine the future development or expansion of the northern ghetto; but they rendered less clear the choices confronting urban blacks after World War II and weakened the resistance to outside forces that assured the continued segregation of a greatly enlarged black presence.[34]

That American cities achieved an exceptionally high degree of racial segregation and maintained those levels throughout the post-World War II period seems beyond dispute. The Taeubers' formulation of indexes of dissimilarity for more than 100 cities reveals increasing segregation between 1940 and 1950, and a seeming reversal of that trend between 1950 and 1960. There is little question that residential segregation was continuing down to 1950, but the apparent reversal in the succeeding decade merits a second look. In the first place, given the historical pattern of ghetto expansion, the lower segregation indexes found in 1960 might well indicate nothing more than the temporary mixture of

[32] Zunz, *The Changing Face of Inequality,* pp. 373–74; Kenneth T. Jackson, *The Ku Klux Klan in the City, 1915–1930* (New York: Oxford University Press, 1967), pp. 140–41.

[33] For profiteering in an earlier era, see Zunz, *The Changing Face of Inequality,* p. 375; for developments after 1940, see Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960* (New York: Cambridge University Press, 1983), pp. 31–35.

[34] Kusmer, *A Ghetto Takes Shape,* pp. 206–74; Spear, *Black Chicago,* pp. 71–126; Trotter, *Black Milwaukee,* pp. 80–114 and passim.; August Meier, *Negro Thought in America, 1880–1915* (Ann Arbor, Mich.: University of Michigan Press, 1963).

border areas and new black provinces in an age of rapid white flight from the central city. Ghetto boundaries were being redrawn after nearly two decades of relative stability; the statistical snapshot taken by the census in 1960 caught that process in full motion. That was certainly the case in Chicago and may well hold in other major cities as well. Indeed, these cities were not desegregating in the 1950s—they were expanding their ghettos.

Secondly, there is a problem in trying to make a single, sound generalization about the residential tendencies of all black Americans on the basis of studies encompassing literally hundreds of cities and metropolitan areas. That is true of the Taeubers' work as well as later examinations of the 1970 census. The towns included in such studies are of varying ages, sizes, and some—especially those caught in the broad net cast by the scrutiny of literally all American standard metropolitan statistical areas (SMSAs) in 1970—include those with infinitesimal black populations. If we weigh all cities equally, regardless of size or the proportion of their black populations, there is a detectable move away from the intense segregation found at midcentury. This is especially so in smaller metropolitan areas with small black populations; segregation levels dropped sharply in such places. If, however, we choose to look at large concentrations of blacks, a very different picture emerges.

The 1980 census counted 14 major American cities with black populations of at least 200,000. Geographically, they represent a fair sample spread across the North (New York, Chicago, Detroit, Philadelphia, and Cleveland), the South (Houston, New Orleans, Memphis, Atlanta, and Dallas), the Border States (Washington, D.C., Baltimore, and St. Louis), and the West (Los Angeles). Together, these metropolitan giants contained nearly 10.4 million blacks or approximately 40 percent of all black Americans in 1980. An examination of the indexes of dissimilarity for these major population centers reveals consistently high levels of segregation between 1940 and 1970 that were fiercely resistant to change.

Between 1940 and 1950, according to the Taeubers, 10 of these 14 cities increased their levels of racial segregation. The four exceptions included Chicago and Cleveland, whose extraordinarily high indexes dropped to 92.1 and 91.5, seemingly because they simply had nowhere else to go; Detroit and Washington, D.C., registered minute decreases, from 81.0 to 80.1 and from 89.9 to 88.8, respectively. For all 14 cities, the segregation indexes ranged from a low of 79.9 to a high of 95.0 in 1940, and from 80.1 to 92.9 in 1950. The figures for 1960 show something of a reversal, with eight cities displaying decreases in segregation and six showing increases. The changes were so slight, however, that the range for all the cities remained virtually unaltered, with a low of 79.3 and a high of 94.6. The same holds true for 1970. Central city indexes constructed by Annemette Sorensen, Karl E. Taeuber, and Leslie J. Hollingsworth, Jr., manage to detail marginal declines in segregation for all 14 urban areas during the 1960s by ignoring the suburbs. Still, the range of indexes remained remarkably stable, with a low of 73.0 and a high of 92.7. Indeed, in 1940, 13 of the 14 cities in question had indexes of at least 80, and 4 were over 90; in 1970 no fewer than 11 were still above 80, and 4 remained higher than 90 (table 1).

The segregation indexes available for both cities and their suburbs in 1970 are not directly comparable to the earlier studies, for they are based on census tracts, whereas the others drew their data from city blocks. Tracts are larger units that mask the segregation within them and, thus, yield generally lower indexes of dissimilarity. But since tract-based indexes exist for both 1960 and 1970, it is still possible to chart the path of change during the 1960s for metropolitan areas as well as the cities themselves.

Over that 10-year period, 9 of the 14 metropolitan areas increased their levels of segregation, 4 showed slight reductions, and 1 remained unchanged. Again, the levels of segregation evident in all the SMSAs remained consistently high (tract-based indexes for the metropolitan areas ranged between 73.8 and 91.2). And the handful of decreases registered were proportionately smaller than the gains in segregation posted in the majority of cases. In none of the four instances where metropolitan areas lowered their scores was the drop as much as 2.5 percent—indeed, in two of the cases it was less than 1 percent. In contrast, five of the metropolitan areas with higher segregation scores in 1970 boosted them by at least 4 percent, and four of them did so by 6 percent or more (table 2).

Perhaps the most startling finding—one that spans both block and tract data, the 1940s and 1950s as well as the 1960s—is the steady and significant increase in segregation found in the five major southern cities under examination. The tract-based

TABLE 1
Block-Based Indexes of Dissimilarity for 14 Cities, 1940–70

	1940	1950	1960	1970
New York	86.8	87.3	79.3	73.0
Chicago	95.0	92.1	92.6	88.8
Detroit	89.9	88.8	84.5	80.9
Philadelphia	88.0	89.0	87.1	83.2
Los Angeles	84.2	84.6	81.8	78.4
Washington, D.C.	81.0	80.1	79.7	77.7
Houston	84.5	91.5	93.7	90.0
Baltimore	90.1	91.3	89.6	88.3
New Orleans	81.0	84.9	86.3	83.1
Memphis	79.9	86.4	92.0	91.8
Atlanta	87.4	91.5	93.6	91.5
Dallas	80.2	88.4	94.6	92.7
Cleveland	92.0	91.5	91.3	89.0
St. Louis	92.6	92.9	90.5	89.3

Source: Annemette Sorensen, Karl E. Taeuber, and Leslie J. Hollingsworth, Jr., "Indexes of Racial Residential Segregation for 109 Cities in the United States, 1940–1970," *Sociological Focus* 8 (April 1975): 125–41.

TABLE 2
Tract-Based Indexes of Dissimilarity for 14 Cities and Their Metropolitan Areas, 1960–70

	1960		1970	
	Central city	SMSA	Central city	SMSA
New York	75.2	74.4	71.6	73.8
Chicago	91.8	91.2	91.0	91.2
Detroit	80.4	87.1	78.2	88.9
Philadelphia	79.0	77.1	76.8	78.0
Los Angeles	85.4	89.2	88.6	88.5
Washington, D.C.	66.4	77.7	72.3	81.1
Houston	80.4	80.4	82.2	78.4
Baltimore	83.0	82.4	84.3	81.0
New Orleans	67.7	65.0	70.9	74.2
Memphis	79.7	72.7	84.4	78.9
Atlanta	83.1	77.1	83.4	81.7
Dallas	88.8	81.2	91.7	86.9
Cleveland	85.6	89.6	86.7	90.2
St. Louis	85.4	85.9	83.8	86.5

Source: Thomas L. Van Valey, Wade Clark Roof, and Jerome E. Wilcox, "Trends in Residential Segregation, 1960–1970," *American Journal of Sociology* 82 (January 1977): 826–44.

data reveal steadily rising levels of segregation that continued through 1970. Even the more optimistic Sorensen study, however, confirms that Houston, New Orleans, Memphis, Atlanta, and Dallas were all considerably more segregated in 1970 than 1940; and by 1970 all save New Orleans had registered segregation indexes that topped 90 (tables 1 and 2). The rise of the Sunbelt, the economic modernization of the South, and the dismantling of the Jim Crow system by the civil rights revolution was apparently accompanied by a rapid separation of urban blacks and whites.

There are, unfortunately, few studies currently available that provide an updating of these figures based on the 1980 census. One study that does exist, however, focuses on black suburbanization and embraces more than 1,600 incorporated suburbs in 44 metropolitan areas. Its findings are not encouraging. The authors conclude that, in the North, blacks have been concentrating in those suburbs that already have a disproportionate share of nonwhites. They have gained access to an inner ring of older suburbs, especially those with high population densities that sit astride central city borders. In the South, the clear evidence of increasing segregation around Atlanta and Miami appears exceptional, but the authors find that the decreasing levels of statistical segregation they detect elsewhere in the region reflect nothing more than the white "displacement" of older black settlements. In short, they see continuity in the existing pattern of segregation and hold little hope that black suburbanization—as it has developed down to 1980—represents any significant reversal of that process.[35]

The pattern of black urbanization since 1940 has consequently produced a "second" ghetto that can be distinguished from the "first" ghetto of the World War I era on both quantitative and qualitative grounds. The quantitative measures are astounding—the modern black metropolis simply dwarfs its earlier counterparts. The initial wave of ghetto building produced its largest black colonies in New York and Chicago, each containing 328,000 and 234,000 blacks, respectively, in 1930. By 1980 New York proper held 1.8 million blacks and Chicago had 1.2 million—indeed, the suburbs around these giants held virtually as many blacks in 1980 as the cities themselves did a half-century before. Detroit has more than doubled and Philadelphia has nearly doubled the number of black New Yorkers in 1930. Los Angeles, Washington, D.C., Houston, and Baltimore also counted more blacks in 1980 than New York had in 1930. Those cities, as well as New Orleans, Memphis, Atlanta, Dallas, and Cleveland, also now have more blacks than Chicago did at the start of the Great Depression. Although the black exodus from the South around World War I earned the appellation of the "Great Migration," it was the second wave, sparked initially by the mobilization for war in the 1940s, that was—in absolute numbers, at least—far more significant (table 3).

Given the demographic explosion after 1940, the subsequent areal expansion necessary to contain such enlarged black populations, and the persistence of a high degree of segregation, it is clear that the emergence of the modern ghetto displayed elements both of continuity and change. There is no question that racial discrimination, for example, persists in the private housing market. Certainly not as pervasive as it was in 1920, it has been moderated by more enlightened popular attitudes, government policies, and—probably most important of all—by the simple availability of housing as whites continue to abandon the central city for the suburbs. Tensions have always been greatest when blacks and whites competed for scarce supplies, as in the housing shortages that accompanied World Wars I and II. The attempts to restrict black access to new housing by exclusionary improvement associations, zoning practices that regulate lot size and construction, the denial of financing by lenders, and the "steering" practices of real estate agents, however, still play an important (if diminishing) role in the preservation of residential segregation.[36]

Another important element of continuity, especially in the immediate postwar period, was the revival of antiblack violence. Between May 1944 and July 1946, whites assaulted 46 black homes as Chicago replayed its World War I experience; 29 of the attacks were arson bombings, and at least three people were killed in that reign of terror. Indeed, between 1945 and 1950, some 485 racial "incidents" were reported to the Chicago Commission on Human Relations, and 357 (73.6 percent) involved

[35] John R. Logan and Mark Schneider, "Racial Segregation and Racial Change in American Suburbs, 1970–1980," *American Journal of Sociology* 89 (January 1984): 174–88.

[36] Brian J.L. Berry, *The Open Housing Question: Race and Housing in Chicago, 1966–1976* (Cambridge, Mass.: Ballinger Publishing Co., 1979); Joe T. Darden, *Afro-Americans in Pittsburgh: The Residential Segregation of a People* (Lexington, Mass: Lexington Books, 1973), pp. 42, 47–49, 64–65.

TABLE 3
Black Population Change in 14 Central Cities and Their Suburbs, 1960–80

	Black population 1980	Percentage change in black population 1960–70	1970–80	Percentage black 1960	1970	1980
		Central cities				
New York City	1,784,000	53.3	7.0	14.0	21.1	25.2
Chicago	1,197,000	35.7	8.6	22.9	32.7	39.8
Detroit	759,000	37.0	14.9	28.9	43.7	63.1
Philadelphia	639,000	23.5	–2.3	26.4	33.6	37.8
Los Angeles	505,000	50.4	0.3	13.5	17.9	17.0
Washington, D.C.	448,000	30.6	–16.6	53.9	71.1	70.3
Houston	440,000	47.2	39.1	22.9	25.7	27.6
Baltimore	431,000	29.1	2.6	34.7	46.4	54.8
New Orleans	308,000	14.5	15.3	37.2	45.0	55.3
Memphis	308,000	31.6	26.9	37.0	38.9	47.6
Atlanta	283,000	36.8	12.1	38.3	51.3	66.6
Dallas	266,000	62.7	26.3	19.0	24.9	29.4
Cleveland	251,000	14.8	–12.7	28.6	38.3	43.8
St. Louis	206,000	18.6	–18.8	28.6	40.9	47.4
		Suburbs (1970 definition)				
New York City	285,000	55.5	31.4	4.8	5.9	7.6
Chicago	231,000	65.5	79.9	2.9	3.6	5.6
Detroit	128,000	26.1	32.5	3.7	3.6	4.5
Philadelphia	245,000	34.1	28.9	6.1	6.6	8.1
Los Angeles	398,000	105.0	65.7	3.6	6.2	9.6
Washington, D.C.	390,000	98.3	134.9	6.4	7.9	16.6
Houston	80,000	5.2	21.4	12.9	8.8	6.2
Baltimore	126,000	25.6	54.9	7.0	7.0	9.1
New Orleans	79,000	26.3	10.4	15.9	12.5	12.6
Memphis	37,000	–34.8	–18.4	40.2	31.7	21.0
Atlanta	179,000	23.5	222.4	8.5	6.2	14.2
Dallas	50,000	1.1	35.4	8.3	5.2	4.7
Cleveland	94,000	452.8	110.6	0.8	3.4	7.1
St. Louis	201,000	65.0	50.4	6.0	7.7	10.9

Source: Harry A. Ploski and James Williams, eds. *The Negro Almanac: A Reference Work on the Afro-American* 4th ed. (New York: John Wiley and Sons, 1983).

conflicts over housing; and the late 1940s and 1950s also witnessed at least half a dozen large-scale riots, involving thousands of participants, that erupted over the black occupation of previously all-white neighborhoods. It is unclear at this point whether the extraordinary level of violence uncovered in Chicago represents an extreme situation or simply reflects its status as one of the Nation's most-studied cities. As the 1942 explosion surrounding the Sojourner Truth Homes in Detroit and lesser disturbances in St. Louis, New York, Philadelphia, Spokane, and Cincinnati indicate, such attacks certainly occurred elsewhere even if the scale and duration of the disorders remains unclear.[37]

The maintenance of racial segregation after 1930, however, was most notable for the appearance of new forces and new players. The qualitative distinction that separates the "second" ghetto from the "first" involves the unprecedented application of governmental power to the roiling urban landscape. It was particularly the presence of the Federal Government and its collection of often contradictory programs that facilitated the persistence of high levels of residential segregation in the midst of unparalleled urban change.

The Federal Government never produced anything coherent enough to be called an urban "policy," but it did develop a series of related programs that, in their cumulative effect, greatly accelerated the racial segmentation of metropolitan America and provided official sanction for existing racial patterns. Before the Depression, government involvement in the maintenance of residential segregation was generally limited to the spotty judicial enforcement of privately drawn restriction agreements and the localities' brief, unsuccessful fling with turn of the century racial zoning ordinances. With the emergence of Federal supports for the private housing industry, public housing, slum clearance, and urban renewal, however, government took an active hand not merely in reinforcing prevailing patterns of segregation, but also in lending them a permanence never seen before. The implication of government in the second ghetto was so pervasive, so deep, that it virtually constituted a new form of de jure segregation.

Between 1935 and 1950, the Federal Government displayed an intense color consciousness and, in fact, insisted upon discriminatory practices as a prerequisite for support. Both the Federal Housing Administration (FHA) and public housing began as Depression-era programs whose initial value was found in their roles as pump-priming devices designed to get the housing and construction industries moving again. In guaranteeing loans, the FHA's interests did not extend beyond the safety of the mortgages it insured, and in following "sound business principles," it delivered itself into the hands of the private housing industry. NAREB leaders boasted that they placed "hundreds" of "their" people in government service, and their less than enlightened racial views soon found their way into FHA guidelines and manuals. Through the FHA the Federal Government advocated the use of zoning ordinances and physical barriers to protect the racial stability of the neighborhoods it insured. Most important, it virtually demanded the use of racially restrictive covenants as a precondition before granting loan guarantees; and it declared stables, pigpens, and "inharmonious racial groups" equally objectionable. For the first 15 years of its existence, the FHA's *Underwriting Manual,* according to housing expert Charles Abrams, "read like a chapter from Hitler's Nuremberg Laws."[38]

The Nation's embryonic public housing program was not subjected to the same kind of leadership, and from the beginning there were some who saw the program's potential as a tool to clear slums, upgrade urban housing stocks, improve the lives of the poor, and perhaps even undermine existing racial patterns. Initially, however—perhaps due to the desire to render the novel Federal presence as unobtrusive as possible—public housing was tenanted under the "neighborhood composition guideline." No Federal project, in short, was allowed to disrupt the racial status quo; developments in black neighborhoods were occupied by blacks alone, and the same applied to whites; mixed areas, when such could be appropriately located, included both races on a proportionate basis. Equal treatment, in the context of the 1930s, consisted of providing blacks

[37] Hirsch, *Making the Second Ghetto,* pp. 40–67; Dominic J. Capeci, Jr., *Race Relations in Wartime Detroit: The Sojourner Truth Housing Controversy of 1942* (Philadelphia: Temple University Press, 1984); Charles Abrams, *Forbidden Neighbors* (New York: Harper and Row, 1955); Long and Johnson, *People vs. Property,* pp. 73–85.

[38] Mark I. Gelfand, *A Nation of Cities: The Federal Government and Urban America, 1933–1965* (New York: Oxford University Press, 1975), pp. 216–22 and passim.; Long and Johnson, *People vs. Property,* p. 72; Charles Abrams, *The City is the Frontier* (New York: Harper and Row, 1965), pp. 61–63 and passim.; Kenneth T. Jackson, "Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration," *Journal of Urban History* 6 (August 1980): 419–52.

with a "fair share" of the new units, not integration.[39] President Roosevelt's "Black Cabinet," however, as well as some officials in the field (such as Elizabeth Wood, executive secretary of the Chicago Housing Authority between 1937 and 1954), did urge the use of public housing to break down residential segregation. Tentative steps in that direction during the war and the immediate postwar years, though, provoked bitterly violent white reactions and were quickly abandoned. The result was that two-thirds of the 128 low-rent projects that permitted black occupancy before World War II were wholly segregated developments that accounted for 80 percent of all such units allocated to blacks. There were some exceptions to this picture of federally supported segregated public housing in Marin County, California, and Pittsburgh, and the overall pattern moderated somewhat during the wartime emergency.[40] Public housing, however, offered no challenge to prevailing residential practices and was used more fully as a bulwark for segregation in the postwar period.

Beginning in 1948, the Federal Government began a long 20-year march towards the acceptance of a colorblind stance on housing issues. First came the Supreme Court decision *(Shelley* v. *Kraemer)* that rendered restrictive covenants unenforceable. The FHA resisted the Court's edict for nearly 2 years, though, and it was not until December 1949 (and after the application of considerable White House pressure by Harry Truman) that the agency announced that it would not insure property covered by restrictive covenants after February 1950. Even that ban, however, served the purpose of alerting developers and encouraged many to hasten their applications for covenant-bound property before the announced deadline.[41]

At most, Truman's persistent prodding in the wake of *Shelley* v. *Kraemer* led the FHA to take a theoretically "neutral" position on racial matters. His intervention finally forced a reluctant FHA to end its outright refusal to support integrated projects in 1949, but the President declined to go so far as to prohibit Federal assistance to segregated developments. The FHA simply let the matter rest with each private developer, with predictable results—less than 2 percent of the housing constructed with federally insured mortgages between 1946 and 1959 was made available to blacks. Executive indifference in the 1950s not only left such FHA practices in force, but led to the virtual gutting of the Race Relations Service of the Housing and Home Finance Agency. One of the stronger voices within the government promoting racial equality, during the Eisenhower years, according to Charles Abrams, it "degenerated into an official apologist for official acceptance of segregation."[42]

It was more than a decade after *Shelley* v. *Kraemer* before the next step was taken as John Kennedy announced in his 1960 campaign that he would end racial discrimination in all Federal housing programs with "a stroke of the presidential pen" if elected. Public opposition to open occupancy and political considerations cramped Kennedy's writing style, though, and it took 2 years before an Executive order executed a partial ban that applied only to new housing and exempted homes financed by savings and loan associations that operated under the Federal Home Loan Bank Board. The final steps came in 1964 when the Civil Rights Act ended discrimination in the bestowal of government benefits and in 1968 when the Fair Housing Act extended the prohibition on discrimination to include virtually all housing; the real estate industry, lenders, and advertisers all fell under the sweep of the law.[43]

The government's assumption of a colorblind posture, however, has obviously had little effect on stubbornly high levels of residential segregation. There are two reasons. First, it is a policy that is terribly difficult to enforce. There are no centralized levers or buttons to push as there are in education and employment where school boards or large employers can be easily scrutinized. Housing remains in the hands of uncounted decisionmakers, literally thousands of real estate agents, lenders, buyers, and sellers. It is also doubtful that more

[39] Martin Meyerson and Edward C. Banfield, *Politics, Planning and the Public Interest* (New York: The Free Press, 1955), pp. 121–50; see also Capeci, *Race Relations in Wartime Detroit,* and Philip J. Funigiello, *The Challenge to Urban Liberalism: Federal-City Relations During World War II* (Knoxville, Tenn.: University of Tennessee Press, 1978), pp. 80–119.

[40] Funigiello, *The Challenge to Urban Liberalism,* p. 97; Meyerson and Banfield, *Politics, Planning, and the Public Interest,* p. 134; Long and Johnson, *People vs. Property,* pp. 70–71; Hirsch, *Making the Second Ghetto,* pp. 206, 207, 218, 228–29.

[41] Jackson, "Race, Ethnicity, and Real Estate Appraisal," pp. 419–52; Gelfand, *A Nation of Cities,* pp. 220–21; Abrams, *The City is the Frontier,* pp. 62–63; Clement E. Vose, *Caucasians Only* (Berkeley, Calif.: University of California Press, 1959).

[42] Gelfand, *A Nation of Cities,* p. 221.

[43] Ibid., pp. 341–42; Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York: Basic Books, Inc., 1975), pp. 133, 151–52.

rigorous enforcement could have more than a marginal effect on the overall distribution of population. That is because of the second reason: Competing, prior, and contradictory government policies have already accelerated the separation of the races and frozen the pattern in concrete.

The FHA did more than just countenance racial discrimination down to 1950; it facilitated the massive postwar suburban boom, helped strip older towns of their middle classes, and practically assured that blacks would remain locked in economically weakened central cities. In adopting systematic methods of appraisal from the Home Owners Loan Corporation, the FHA consistently rendered the most favorable judgments on newer, affluent fringe areas or suburbs while black occupancy—by itself, without regard for any other factors—guaranteed any neighborhood the lowest possible rating. The resultant "redlining"—the routine denial of loans in poorly rated areas—disproportionately affected blacks and assured future central city deterioration.[44] One-half of Detroit and one-third of Chicago were simply excluded from the program by fiat, and after 12 years of operation, there was not a single dwelling unit in Manhattan that had the benefit of FHA coverage.[45] And yet, from the mid-1930s to the mid-1970s, the FHA managed to provide $119 billion in home mortgage insurance. Before 1950, 11 million homes were built with the assistance of Federal agencies that "pursued a concerted, relentless, and officially sanctioned drive to keep people living only with their own kind. . . ." Private prejudices were now clothed with public powers. In the 1950s and 1960s, Federal assistance continued to flood outlying areas, and half of the suburbs built in those decades enjoyed the benefits of FHA or VA financing; they remained overwhelmingly white.[46] The suburbs thus bloomed in the crucial first two decades after World War II, watered and nourished by a freely flowing Federal spigot, and yet unburdened for the greater portion of that era by the need to deal equitably in racial affairs.

Such policies and results were not always or simply matters of antiblack animus. An antiurban bias also informed much of the FHA's actions. Narrow lots, multifamily dwellings, rental units, and rehabilitation projects all had great difficulty acquiring FHA insurance, and managed to do so only infrequently, if at all, on terms less favorable than those granted to single detached homes in the suburbs. Row houses in Philadelphia and similar structures in New York and Baltimore, for example, found it impossible to qualify for FHA assistance. Densely populated, economically or racially mixed, and aging neighborhoods, whatever their condition, were devalued and redlined. The effect, however, was the same as if the racial criteria still obtained: The Federal Government invited and underwrote the outward migration of the white middle class while eroding the economic viability of the inner city.[47]

The FHA provides only a single—if spectacular—example of Federal encouragement and subsidization of white flight. The suburbs themselves would have been unthinkable without the rapid postwar construction of the interstate highway system, and policies that favored the automobile over other forms of transit similarly facilitated suburbanization. Even the tax code, which encourages the abandonment of older, still useful structures and provides appealing deductions for mortgage interest and real estate taxes, rendered the suburbs increasingly attractive. Other government policies could doubtlessly also be listed. The point is not that the Federal Government "caused" the decentralization of American cities in any meaningful sense; that process had been going on for a century or more by the time World War II ended. But public policy did gravely affect the pace and nature of that outward movement; the sudden appearance of white suburbs ringing increasingly black core cities in the last generation must be viewed in the context of Federal management and support.

The central city subsequently received its own share of government attention although it was attention that was inspired, once again, by those who had devalued and promoted the decentralization of urban America. As early as the 1930s, NAREB and its affiliated organizations cast covetous eyes on the central city even as they bemoaned its "blight" and "uneconomic" uses. The forced concentration, particularly, of inner-city blacks, the dense overcrowding and physical deterioration of most core neighborhoods, and the economic poten-

[44] Jackson, "Race, Ethnicity, and Real Estate Appraisal," pp. 419–52.
[45] Gelfand, *A Nation of Cities,* pp. 123, 217.
[46] Jackson, "Race, Ethnicity, and Real Estate Appraisal," pp. 419–52; Abrams, *The City is the Frontier,* p. 62.
[47] Jackson, "Race, Ethnicity, and Real Estate Appraisal," pp. 419–52.

tial of such easily accessible, centrally located areas led the spokesmen for the housing industry to call for government assistance in reclaiming such territories for private development City fathers, burdened financially by spreading slums and an eroding tax base, found much in the NAREB appeal to recommend itself. In the 1940s those interests were joined by large downtown businesses, central city institutions, and major urban investors who anticipated and feared the massive postwar trek to suburbia. To revitalize and expand their markets, hold their constituencies, and protect their investments, they, too, called for government aid.[48]

There were three basic problems that prevented the private interests from acting on their own. First, there was the problem of acquiring land in large enough parcels to permit successful redevelopment. The virtual impossibility of concluding negotiations with hundreds of individual landowners, and the certainty of "holdouts," meant that land could only be assembled through the exercise of the public power of eminent domain. Second, the most desirable inner-city land sought by developers was prohibitively expensive and became even more costly after slum clearance and site preparation. Clearly, not only government power, but government subsidies were also required. Finally, the people occupying the densely populated urban heartland had to live somewhere. In the 1930s, NAREB disavowed all responsibility for those to be uprooted; but in the severe housing shortage of the 1940s, it was a practical and political problem that could not be ignored. Public housing—if not as social reform, then as relocation housing to permit private development—proved to be a partial answer.

A number of cities and States passed their own legislation and began to attack these problems even before the Federal Government got involved; indeed, their actions served as models for the later Federal intervention. New York used a 25-year tax exemption to entice the Metropolitan Life Insurance Company to build Stuyvesant Town, an apartment complex on the lower east side that barred blacks and forced the removal of some 10,000 low-income people from an 18-block area. The Mellon family commissioned revitalization studies of downtown Pittsburgh, formed the Allegheny Conference on Community Development, and similarly recruited the Equitable Life Insurance Company to begin redevelopment there. It was Chicago, though, and its implementation of the Illinois Blighted Areas Redevelopment Act of 1947 and related legislation that provided not only for the use of eminent domain to clear slums, but also devised the "write down" formula that empowered local governments to pass on the property so acquired to private developers for a fraction of its cost, and provided for relocation housing as well. In each of these features, the Illinois laws presaged the Federal Housing Act of 1949. Not only had private developers been given new bootstraps, but local, State, and Federal authorities further obliged them by hauling them up two-thirds of the way. And those who claimed that the subsequent destruction of cheap housing in a time of shortage and the substitution of office complexes, luxury apartments, and commercial developments represented a "perversion" of the law were simply blinded by the legislation's rhetorical shroud that expressed concern for the poor and promised a decent, safe, and sanitary dwelling for every American.[49]

The slum clearance and public housing programs that gained momentum after 1949 also contributed to the racial segmentation of American society. Public housing, frequently used now simply to free inner-city land for private development, became increasingly identified as a "black" program, utilized high-rise construction, and resegregated its tenants in already densely populated core areas. Able to accommodate only a fraction of those uprooted by the wrecker's ball, thousands of others sought new homes in traditional areas. If the process of suburbanization created central city vacancies that facilitated racial succession, redevelopment spurred that movement and further accelerated the whites' desertion of the central city.[50]

This movement across the urban racial frontier and redefinition of ghetto borders also led directly to the next phase of the government's postwar revitalization program: urban renewal. Redevelopment had

[48] Marc A. Weiss, "The Origins and Legacy of Urban Renewal," in Pierre Clavel, John Forester, and William W. Goldsmith, eds., *Urban and Regional Planning in an Age of Austerity* (New York: Pergamon Press, 1980), pp. 53–80; Gelfand, *A Nation of Cities*, pp. 112–15.

[49] Gelfand, *A Nation of Cities*, pp. 129, 212; Roy Lubove, *Twentieth Century Pittsburgh: Government, Business, and Environmental Change* (New York: Wiley and Sons, 1969); Hirsch, *Making the Second Ghetto*, pp. 100–34 and passim.

[50] For a detailed examination of this process in one city, see Hirsch, *Making the Second Ghetto.*

always been closely associated with slum clearance. The semantic shift to "urban renewal" indicated a substantive deemphasis of the concern with slums. A new approach was justified, the National Commission on Urban Problems later concluded, "as a broader design to rebuild the cities. . . ." The new legislation placed greater stress on the rehabilitation of existing housing and neighborhoods, rather than on their demolition, and for the first time spoke of preserving still healthy middle-class areas.[51]

The crucial point, however, was that the basic provisions of the Federal Housing Act of 1954 that embodied the renewal concept copied those enacted in the Illinois Urban Community Conservation Act of 1953. Largely the product of the University of Chicago and its institutional allies, the "conservation" movement in Chicago aimed to staunch the flow of blacks into the university's Hyde Park community, extend the concept of eminent domain to areas that were not yet slums themselves, and redraw the area's racial geography to suit itself.[52]

Given that genesis (the University of Chicago wanted to create a predominantly white and economically upgraded community), some ramifications of the national program become more explicable. The charges so often leveled at the Federal effort—that it neglected the poor, that it was actually antipoor because of its demolition of low-rent housing and inadequate relocation procedures, that it simply subsidized those who needed aid least, and that it was transformed into a program of "Negro removal"—were hardly evidence of a plan gone awry. These were not "perversions" of the enabling legislation; they were the direct consequences of it. Other cities were not compelled to use the law in like fashion; but many did just that, using devices precisely tailored to achieve those ends. In sum, urban renewal was rooted, in large part, in the desire to control and mitigate the consequences of racial succession in the central city.

The urban riots of the 1960s provided the illumination by which the urban renewal program was terminated in the early 1970s. By that time more than a generation of Federal intervention in housing and urban affairs had radically transformed metropolitan America, but only within the limits decreed by the private housing industry and those corporate, institutional, and political interests who designed and implemented the programs. Sometimes derided as showing the futility of social reform, urban renewal was never anything of the sort. The poor reaped only the benefit of rhetorical preambles and a whirlwind of bulldozers.[53]

In the 1930s and 1940s, then, the Federal Government mandated racial discrimination; through the 1950s and much of the 1960s, it permitted bias in both the private and public spheres; in the 1970s and 1980s, it has outlawed most forms of such discrimination, but only after a sustained 25-year postwar building boom that served as a federally supported centrifuge that separated an outer layer of whites from a dense black core. Attempting to end discriminatory practices in housing today is not simply a matter of closing the barn door a little too slowly—the horse has not only escaped, but he has gotten into his trailer, moved down the interstate, and been put out to stud in rural pastures.

There is no question that the dual housing market still exists and that attempts to create a colorblind market under civil rights law have failed up to now. But the dual market that survived in the 1970s was not the same one that existed 20 years before. White abandonment of America's central cities has ended much of the scarcity that characterized the earlier black housing market. Housing prices have fallen proportionately, and the "race tax" that elevated black costs above those paid by whites for equivalent shelter is not the factor it was a generation earlier. The quality of black housing has also improved substantially over the last 40 years, particularly for the growing middle class. But even the poor have derived some benefits here, and the public housing units occupied by thousands—despite the scandalous conditions endured by many—still represent a net gain over the ramshackle hovels pressed into service by the end of the Great Depression. It must be remembered, however, that in that same period of time, homeownership and a suburban lifestyle became the common expectation of the vast middle class where, previously, they had been luxuries reserved for the wealthy. Gains for blacks were relatively less. Segregation still persists, as the indexes of dissimilarity indicate, but there are more alternatives today for upwardly mobile blacks.

[51] Ibid., p. 271.

[52] Ibid., pp. 135–70, 268–75.

[53] The use of the results of urban renewal to discredit government intervention and, apparently, all such efforts at "reform" is carried to its greatest polemical lengths in Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal* (Cambridge, Mass.: MIT Press, 1964).

White desertion of the central city has opened new neighborhoods, and the black middle class has been quick to respond. One result is the increasing class differentiation now found within urban black communities.[54] Always present to some extent, the ability of well-to-do blacks to distance themselves from the poor has become much more pronounced in the last decade or two; and spatial distance, throughout American urban history, has generally reflected social, ideological, and political difference as well. The full implications of this movement have yet to be seen.

The flight of the black middle class from the poorest sections of the central city also must be placed in the context of the broader assimilation experience of the other migrants to urban America. Prior to 1950, the most mobile segments of the black middle class were denied the role played by their earlier white ethnic counterparts. As the older immigrant communities dispersed, those who enjoyed some measure of economic success led the movement and eased the transition into the American mainstream for those who trailed them. The recent availability of more decent housing, however, has now allowed economically successful blacks to undertake that outward push with different results. One consequence is that, as the indexes of dissimilarity of our largest cities indicate, this movement is proceeding within the context of continued racial segregation; black economic achievement and material well-being have not heralded the "disappearance" of those "assimilated" blacks as was the case with their ethnic competitors. But interestingly, the existence of ample housing stocks and respectable alternatives to the most impoverished communities have led, apparently, to a reduction of the pressure placed on white suburban areas. Attempts to promote and manage the integration of such all-white neighborhoods have, thus, not been notably successful because of both continued white resistance and seeming black indifference. White accommodations and integration were valued more, it appears, in times of housing shortage when they were the only alternatives to deplorable living conditions. In part, this phenomenon might reflect a new kind of "voluntary" segregation; it is possible that, finally, the centripetal pull of Afro-American "cultural affinities" is being tested and found more enduring than those of the white ethnics. But given past history, it might also simply reflect the judgment that entry into all-white communities is just not worth the risk or aggravation, and it is certainly no longer necessary to achieve a decent standard of living.

A second major consequence of this black middle-class movement is that it threatens to leave the poor behind in large blocks of public housing and deteriorating core areas. The decline in overt racism and the enforcement of antidiscrimination laws have meant little to the poorest black urban dwellers. Past practices have had their effect, and there are institutional, behavioral, and political legacies that continue to hamper efforts—whether internal or external—to alter their lives materially. Their continued segregation, not simply by race now, but increasingly by class as well, represents a new stage in the evolution of America's black urban communities. Rather than being placed in an advantageous position by their more successful representatives, those left behind seem more distant and more isolated from the mainstream than before.

It must be seen, then, that the persistence of racial segregation remains a central feature of urban life in the United States, and unquestionably will remain so for the forseeable future. Unable to alter significantly existing and deeply rooted patterns of segregation, the civil rights era's ban on racial discrimination did not affect the hard core economic problems that continue to plague central cities and their residents. If the ghetto has been gilded for some and escaped by others, it shows no signs of disappearing and, indeed, may now present the dual problems of race and poverty in more concentrated form than ever before.

[54] Berry, *The Open Housing Question,* pp. 499–504 and passim.; William Gorham and Nathan Glazer, eds., *The Urban Predicament* (Washington, D.C.: The Urban Institute, 1976), pp. 119–78.

LEGAL ISSUES IN HOUSING DISCRIMINATION

Proving Housing Discrimination: Intent vs. Effect and the Continuing Search for the Proper Touchstone

By John O. Calmore*

> The most difficult concept in civil rights litigation, and housing discrimination litigation in particular, is the question of proof: what evidence is required to prove a violation and which party carries the burden of proof.[1]

> [T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. . . .Disproportionate impact is not irrelevant, but it is not the touchstone of an invidious racial discrimination forbidden by the Constitution.[2]

> The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. . . .Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations.[3]

Introduction

This paper is occasioned by the U.S. Commission on Civil Rights' hearings on housing discrimination, November 12–13, 1985, in Washington, D.C. These hearings follow the Commission's extensive consideration of housing discrimination during its hearings

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[1] J. Kushner, *Fair Housing: Discrimination in Real Estate, Community Development and Revitalization* (1983), p. 53.

[2] Washington v. Davis, 426 U.S. 229, 240 (1976).

[3] United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

on "A Sheltered Crisis: The State of Fair Housing in the Eighties," September 26–27, 1983. Having addressed the Commission at those 1983 hearings, I welcome the opportunity to appear again before the Commission to discuss the legal issues related to proving housing discrimination.

The primary focus of the paper will be on the Fair Housing Act, Title VIII of the Civil Rights Act of 1968.[4] The act declares that it is national policy for "fair housing" throughout the United States. Vindicating a "policy that Congress considered to be of the highest priority," the statute was enacted to bar both private and public discrimination in the sale or rental of housing.[5] The Supreme Court, speaking unanimously, has stated that the vitality of fair housing policy can be achieved "only by a generous construction" of the statute.[6] Section 1982 of the Civil Rights Act of 1866 is also an important statute prohibiting housing discrimination. It provides that all citizens of the Nation are to have the same right as enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey property.[7] Although the Fair Housing Act and section 1982 are independent statutory remedies that prohibit housing discrimination, they often are used as a complementary tandem.[8]

A well-respected fair housing advocate and author states, "Given the pervasive pattern of discrimination in the nation's housing supply and segregation in urban areas, the future of fair housing can only be characterized as bright."[9] Well, it depends. It depends largely on whether victims of housing discrimination will present and prove their claims. This, in turn, depends largely on how we resolve the issues presented in this paper.

Although the legal issues discussed herein are important, they are merely part of a larger political debate concerning the question, "What values underlie the role of law in prohibiting racial discrimination?" In large measure the debate over whether intent or effect should be the touchstone in proving racial discrimination begs the larger question of whether the reach of fair housing law should extend beyond mere racial discrimination to race-linked social disadvantage.[10] Thus, the debate is not really over what the law is, but, rather, over what the law should be. Thus, for instance, in discussing the recent debate over renewal and amendment of the Voting Rights Act, Professor Blumstein argues that "the substantive concept of 'discriminatory effect' stemming from neutral legislation is not only anomalous but also analytically bankrupt."[11] He adds: "The desire to remedy a racially disproportionate impact is animated by policy objectives quite different from those behind the principle of racial nondiscrimination and is supported by an underlying, often unarticulated notion of race-based entitlements."[12]

Race-linked social disadvantage is a legacy of this Nation's history of racial oppression.[13] It has less to do with the right to shelter or any entitlement theory than it has to do with making real the black person's enjoyment of the same shelter rights enjoyed by white persons. Moreover, the dichotomy between racial discrimination and racial disadvantage is not as neatly drawn as Professor Blumstein would have us believe. Often the best and sometimes the only proof of racial discrimination is proof of the correlation between economic inequality and race.[14] As stated by Professor Horowitz of the Harvard Law School, because America "accepts inequality as both an incentive and reward for talent and industry,

[4] 42 U.S.C. §§3601–19, 3631. Two excellent books on fair housing are J. Kushner, *Fair Housing: Discrimination in Real Estate, Community Development and Revitalization,* and R. Schwemm, *Housing Discrimination Law* (1983).

[5] "Fair housing" has been defined as

> [a] goal of national policy. . .to undo the results of officially approved housing discrimination between the years 1930 and 1962. This goal would include achievement of residential integration of the metropolitan areas of the nation, thereby cojoining the 1949 goal of "a decent home and a suitable living environment for every American family" with the apparent 1968 goal of removing racial barriers to home acquisition.

Chandler, "Fair Housing Laws: A Critique," 24 Hastings L.J. 159, 164 n.36 (1973). *Compare* 42 U.S.C. §§1401–36 (1970) with 42 U.S.C. §§3601–19, 3631 (1970).

[6] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

[7] 42 U.S.C. §1982 (1982). *See also,* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[8] Morris & Powe, "Constitutional and Statutory Rights to Open Housing," 44 Wash. L. Rev. 1, 56–83 (1968); Smedley, "A Comparative Analysis of Title VIII and Section 1982," 22 Vand. L. Rev. 459 (1969).

[9] Kushner, *Fair Housing,* p. 670.

[10] Horowitz, "The Jurisprudence of Brown and the Dilemmas of Liberalism," 14 Harv. C.R.–C.C.L. Rev. 599, 609 (1979) (hereafter cited as Horowitz).

[11] Blumstein, "Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act," 69 Va. L. Rev. 633, 634 (1983).

[12] *Id.* at 635.

[13] *See generally* Calmore, "Exploring the Significance of Race and Class in Representing the Black Poor," 61 Ore. L. Rev. 201 (1982).

[14] Horowitz at 609.

we are forced to distinguish between the indistinguishable. We are expected to accept social economic inequality at precisely the moment that it is the best evidence of racial discrimination."[15]

Although in absolute numbers there are more whites than blacks mired in poverty, blacks carry a dramatically disproportionate burden of poverty. Consider this:

> Nearly 36 percent of all blacks—more than one out of every three—lived in poverty in 1983. This is the highest black poverty rate since the Census Bureau began collecting data on black poverty in 1966.
>
> From 1980 to 1983, an additional 1.3 million blacks became poor.
>
> Nearly half (47 percent) of all black children, over half of all blacks living in households headed by a woman, over one-third of the black elderly, over one-third of all adult women of prime working age, and nearly one-fourth of all black men of prime working age now live in poverty.
>
> Since 1980 the gap between black poverty and white poverty—always very large to begin with—has widened further. The proportion of the black population added to the poverty ranks since 1980 is almost double the proportion of the white population that fell into poverty during this period.
>
> Stated another way, although blacks make up 12 percent of the U.S. population, they were 22 percent of those added to the poverty population since 1980. This means that blacks were nearly twice as likely to fall into poverty since 1980 as other Americans were.[16]

Because of the disparity here, many times blacks' claims for substantive distributive justice are essentially race claims. The law plays a cruel hoax, however, because often what begins as a claim concerning the effects of racial discrimination gets transformed in constitutional analysis into a complaint not of racial injustice but economic injustice and then deprived in the reformulated terms.[17] As Professor Freeman says, "The net effect is that the victim of racial discrimination must persevere until the utopian day when everyone is entitled to distributive justice."[18] This general critique of antidiscrimination law not extending its reach to racial disadvantage is no less a pressing concern in the area of housing discrimination law particularly. Thus, Father Drinan, a coauthor of the Fair Housing Amendments Act of 1980, perceptively inquires: "Can 'fair' housing come about if the economic disparity between white and black citizens is not first lessened?"[19]

As an introductory caveat, I note some trepidation in appearing before the Commission and arguing against Professor Blumstein's position. Indeed, the Blumstein notion has been echoed by no less than the present Vice Chairman of this Commission. Writing in a recent edition of the *New York Times Magazine* on the topic "What Constitutes a Civil Right?" Mr. Abram states:

> Beginning with President Johnson's conference, the civil rights movement became fractured and confused. The new movement treated economic claims as civil rights, by embracing an idea of "rights" that included economic entitlements—a "right" to shelter, a "right" to health care, a "right" to day care for children. The movement demanded these "rights" even though none of them are to be found in the Constitution.
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> * * *
>
> By treating economics as civil rights, the new movement lost dawning societal consensus. When economic and social goals were asserted as civil rights, the movement lost a certain moral force and its unity was fractured. Americans, who were persuaded to salute civil rights as they did the flag, were not willing to pledge allegiance to a certain level of food-stamp spending.

Additionally, as a former legal services attorney and as a current law professor teaching civil rights, I come before the Commission aware of internal conflict and outside criticism from black leaders. I am worried that Commissioner Berry could be right in claiming that the Commission majority "can be expected to say whatever is politically expedient. . .," that it can be "expected to support the

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[15] *Id.*

[16] Center on Budget and Policy Priorities, "Highlights from 'Falling Behind'," *Newsletter* (1985), p. 2.

[17] Freeman, "Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine," 62 Minn. L. Rev. 1049, 1061 (1978) (hereafter cited as Freeman). *See also* Abrams, "Primary and Secondary Characteristics in Discrimination Cases," 23 Vill. L. Rev. 35, 51–55 (1977) (discussing poverty as a race-linked, secondary characteristic of discrimination).

[18] Freeman at 1061.

[19] Drinan, "Untying the White Noose," 94 Yale L.J. 435, 440 (1984).

Administration's retreat on civil rights protections."[20] I am worried that many blacks would agree with Carl Rowan that a majority of the Commission is "waging a war on the civil-rights movement" and has "turned the Civil Rights Commission into nothing but a propaganda organ for far-right ideologues."[21]

In spite of my reservations, the Commission remains a vital civil rights forum and the issues I am addressing are crucial for black and white America. Thus, I proceed in this endeavor with the hope that I am addressing an audience with open minds and fair hearts. With that said, let me turn to the specific issues at hand.

The headnotes introducing this paper put the problem in perspective. Headnote 2 is an excerpt from the Supreme Court's 1976 *Washington* v. *Davis*[22] decision. The case involved a claim of employment discrimination. Because the defendant was exempt from Title VII of the Civil Rights Act of 1964, plaintiffs sued under the Constitution's equal protection clause. Although the Supreme Court required discriminatory intent, the case's implications do not necessarily impose a requirement of discriminatory intent beyond the realm of equal protection. In *Davis,* the Court explicitly contrasted its opinion on equal protection with that of *Griggs* v. *Duke Power,*[23] an earlier Supreme Court case that permitted proof of statutory discrimination on the basis of disproportionate impact. Additionally, under Title VIII, the Supreme Court has held in *Arlington Heights I* that notwithstanding *Washington* v. *Davis* a showing of discriminatory effect may prove a statutory violation even in the absence of proving discriminatory motive.[24]

As I argue hereinafter, imposing an intent standard of proof on fair housing cases is simply bad law under current doctrine, bad social policy in light of America's history and present conditions of racial discrimination, and, ultimately, a bad idea whose time has not and should not come. The following sections will show that neither the legislative history of Title VIII nor the Constitution supports or requires the intent standard. The case law interpreting Title VIII has demonstrated that the discriminatory effect standard is judicially manageable and fair to both plaintiffs and defendants. Finally, I will indicate why imposition of an intent standard, whether by the Supreme Court or through proposed fair housing legislation, would have such adverse effects on challenging housing discrimination that it would place race-linked disadvantage, as well as subtle and sophisticated discrimination, beyond remedy in too many instances.

The Legislative History of Title VIII Supports an Effect Standard

The legislative history of Title VIII is not definitive in resolving the question of whether the act's coverage was intended to include cases of discriminatory effect.[25] Federal courts have observed that the legislative history of the Fair Housing Act is "somewhat sketchy" and in *Trafficante* v. *Metropolitan Life Insurance Co.,* the first Title VIII case reviewed by the Supreme Court, it was noted that, generally, "[t]he legislative history of the Act is not too helpful."[26] Yet, the legislative history evidences a broader congressional concern than simply prohibiting intentional housing discrimination.

Although the subject of fair housing legislation has been before Congress since President Johnson's 1966 and 1967 proposals, Title VIII of the Civil Rights Act of 1968 resulted from a relatively abbreviated and intense period of congressional deliberation that took place against the backdrop of the Nation's inner cities afire, the Kerner Commission Report on civil disorder, and the death of Martin Luther King, Jr., at the hands of a white assassin.[27] The circumstances under which the law was passed were chaotic. Three months after Senator Mondale's principal amendment in early February, President Johnson signed H.R. 2516 on April 11, 1968, and the Fair Housing Act became law 1 week after Dr. King's assassination. Aside from circumstances prone to force a calculated compromise over carefully considered planning, the legislative history is also less revealing than normally the case because Title VIII was adopted from Senator

[20] Berry, "Taming the Civil Rights Commission," *The Nation,* Feb. 2, 1985. p. 107.
[21] Rowan, "Abolish the Civil-Rights Panel—Pendleton Made It a Sham," *Los Angeles Times,* Mar. 11, 1985, part II, p. 5, col. 1.
[22] 426 U.S. 229 (1976).
[23] 401 U.S. 424 (1971).
[24] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).
[25] The history of the act is discussed in Schwemm, "Discriminatory Effect and the Fair Housing Act," 54 Notre Dame Law. 199, 207–12 (1977) and Dubofsky, "Fair Housing: A Legislative History and a Perspective," 8 Washburn L.J. 149 (1969).
[26] 409 U.S. 205, 210 (1972).
[27] R. Schwemm, *Housing Discrimination Law,* p. 35.

Mondale's floor amendment, and thus committee reports and other documents usually associated with major congressional enactments were not included.

As a significant illustration, however, in concluding that a Title VIII claim must rest initially upon a showing that the challenged action of the defendant had a racially discriminatory effect, the Federal appeals court in *Resident Advisory Board* v. *Rizzo* considered the following:

> Although the legislative history of Title VIII is somewhat sketchy, the stated congressional purpose demands a generous construction of Title VIII. The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination. During the long floor debate prior to passage of Title VIII in the Senate, several Congressmen [including sponsoring Senators Mondale and Brooke] spoke of the importance of Title VIII in eliminating the adverse discriminatory effects of past and present prejudice in housing. Significantly, as the district court noted, while the floor debate continued, Senator Baker introduced an amendment that would have required proof of discriminatory intent to succeed in establishing a Title VIII claim. Adoption of this amendment would by definition have burdened Title VIII with a standard similar to the present "impact-plus" equal protection standard of *Washington v. Davis.* Senator Baker's amendment was rejected with Senator Percy maintaining that if "racial preference" was to be an element of the new legislation, "proof would be impossible to produce." (Citations omitted.)[28]

Beyond this there is little in the congressional history regarding Title VIII's burden of proof. To the degree the issue is addressed whether Congress intended to prohibit both purposeful discrimination and the effects of discrimination, however, the evidence supports the conclusion that its purpose was to proscribe both aspects of discrimination.

The Case Law of Title VIII Establishes the Justification of an Effect Standard

Title VIII's principal coverage, 42 U.S.C. sections 3604–3606, prohibits discriminatory conduct undertaken "because of," "based on," or "on account of" race (or some other protected status such as color, religion, national origin, or sex). These phrases are undefined in the statute. Although some would argue that the "because of" language suggests that subjective intent is required to render conduct in violation of Title VIII, the substantial majority of court decisions has held that a Fair Housing Act violation can be demonstrated if the action of complaint had a racially discriminatory effect.[29]

Most court decisions applying the discriminatory effect standard have related to 42 U.S.C. section 3604(a), a key provision of the statute under which it is unlawful (1) to refuse to sell or rent after a bona fide offer is made; (2) to refuse to negotiate for sale or rental; or (3) otherwise to make unavailable or deny a dwelling to any person because of race, color, religion, sex, or national origin. When the alleged discriminatory conduct is not easily characterized as either a refusal to deal or to negotiate, plaintiffs have relied on the general provision, "to otherwise make unavailable or deny." This "omnibus provision" prohibits racial steering, redlining, and exclusionary zoning practices.[30] The basic subsection (a) prohibits "grudging" or passive acceptance of nonwhites as contrasted with enthusiastic service to whites; solicitation of potential buyers in white areas but not in black areas; racially discriminatory appraisal of dwellings; landlord interference with interracial associations; and the deliberate maintenance of an all-white, discriminatory image.[31]

Although the most elaborate analysis of plaintiffs' prima facie case based on discriminatory effect is seen in lawsuits challenging local government exclusionary practices or other action affecting a large number of people, the effect standard has also been upheld in suits brought to redress discrimination victimizing plaintiffs in private transactions. For instance, in *Smith* v. *Anchor Building Corp.,* the Eighth Circuit stated that a prima facie inference of discrimination arises as a matter of law where (1) a black rental applicant meets the objective requirements of a landlord, and (2) the rental would likely have been consummated were he or she a white applicant. If this inference is not satisfactorily explained by the defendant, discrimination is established and plaintiff prevails.[32]

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[28] 564 F.2d 126, 147 (3d Cir. 1977).

[29] *See e.g.,* United States v. City of Black Jack, 508 F.2d 1179, 1184–85; Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights *(Arlington Heights II),* 558 F.2d 1283, 1287–90 (7th Cir. 1977); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146–48 (3d Cir. 1977). *See also* R. Schwemm, *Housing Discrimination Law,* p. 59.

[30] *See* Calmore, "Fair Housing and the Black Poor: An Advocacy Guide," 18 Clearinghouse Rev. 606, 612 (November 1984 Special Issue).

[31] *Id.*

[32] 536 F.2d 231, 233 (8th Cir. 1976).

Griggs v. Duke Power: The Employment Discrimination Analysis

The Supreme Court has not ruled explicitly on whether Title VIII permits an effect standard of proof. It has, however, ruled that such a standard is permitted under Title VII, the employment statutory analogue to Title VIII. In the 1971 case of *Griggs* v. *Duke Power Co.*, the Court interpreted "because of race" and unanimously established the principle that a facially neutral job selection criterion with discriminatory effects violated Title VII. Thus, the Court held that proof of discriminatory intent is not necessary when the selection practice or policy has a "disparate impact," excluding blacks at a substantially higher rate than whites.[33] According to a *Harvard Law Review* comment, at the crux of proving racial discrimination in this context is the presentation of percentage differentials that are sufficiently substantial to infer bias. The disparate impact prima facie case raises a presumption that a substantial statistical disparity could only arise as a result of actual discrimination. The *Griggs* rule has correctly been rationalized in terms of the improbability of alternative, nondiscriminatory explanations. Thus, under *Griggs* "the inequality itself raises an inference that a specific discriminatory process is functioning to cause the observed disparity."[34]

Borrowing from employment law, the courts have characterized three kinds of statistical analyses available to plaintiffs for use in showing a significant disparity.[35] "Applicant flow statistics" compare the percentage of actual or potential black applicants who have been disqualified by a landlord's selection policy with the percentage of their white counterparts who have been similarly disqualified. The conclusion here could evidence "disproportionate impact." "Relevant tenant pool" statistics compare the percentage of blacks in the landlord's tenant body with the percentage of blacks in the geographic area's pool of qualified tenants. Finally, "population statistics" compare the percentage of blacks in the landlord's tenant body with the percentage of blacks in the general population of the geographic area. These second and third statistical comparisons can evidence nonwhite underrepresentation as a form of "discriminatory effect."[36]

As an illustration, consider *United States* v. *Real Estate Development Corp.* where a prima facie case was established by facts showing that (1) blacks lived within a four- or five-block radius of defendant's apartments; (2) the city where the apartments were located had a population including 37.6 percent blacks; (3) over a 6-year period none of defendant's apartments had ever been rented to blacks even though a number of them had applied to rent units in the apartments.[37]

The probative value of this statistical evidence was reinforced by the landlord's failure to apply objective criteria similarly to all rental applicants. This indicated to the court that race was the only identifiable factor that could explain the lack of black tenants. Finally, the court dismissed the possibility that the absence of black tenants, under the circumstances, was an indication of their lack of interest. Instead, as viewed by the court, it indicated "a sense of the futility of such an effort in the face of notorious discriminatory policy" of the landlord.[38] Under the facts described above, it is difficult to imagine principled objection to the court's finding of discrimination even in the absence of any proof of illicit motive or intent.

Village of Arlington Heights: The Housing Analysis

In 1977 the Supreme Court decided *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, popularly known as *Arlington Heights I.* The Court followed its decision in *Washington* v. *Davis* and held that even though the "ultimate effect" of a town's zoning decision might be racially discriminatory, this was inadequate to establish a constitutional equal protection claim. The Court,

[33] 401 U.S. 424, 432. The Court declared: "Good intent or absence of discriminatory intent does not redeem employment procedures that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . .Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (emphasis in original). The act is codified at 42 U.S.C. §§2000e *et seq. See generally,* Comment, "Applying the Title VII Prima Facie Case to Title VIII Litigation," 11 Harv. C.R.-C.L.L. Rev. 138 (1976).

[34] Note, "Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal," 89 Harv. L. Rev. 387, 393 (1975). *See also* Note, "Employment Testing: The Aftermath of Griggs v. Duke Power Company," 72 Colum. L. Rev. 900, 908 (1972).

[35] Note, "Beyond the Prima Facie Case," at 391–92.

[36] Note, "Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives," 1981 U. Ill. L. F. 181, 190–91.

[37] 347 F. Supp. 776 (N.D. Miss. 1972).

[38] *Id.* at 779.

however, remanded the case for a consideration of whether the effect standard should apply to Title VIII.[39] In commenting on the Supreme Court's decision to remand the case, the Third Circuit noted that if the equal protection intent standard of *Washington* v. *Davis* also governed Title VIII actions, remand of the Title VIII claim would have been unnecessary and a waste of valuable judicial resources: "In remanding, rather than directing the dismissal of the *Arlington Heights* litigation, the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern Title VIII claims."[40]

Indeed, on remand in *Arlington Heights II,* the Seventh Circuit Court of Appeals adopted this interpretation of the Supreme Court's action, holding that "a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent."[41] The Second Circuit decision in *Robinson* v. *12 Lofts Realty, Inc.*[42] indicates how other courts have read the *Arlington Heights* litigation to support a discriminatory effect theory for Title VIII. The *Robinson* opinion is particularly significant in light of the earlier 1975 Second Circuit opinion in *Boyd* v. *Lefrak Organization* which determined that *Griggs* was "inapposite" to fair housing litigation. According to the court in *Robinson,* in upholding an effect standard, the Seventh Circuit reasoned:

> that a prima facie case under the Act could be established on the basis of effect alone. In reaching this conclusion, the court took account of the similarity of Title VIII, which bans housing discrimination, to Title VII which bans discrimination in employment and relied in part on the thrust of the Supreme Court's decisions in employment discrimination cases. It noted that while in *Washington v. Davis,* 426 U.S. 229 (1976), the Supreme Court had held that discriminatory motivation was required to establish a violation of the Equal Protection Clause, in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), which was reaffirmed in *Washington v. Davis,* the Supreme Court had held that a showing of discriminatory intent was not necessary to establish a prima facie case under Title VII. *Village of Arlington Heights II,* supra, 558 F.2d at 1288–90. Thus, the Seventh Circuit, along with most other circuits, has held that discriminatory impact is the appropriate standard by which to determine whether a plaintiff has made out a prima facie case under Section 3604(a).[43]

Limitations of the Effect Standard

Although the *Griggs* analysis has been extensively applied to various Title VIII claims, it does not mean certain or automatic victory for the fair housing plaintiff who alleges discriminatory effect. First of all, the plaintiff must still carry his or her traditional burden of proof by demonstrating that the challenged conduct does indeed have a discriminatory effect. As Professor Schwemm states, "it is worth observing here that a number of courts, at least at the trial level, have accepted the discriminatory effect theory in Title VIII cases and have then ruled against the plaintiff because he failed to prove the existence of such an effect."[44] Moreover, as discussed more fully below, it should be noted that the proof of discriminatory effect also does not guarantee victory; rather, it merely shifts the burden of showing that the defendant's challenged conduct can be justified on some nonracial ground, such as "business necessity."

In cases where a general business or economic policy is challenged, proof of illegal discrimination can be difficult even under a theory of disproportionate impact, if the discrimination is viewed as economic rather than racial; such policies are readily accepted as legitimate. Although these so-called acceptable economic standards and business policies may be nothing more than a subterfuge for racial discrimination, it is often easier to declare than to demonstrate. Consider the difficulty of prevailing in this type of case as illustrated by *Dreher* v. *Rana Management, Inc.*[45] In that case, the defendant rented its entire building to Hofstra University for use as a dormitory, restricted to full-time students. The effect of this business transaction was to replace a tenant body 90 percent of whom were low-income blacks with one that was 75 percent white students. The trial court ruled that a private landlord can remove previously open-market housing from the rental market completely and enter into an arrangement that affords him significant financial benefits, even though the effect of that decision, while reducing housing to everyone seeking open-market housing, falls disproportionately on individual blacks who had previously occupied the housing

[39] 429 U.S. 252 (1977).

[40] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 128 (3d Cir. 1977).

[41] 558 F.2d at 1290.

[42] 610 F.2d at 1290.

[43] *Id.*

[44] R. Schwemm, *Housing Discrimination Law,* p. 61.

[45] 493 F. Supp. 930 (E.D.N.Y. 1980).

and on the black community that previously had access to the building.[46]

In distinguishing this case from one in which a landlord's conduct or policy regarding a particular, individual rental decision is questioned, in *Dreher* the economic justifications for the wholesale removal of the housing were compelling and, if plaintiffs had prevailed, it would have forced defendant "to affirmatively provide housing for minority group members to the detriment of defendant's valid economic interests, a cause of action the Court of Appeals for this circuit has been reluctant to enforce."[47]

Title VIII Proof Standards: A Comparison Between a Factors Analysis and a Prima Facie Case Analysis

Establishing a Fair Housing Act violation on the basis of discriminatory effect is approached differently in two principal ways: (1) focusing on critical factors as articulated in *Arlington Heights II,* the Seventh Circuit remand decision or (2) applying the prima facie concept as articulated in the Third Circuit decision of *Resident Advisory Board* v. *Rizzo.* Both decisions were decided within a couple months of each other in 1977 and their approaches, separately or in combination, have been followed in subsequent Federal decisions at both the trial court and appellate levels. Although these later decisions have elaborated on the approaches and illustrated the varying factual contexts in which they apply, the conceptual framework of *Arlington Heights II* and *Rizzo* remain largely unqualified.

Although the Seventh Circuit's *Arlington Heights II* decision held that at least under some circumstances a violation of 42 U.S.C. section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent, the court refused to conclude that every action that produced discriminatory effect is illegal. The court advised that the courts must use their discretion in determining whether, in light of the particular circumstances of each case, relief should be granted under Title VIII.[48]

Rejecting the *Griggs* method of having the evidence of discriminatory effect shift the burden of justification to the defendant village, the court utilized "four critical factors" to be considered in deciding whether discriminatory impact would establish a Title VIII violation. Those factors are: (1) how strong is plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington* v. *Davis;* (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[49] The court identified two kinds of discriminatory effect: (1) when a decision or conduct causes a greater "adverse impact" on blacks than on whites, or (2) when a decision or conduct "perpetuates segregation," thereby blocking interracial association.[50] Note that the court considered the second effect as invidious under Title VIII regardless of the extent to which it might cause a disparate effect on blacks.[51]

The *Rizzo* litigation arose out of the city of Philadelphia's attempts to prevent construction of a public housing project in a nearly all-white area of the city. The trial court ruled that because 95 percent of those on the housing waiting list were nonwhite, the failure to build such housing had a discriminatory effect on nonwhites.[52]

In affirming that a showing of discriminatory effect alone will establish a Title VIII prima facie case, the Third Circuit set forth the following standard for determining whether the defendant has carried its burden of justification for the acts resulting in the discriminatory effect:

> A justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.[53]

The court explained that should defendant introduce evidence that no less discriminatory alternative course existed, then the burden would shift back to

[46] *Id.* at 934–35.
[47] *Id.* at 934.
[48] 558 F.2d at 1290.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 1291.
[52] 564 F.2d at 126.
[53] *Id. See also* United States v. City of Parma, 494 F. Supp. 1049, 1055 (N.D. Ohio 1980), where same standard is applied to a segregative effect case.

plaintiff to demonstrate that such a course was available.[54]

While citing the *Arlington Heights II* decision with approval, the *Rizzo* court noted this distinction:

> To the extent that the Seventh Circuit would seem to go beyond this standard (i.e.. that a showing of discriminatory effect alone establishes a prima facie case) in its statement of "critical factors," our impression is that the court is setting forth a standard upon which ultimate Title VIII relief may be predicated, rather than indicating the point at which the evidentiary burden of justifying a discriminatory effect will shift to the defendant.[55]

The *Arlington Heights* approach is inadequate in many regards. In *Arlington Heights,* the discussion regarding discriminatory effect misses an important point. Blacks in the case represented only 18 percent of the area population and 40 percent of the class eligible for the proposed low-income housing. The discriminatory effect was deemed to be "relatively weak" because the disadvantaged class was "not predominantly nonwhite." The decision has been aptly criticized for misplacing emphasis on the disadvantaged class's racial makeup:

> Taken alone, the fact says nothing about whether the disadvantage suffered by the minority is a disproportionate one. Disproportionate racial impact is a function of the disparity between minority representation in the disadvantaged class and in the area population; the magnitude of the impact equals the size of the disparity. Read strictly, the Seventh Circuit's analysis would apparently limit a finding of disproportionate impact to communities in which minorities account for more than 50 percent of those eligible for subsidized housing, thereby placing beyond the scope of Title VIII instances of disproportionate impact that should properly be open to attack.[56]

It has been suggested, however, that the court in *Arlington Heights* did not intend to consider disproportionate racial impact.[57] Yet the court's requirement that more nonwhites than whites be disadvantaged runs counter to the generally accepted notion that disproportionate impact, as opposed to "greater adverse impact," is an important discriminatory effect in itself. The *Arlington Heights* analysis can also be faulted in that the element of discriminatory intent should play no *necessary* part in a discriminatory effect case. In the analogous employment discrimination area, the Supreme Court held that Title VII was violated even though "there was no showing of discriminatory purpose."[58]

The *Arlington Heights* justification of the municipal action places upon defendant a very light burden, i.e., whether the action is "within the ambit of legitimately derived authority."[59] This burden will almost always be met. Without consideration of less discriminatory alternatives, this factor becomes an automatic point for the defendant. Thus, one commentator has suggested that a fifth factor be added to the *Arlington Heights* analysis: the "adequacy of municipal justification," balancing this against the magnitude of discriminatory effect.[60] Under the proposed consideration, a court would evaluate a defendant's justification in light of three factors: "the interest claimed to be served by the municipal decision; the extent of the adverse impact on this municipal interest likely to result from construction of housing; and the availability of methods other than prohibiting construction to protect the asserted interest."[61]

In concluding that the *Rizzo* approach is preferable to that of *Arlington Heights,* Professor Schwemm has observed that the Seventh Circuit decision fails to explain how the relevant factors are to be weighed, "and it thus fails to provide adequate guidance to the trial judges, litigants, and future decision makers who will have to apply it. The proper structure for balancing these factors and for identifying where the burden of proof lies has already been established under Title VII by *Griggs* and its progeny. *Rizzo* wisely decided to follow this lead."[62]

Last year, in *Betsey* v. *Turtle Creek Associates,* the Court of Appeals for the Fourth Circuit elaborated on the *Rizzo* approach, applying it in the context of a suit not brought against a local government exclusionary practice but, rather, in the context of a private landlord-tenant transaction.[63] Plaintiffs challenged the apartment owners' decision to convert one of its buildings from one housing families with children to one for adults only. In order to institute

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[54] 564 F.2d at 126 n.37.

[55] *Id.* at 148 n.32.

[56] Comment, "Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent," 53 NYU L. Rev. 150, 172 (1978).

[57] Note, "Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard," 27 UCLA L. Rev. 398, 412 n.60 (1979).

[58] *Griggs,* 401 U.S. at 428.

[59] *Arlington Heights II,* 558 F.2d at 1293.

[60] Comment, "Last Stand on Arlington Heights" at 177.

[61] *Id.* at 178–79.

[62] Schwemm, "Discriminatory Effect," at 257–58.

[63] 736 F.2d 983 (4th Cir. 1984).

the all-adult rental policy, the owners issued eviction notices to the plaintiff families with children. Plaintiffs sought injunctive relief, claiming that defendants acted with a racially discriminatory intent in seeking to evict them and that the evictions would have a disparate impact, both constituting a violation of Title VIII.[64]

At trial, the district court ruled discriminatory intent was established, but that the defendant had rebutted this evidence by proving that they were motivated by economic considerations and not race. The trial court further ruled that plaintiffs had failed to prove a prima facie case of disparate racial impact and, therefore, entered judgment for defendant on all claims. Plaintiffs appealed the discriminatory effect ruling.[65]

The trial court had rejected "clear proof of discriminatory impact" because (1) there was an absence of a continuing disproportionate impact; (2) there was a high percentage of blacks in the entire complex, i.e., other buildings; and (3) there was an insignificant impact of the policy on blacks residing in the local community. But the court of appeals found these three factors irrelevant to a prima facie showing of racially discriminatory impact. The court held that in order to prevail in a discriminatory impact case under Title VIII, plaintiffs, members of a discrete minority, are required to prove only that a given policy had a discriminatory impact on them as *individuals.* The plain language of the statute makes it unlawful "to discriminate against *any person.*"[66] According to the court:

> The correct inquiry is whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied. In this case, the all-adult conversion policy was applied to the residents in Building Three. "Bottom line" considerations of the number and percentage of minorities in the rest of the complex or the community are "of little comfort" to those minority families evicted from Building Three.[67]

In addressing the defendants' justification burden, the court stated that they would have to show more than that they were motivated by economic considerations as in rebutting the prima facie discriminatory intent case. With discriminatory effect, the owners had to confront a more difficult burden than merely articulating some "legitimate non-discriminatory impact." Instead, defendants "must prove a business necessity sufficiently compelling to justify the challenged practice." Note the distinction here in the private conduct case, from that in *Rizzo,*[68] involving governmental conduct.

The Effect Standard Is Workable and Fair

As indicated by our review of the housing cases, as well as employment cases, interpreting and applying the discriminatory effect standard, we see that the standard is not only judicially manageable, but it also provides clear guidance for fair housing lawyers and claimants. Morever, we should not fail to recognize that in most fair housing cases involving private transactions, they have turned on whether there was purposeful discrimination and not discriminatory effect. Furthermore, even in those cases finding disparate impact, there was usually also evidence of intentional disparate treatment, and this is true in both private transaction cases and those involving discrimination resulting from land use and other exclusionary practices by municipal governments.[69]

In the disparate treatment case, the defendant's burden is relatively light in rebutting plaintiff's prima facie case. Defendant simply must demonstrate that there were reasons other than plaintiff's race underlying the refusal to deal with plaintiff, and these countervailing justifications will usually relate to the shelter seeker's applicant characteristics. As stated by Professor Schwemm:

> A landlord is certainly free under Title VIII to pick a white applicant over a black applicant if his sole reason for doing so is that the white applicant is better qualified on the basis of legitimate rental criteria. The legislative history of Title VIII affirmatively shows that it was not designed to guarantee housing to those unable to afford it, and the courts have recognized that defendants "have a right to refuse approval on any honest basis unrelated to the race" of the prospective tenant. On the other hand, if the evidence shows that the defendant did not rely on these nonracial reasons (e.g., the new white tenant is actually less qualified than the plaintiff), then the plaintiff is likely to prevail, because it now appears that the actual and only reason for the defendant's refusal was the plaintiff's race.[70]

[64] *Id.* at 985.
[65] *Id.*
[66] *Id.* at 987.
[67] *Id.*
[68] *Id.* at 988.
[69] R. Schwemm, *Housing Discrimination Law,* p. 61.
[70] Ibid. p. 54.

As suggested in *Bush* v. *Kaim,* some of the factors to consider in determining whether defendant's reasons for not accepting a shelter seeker were racially motivated or not include:

1. Did the owner request information relevant to these subjects from plaintiff?
2. Did the owner request such information from other applicants?
3. Did he secure such information from other sources?
4. Did he request this information from the plaintiff and/or from the other applicants during the period in which he was selecting a tenant?
5. Did the owner make any attempt to follow up on this information or to check its accuracy?
6. Did he perform this followup or checking process during the time in which he was deciding to whom to rent?
7. Were there other applicants with better or more desirable ratings in these areas than the plaintiff?[71]

Often a negative answer to these questions will support plaintiff's burden of showing pretext. Hence, in evaluating discrimination involving an applicant's characteristics, it is important to scrutinize the circumstances under which the denial was made, by considering such factors as (1) whether normal procedures were followed in checking applicant's background; (2) whether normal criteria were applied equally to similarly situated blacks and whites; (3) whether defendant's subjective criteria were colored by racial prejudice or stereotype; and (4) whether objective selection criteria were reasonable measures of an applicant's suitability as a tenant or buyer.

Generalizing about the evaluation of the legitimacy of a defendant's excuse based on applicant characteristics is difficult because there is such a variety of reasons upon which a defendant may rely and because the issue is primarily one of the defendant's credibility under quite varied circumstances. Reasons offered unsuccessfully by defendants include that plaintiffs were unmarried persons, single women, divorced men, military personnel below the rank of major, noncitizens with diplomatic immunity, students, without children or with too many children, too young, or had failed to follow proper application procedure, became angry or "uppity" when applying, misrepresented employment history, failed to demonstrate ability to meet necessary financial obligations.[72]

Many of the critics who want to impose intent as the only standard of proof simply fail to consider that in most cases it is already the predominant standard and any legitimate reasons for the challenged conduct will defeat the housing discrimination claim. In the remaining cases, these critics fail further to recognize that discrimination in present day America is often subtle and so "artfully cloaked and concealed in sophisticated language that its true nature does not become obvious."[73]

A Constitutional Intent Standard Is Not a Limitation on Congressional Enactment of an Effect Test

In light of the Supreme Court's *Arlington Heights* decision, however dark the clouds on the horizon, it remains that a violation of Title VIII may be established by proof of a discriminatory effect without accompanying proof of discriminatory intent. Opponents of this proposition might seek to rely on constitutional intent requirements as imposing a limitation on the congressional enactment of an effect test. If intent is required to prove racial discrimination under the 14th amendment, and soon perhaps under the 13th amendment, the argument goes, then congressional enforcement of those amendments through authorized legislation such as Title VIII or Section 1982 must also require intent rather than effect as the standard of proof in racial discrimination claims.

Ratification of the 13th, 14th, and 15th amendments, respectively in 1865, 1868, and 1870, represented Congress' attempt to provide constitutional safeguards for the private rights, primarily of blacks, that had received inadequate protection prior to and shortly after the Civil War. These amendments, respectively, prohibited slavery and involuntary servitude; guaranteed all persons the privileges or immunities of national citizenship, due process of law, and equal protection of the law; and prohibited the deprivation of citizens' right to vote on account of race, color, or previous condition of servitude. Each amendment, moreover, authorized Congress to enforce these rights by "appropriate legislation." Title VIII of the Civil Rights Act of 1968 represents

[71] Bush v. Kaim, 297 F. Supp. 151, 162 (N.D. Ohio 1969).
[72] *See* cases cited in Calmore, "Fair Housing and the Black Poor," at 634 nn.319–30.
[73] Haythe v. Decker Realty Co., 468 F.2d 336 (7th Cir. 1972).

a statute passed pursuant to the congressional enforcement authority embodied in section 2 of the 13th amendment and section 5 ot the 14th amendment.

The Thirteenth Amendment

In *Jones* v. *Alfred H. Mayor Co.,* the Supreme Court addressed the scope of congressional power under the 13th amendment and rejected the notion that any judicially defined concept of slavery could significantly limit the scope of congressional power: "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[74] As observed by the eminent constitutional scholar, Laurence Tribe:

> If *Jones* is read literally, Congress possesses a power to protect individual rights under the thirteenth amendment which is an openended power to regulate interstate commerce. Seemingly, Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination and thus an aspect of slavery, and proscribe such infringement as a violation of the thirteenth amendment. On this view, Congress would possess plenary authority under the thirteenth amendment to protect all but the most trivial individual rights from both governmental and private invasion.[75]

An ill wind blows, however, in the form of the Supreme Court's 1981 decision in *Memphis* v. *Greene.*[76] In this case, a group of white homeowners in the city of Memphis closed their street at the point where their white neighborhood was joined by a largely black neighborhood. The street closure was accomplished by the white neighborhood association's receiving a deeded strip of land across the street, thereby restricting the blacks' access to the white neighborhood and forcing them to take an alternate route to downtown. The white neighborhood's action was challenged under the 13th amendment and 42 U.S.C. section 1982. After the Sixth Circuit reversed the trial court's judgment for the white homeowners, the Supreme Court heard the case to investigate the intent required under both the 13th amendment and Section 1982. The Supreme Court, however, did not reach that issue because it determined that the black plaintiffs did not suffer a significant property injury by the closure. The decision does, though, seem to set the stage for requiring intentional discrimination in section 1982 cases. Worse, as one commentator states, the *Greene* case may come to represent the "prototype of facially neutral actions used as smoke screens to cloak discrimination."[77]

The Fourteenth Amendment

In interpreting section 5 of the 14th amendment, the fundamental question is "whether judicially defined rights fix the limits of the congressionally possible by serving as relatively detailed descriptions of the ends that congressional action protecting fourteenth amendment rights must further?"[78] In *Katzenbach* v. *Morgan,* the Supreme Court answered negatively.[79] This case involved a provision of the 1965 Voting Rights Act. The act permitted a Spanish-speaking citizen to vote if he or she had successfully completed the sixth grade in an accredited Spanish-language school, even though that citizen could not read or write English. The State, however, had a literacy requirement that had previously been upheld by the Supreme Court as not violating the equal protection clause. Thus, the State protestors argued that the Voting Rights Act could not be justified as an enforcement measure of the 14th amendment. This argument was rejected in *Katzenbach.* The Court held that section 5 of the 14th amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[80] Thus, while the 14th amendment requires that only purposeful discrimination violates the equal protection clause, in *Davis* and *Arlington Heights I* the Supreme Court recognized that congress was permitted to allow relief under both employment and housing statutes on proof of disproportionate impact or discriminatory effect.

But What About Bakke and General Building Contractors?

In *University of California Regents* v. *Bakke,* the court considered Title VI of the Civil Rights Act of

[74] 392 U.S. 409, 440 (1968)
[75] L. Tribe, *American Constitutional Law* (1978) 259.
[76] 451 U.S. 100 (1981).
[77] Comment, "City of Memphis v. Greene: A Giant Step Backwards in the Area of Civil Rights Enforcement," 48 Brooklyn L. Rev. 621, 641 (1982).
[78] L. Tribe, *Constitutional Law,* p. 265.
[79] 384 U.S. 641 (1966).
[80] *Id.* at 651.

1964, which prohibits discrimination under programs or activities receiving Federal financial assistance.[81] Justice Powell, writing for the majority, stated that the legislative history of Title VI demonstrated a congressional intent to cut Federal funds to entities that violate a prohibition of racial discrimination similar to the reach of the equal protection clause of the 14th amendment. The separate concurring and dissenting opinion of Justices Brennan, White, Marshall, and Blackmun agreed that Title VI went no further in prohibiting the use of race than the equal protection clause of the 14th amendment itself.

The argument that this position supports imposing an intent standard in Title VI cases, however, has only a false look of truth. First, *Bakke* considered a special medical school admissions program that was challenged by a white applicant because the program gave a preference to nonwhites. The issue was whether the admitted consideration of race was permissible in an affirmative action program as a way to eliminate the effects of past discrimination. Because the criterion of race was deliberately employed, the case did not require a consideration of whether proof of discriminatory intent was necessary to prove a violation of Title VI.

Second, even if we assume that Title VI reaches no further than the equal protection clause which, in light of *Washington* v. *Davis,* would suggest that Title VI does not proscribe unintentional racial discrimination, the Court's interpreted legislative history would actually support an effect rather than an intent standard because Title VI as well as Titles VII and VIII were enacted prior to the 1976 *Davis* decision, at a time when the equal protection clause was interpreted to prohibit discriminatory effects.[82]

Additionally, as observed by one commentator:

> [I]t is significant that well after Title VI had been interpreted to prohibit disparate impact discrimination by administrative regulation, Congress enacted virtually identical language in ten additional statutes, in one of which Congress explicitly provided that it be enforced in conformity with agency regulations promulgated under Title VI. If Congress intended that Title VI and its offspring be limited to a showing of intentional discrimination, it would appear that Congress would have drafted these later acts differently.[83]

Finally, in 1983, in *Guardians Association of New York Police Department* v. *Civil Service Commission of New York,* an opinion admittedly more likely to "further confuse than guide," the Supreme Court, nonetheless, declared that proof of discriminatory effect is sufficient to establish a Title VI claim.[84]

In *General Building Contractors Association* v. *Pennsylvania,* although the majority held that Section 1981, like the 14th amendment, can only be violated by "purposeful discrimination," it declined to "decide whether the 13th amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose."[85] Justice Rehnquist declared, nonetheless, that the Enforcement Act of 1870, which contained the language that now appears as Section 1981, was enacted as a means of enforcing the recently ratified 14th amendment rather than the 13th amendment. Thus, he concluded that in light of the close connection between the Act of 1866 and 1870, and the 14th amendment, "it would be incongruous to construe the principal object of their successor, Section 1981, in a manner markedly different from that of the [14th] Amendment itself."[86]

In spite of Justice Rehnquist's dicta, the Court's imposition of the intent standard in Section 1981 cases is not a reliable precedent for imposing the same standard in Title VIII cases. The case turned on an interpretation of legislative history as supporting the intent standard, a reliance not available in light of Title VIII's legislative history. The case, moreover, did not turn on any conclusion that Section 1981 could extend no further than the 13th or 14th amendments, however "incongruous" that might be. Indeed, Justice Rehnquist admitted that Sections 1981 and 1982 had roots in both amendments and it was that dual heritage that allowed Congress to enact Section 1982 constitutionally without limiting its reach to "state action," a requirement under the 14th amendment. Thus, by proper analogy, even had the Court ruled that the 13th amendment, like the 14th, proscribed intentional discrimination only, this would not have prevented Congress' constitutional enactment allowing discriminatory effect to establish a proper claim under Title VIII. In short, while *General Building Contractors* bodes ill for future interpretations of the burden

[81] 438 U.S. 265 (1978).
[82] *See* cases overturned by *Davis,* 426 U.S. at 245 n.11.
[83] Rose, "Challenging the Relocation and Closure of Inner-City Hospitals—Analysis, Methodologies and Limitations," 16 Clearinghouse Rev. 102, 110 (1982).
[84] 103 S. Ct. 3221 (1983).
[85] 458 U.S. 375 (1982).
[86] *Id.* at 389–90.

of proof regarding Section 1982, because of its similar legislative history to Section 1981, the case says absolutely nothing about any constitutional intent requirement limiting the reach of Title VIII.

Proposed Legislation Imposing an Intent Standard for Enforcing Title VIII Should Be Defeated

In January 1985 Senator Orrin Hatch introduced Senate Bill 139, the Equal Access to Housing Act of 1985, to amend Title VIII to require an intent standard for the enforcement of fair housing, a restriction he sought to impose twice previously within the last 5 years.[87] Professor Kushner has commented that "[t]he real purpose or concern of Senator Hatch, one which is groundless when one reviews the decisions of the courts issued under Title VIII, is that suburban zoning will be susceptible to judicial nullification because poor people are unable to purchase or rent housing."[88]

Senator Hatch has also expressed the concern that, in zoning cases, HUD and the Civil Rights Division of the Department of Justice could rely on the effect standard to involve the Federal bureaucracy and Federal courts in matters that have always been the prerogatives of State and local governments.[89] The Senator also seems to think that the effect standard is simply unfair to defendants in housing discrimination cases because it raises a presumption of fault without requiring proof of intent to discriminate, reflecting an inappropriate favoritism for the class of victims.[90] Thus, relying on the constitutional intent standard for equal protection claims as set forth in *Davis* and *Arlington Heights II,* the Senator believes the effect of discrimination should be considered as circumstantial evidence of discrimination, but not dispositive.[91]

With Senator Hatch's bill, as with other positions advocating the intent standard, there is a basic defect in perspective. In a brilliant article, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,"[92] Professor Freeman points out that the concept of racial discrimination may be approached from two very different perspectives, either that of the "victim" or the "perpetrator."[93] From the former view, racial discrimination describes the actual conditions associated with being victimized by racist society: the lack of money, jobs, quality education, and affordable, decent housing. The perpetrator perspective makes antidiscrimination law indifferent to the victim's conditions because it narrowly focuses on remedying the acts, or series of acts, inflicted on the victim by an identifiable wrongdoer. The overall life situation of the victimized group is largely ignored.[94] Whereas from the victim's perspective, remedial measures require affirmative effort to eliminate the oppressive conditions, from the perpetrator's perspective, the goal is merely to neutralize the wrongdoer's improper conduct.[95] With the host of historical and institutional factors conspiring toward discrimination in the housing of nonwhites, the effort to neutralize the acts of wrongdoers is virtually impossible, except in rather isolated, individual cases.[96]

According to Professor Freeman:

> Central to the perpetrator perspective are the twin notions of "fault" and "causation." Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. The fault idea is reflected in the assertion that only "intentional" discrimination violates the antidiscrimination principle. In its pure form intentional discrimination is conduct accompanied by a purposeful desire to produce discriminatory result. One can thus evade responsibility for ostensibly discriminatory conduct by showing that the action was taken for a good reason, or for no reason at all.
>
> The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents," who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.
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> * * *
>
> Operating along with fault, the causation requirement serves to distinguish from the totality of conditions that a victim perceives to be associated with discrimination and those that the law will address. These dual requirements place on the victim the nearly impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an

[87] For historical perspective *see* J. Kushner, *Fair Housing,* pp. 663–70.
[88] Ibid. p. 666.
[89] 126 Cong. Rec. 515191 (Dec. 1, 1980).
[90] *Id.*
[91] 127 Cong. Rec. 510577 (Sept. 28, 1981).
[92] 62 Minn. L. Rev. 1049 (1978).
[93] *Id.* at 1052–53.
[94] *Id.* at 1053.
[95] *Id.* at 1054.
[96] *See generally* Lake, "The Fair Housing Act in a Discriminatory Market: The Persisting Dilemma," Am. Plan. A.J., January 1981, at 48.

identified blameworthy perpetrator, regardless of whether other conditions of discrimination, caused by other perpetrators, would have to be remedied for the outcome of the case to make any difference at all.[97]

It is interesting to note that Professor Freeman sees *Griggs* v. *Duke Power Co.* as the paradigmatic Supreme Court decision adopting the victim perspective. Senator Hatch's proposed legislation would negate that case's useful precedent under Title VIII.[98]

In writing for the majority, Justice White justified the *Davis* decision by arguing that a disproportionate impact standard "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[99] This argument, speculative at best, was also overstated. Lower court decisions relying on the disproportionate impact doctrine prior to *Washington* v. *Davis* were quite restrained, demonstrating "that a discriminatory effect test need not open the floodgates to a wave of unprecedented equal protection challenges to racially neutral tax, welfare, and regulatory laws if the standard for judging the government's justification for these laws is flexible."[100]

The primary reason for the Court's adopting the discriminatory purpose standard is the fact that it is a manifestation of the judicial restraint philosophy of the Court. As one commentator observed:

> The Court's unwillingness to apply the disproportionate impact standard suggests that it does not believe that the judiciary should be the leader in the nation's drive for racial equality. The result in *Davis* indicates that the Court prefers that the other branches of the federal government be the primary articulators and guarantors of this equality.[101]

After *Washington* v. *Davis,* some lower Federal courts continued to emphasize the importance of foreseeability by equating purposeful discrimination with foreseeable adverse impact. However, in *Personnel Administrator of Massachusetts* v. *Feeney,*[102] a sex discrimination case challenging veterans' preferences, the Court ruled that, to infer illicit purpose, there must be more than intent as volition or awareness of consequences; a decisionmaker must act because of an adverse impact and not simply in spite of such an impact.[103] The *Feeney* decision apparently views racial discrimination as being completely a matter of illicit purpose.

Assuming that plaintiff demonstrates discriminatory purpose, the burden then shifts to defendant to establish that "the same decision would have resulted even had the impermissible purpose not been considered."[104] If the defendant succeeds in showing this, then in a case like *Arlington Heights,* the plaintiff "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose."[105] Under such circumstances, there would be no justification for "judicial interference" with the challenged action.[106]

The "same decision" test has been extensively criticized. For one thing, it seems inconsistent with the Court's position "that proof of disproportionate racial impact is probative of discriminatory purpose and [does] not exclude the possibility that such an impact could by itself be sufficient in some cases."[107] A "same decision" test invites after-the-fact rationalizations that amount to no more than pretext.

The motive-centered doctrine itself has been criticized for placing a very heavy burden of persuasion on the wrong side of the dispute.[108] Worse, a motive-centered theory is often viewed as considering the facts of racial inequality as though their importance is limited only to how they bear on the question of whether official motive was legitimate: "However, the facts of racial equality are the real problem. . . .[A] motive-centered inquiry

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[97] Freeman, "Legitimizing Racial Discrimination," 62 Minn. L. Rev. at 1054–56.

[98] *Id.* at 1093.

[99] 426 U.S. at 248.

[100] Schwemm, "From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation," 4 U. Ill. L.F. 961, 990 (1977).

[101] Comment, "Proof of Racially Discriminatory Purpose Under the Equal Protection Clause, Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg," 12 Harv. C.R.-C.L.L. Rev. 725, 738–39 (1977).

[102] 442 U.S. 256 (1979).

[103] *Id.* at 279.

[104] *See* criticism of this view, Note, "Discriminatory Purpose and Discriminatory Impact: An Assessment After Feeney," 79 Colum. L. Rev. 1376, 1397–98 (1979).

[105] *Arlington Heights I,* 429 U.S. at 270–71 n.21.

[106] *Id.*

[107] *Id.*

[108] *See* Gates, "The Supreme Court and the Debate Over Discriminatory Purpose and Disproportionate Impact," 26 Loy. L. Rev. 567, 613–16 (1980).

should [not] distract the lawsuit from focusing on the community's real ills."[109] Beyond the litigation process, the motive-centered inquiry has negative practical ramifications in relation to the negotiation of possible settlement. According to Professor Karst:

> Name-calling and indignation will, to some significant extent, displace the effort to deal with the racial inequality itself. The improvement of race relations is difficult enough when the parties to such negotiations concern themselves with the questions of the actual extent of racial inequalities and with the costs of lessening them. When accusations of bad faith are added to the mix, the resulting negative emotional charge can only hinder the process of healthy resolution of a community's racial problem.[110]

In 1980 the Supreme Court held that section 2 of the Voting Rights Act of 1965 did not permit judicial relief in vote dilution instances, such as at-large elections, in the absence of proof that the alleged discrimination was intentional.[111] In 1982, however, Congress approved amendments providing that violations of section 2 can be established without proving discriminatory intent.[112] The report of the Senate Committee on the Judiciary points out:

> In *Bolden,* a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discrimination cases. The Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.[113]

So, too, with Senator Hatch's so-called "equal access" to housing legislation, the "unacceptably difficult burden on plaintiffs" contained in his act should be rejected by Congress.

Conclusion

As Professor Dorn points out, equal opportunity can lead to racial equality only if the races are substantially equal at the time the rule is applied because America's current working concept of equality of opportunity is so biased in favor of the advantaged.[114] The doctrine's development and application have focused on permitting all social groups to compete in the political, social, and economic marketplaces, but the concept is unrealistic in its assumption that such groups compete unencumbered by handicaps at the beginning.[115] If fair housing is to be truly that, and if equal opportunity is to be truly that, then the Nation simply cannot buy into the perpetrator perspective represented by the intent standard of proving discrimination. I conclude this paper by citing the factor of racism. As I have stated on another occasion:

> Beyond consciously held attitudes, racist mentality may also display what Paul Brest has described as "racially selective indifference." Similarly, Edgar and Jean Cahn refer to "racism by inadvertence" or "selective inattention." Such indifference is racist when it effectively denies benefits to members of the subjugated group or imposes burdens on them which would not be denied or imposed if they were white.
>
> The above notions hint at why racism is often so hard to identify in any articulable fashion. And yet today's racism is a living system, as much so as were slavery and Jim Crow. The difference is that today's racism, systematic and highly tuned, inflicts a greater proportion of its harms without trying, or thinking. Still, "[o]ne who is stumbled over often enough may, understandably, notice that these cumulative impacts bear a certain functional resemblance to kicks." It is this unthinking aspect of racism which makes nonsensical the requirement in *Washington* v. *Davis* that racial discrimination be proved by showing intent.
>
> Racism, it becomes apparent, is not merely individualistic and attitudinal; it is also collective. It is similar to negligence in that whites often exercise a lesser standard of care in their attitudes toward and treatment of blacks than they exercise in regard to their fellow whites. Much of this is because whites are socialized under the influence of institutional racism, which consists of those racist policies and practices that are built-in components of the very structure and process of most American institutions. Often without the intent of the people involved, institutional policies and practices serve the aims of racism, excluding, disadvantaging, or stigmatizing blacks.[116]

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[109] Karst, "The Costs of Motive-Centered Inquiry," 15 San Diego L. Rev. 1163, 1165, (1978).

[110] *Id.* at 1165–66.

[111] City of Mobile v. Bolden, 446 U.S. 55 (1980).

[112] 42 U.S.C.A. §1973(b) (Supp. 1983).

[113] S. Rep. No. 97–417 at 16, U.S. Code Cong. & Admin. News at 193.

[114] E. Dorn, *Rules and Racial Equality* (1979), pp. 139–40. Professor Dorn states: "In a way, equal opportunity turns against itself. It is intended to be an open rule for individuals, one which promises that merit will win out over privilege. But it turns into a closed rule for groups, one which actually protects privilege and perpetuates the effects of past injustice." Ibid., p. 140.

[115] Schaar, "Equality of Opportunity and Beyond," in *Equality,* ed. J. Pennock & J. Chapman (1967), p. 228.

[116] Calmore, "Exploring the Significance of Race and Class in Representing the Black Poor," 61 Ore. L. Rev. 201, 208–209 (1982).

In proving racial discrimination, then, effect, and not illicit motive, is indeed the proper touchstone. The standard of intent is less a touchstone than it is a Sisyphean rock.

The Fair Housing Act of 1968 and the Civil Rights Act of 1866: The Test for Liability in Housing Discrimination Cases

By Marshall D. Stein*

Introduction

This Commission has charged us with providing it with certain information about discrimination in housing. Professor Calmore and I have been directed to focus our attention upon some of the keystone legal provisions designed to prohibit racial discrimination in housing. The two statutes that we discuss came into being a century apart. Though each arose in very different settings, the means selected to achieve their objectives were remarkably similar. Sections 1981 and 1982 (42 U.S.C.) were derived from the Civil Rights Act of 1866. They were designed to prevent the reenslavement of the recently emancipated black population in the South; to ensure that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[1] The post bellum Congress was concerned with barring racially motivated actions being taken against blacks.

A century later, Congress again focused upon the rights of black citizens in its 3-year effort to create a Fair Housing Act. In 1866 Congress' focus was exclusively upon actions that clearly had an intended racial purpose. In 1966 Congress considered the notion that if a black were turned down in his efforts to buy or rent housing, the burden of proving that the rejection was not racially motivated should shift to the person who turned him down. Congress considered this alternative and rejected it. The policy that did pass, of providing "for fair housing throughout the United States,"[2] was a policy that required proof of invidious discriminatory intent. Both its sponsors and its opponents clearly understood this.

This paper will trace the 3-year effort that brought a Fair Housing Act into being in 1968, and will show how the lower appellate courts have misapprehended the standard for liability under Title VIII. Moreover, the treatment of this intent versus effects standard in books, law reviews, and journals will also be canvassed. Then, the Supreme Court's likely resolution of the standard for liability under section 1982 will be presented. From there, consideration will be given to the guidance that has been provided by the Supreme Court for how discriminatory intent is to be determined.

Finally, a few suggestions are made for how to reach the point where an appraisal can be made on

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[1] 42 U.S.C. §1982.

[2] 42 U.S.C. §3601.

whether to maintain the intent standard or to change it. Given the unusual circumstances of Congress' having created one standard of liability in the Fair Housing Act (intent) that has been administered under a different standard by almost all of the Federal courts (effect), it is necessary to sort out these differences before an informed policy choice can be made.

The Fair Housing Act of 1968

The Supreme Court has repeatedly indicated that the key to determining the meaning of a statute barring discrimination is its legislative history. Congress took several years to pass a fair housing provision. The effort failed in 1966, and one of the principal reasons was the concern that the 1966 act would allow a prima facie showing of discrimination to be established on results alone. The act that did pass in 1968 deleted the provision that caused such concern in 1966, so that a violation of the bill which passed cannot be established solely by proof of discriminatory results. Senators and Congressmen who voted on the Fair Housing Act clearly understood that it prohibited refusals to sell, rent, etc., that were racially motivated.

A Fair Housing Act was only passed when its proponents agreed to drop a standard of proof whereby discriminatory effect would establish a violation

The Supreme Court has not yet had occasion to determine whether a violation of Title VIII can be established solely by a showing of disparate impact or whether it requires proof of racial motivation. The circuits are divided on this issue.[3] However, the Supreme Court has provided specific guidance on how to determine the standard of proof for congressional enactments in the area of civil rights.

Therefore, this section of the paper is divided into three parts: The first addresses the guidelines for legislative interpretation and the legislative history of Title VIII; the second reviews the case law in the circuits; and the third looks at the assessment of this issue in books, law reviews, and journals.

The Supreme Court has held that legislative history is critical in interpreting Congress' intent in civil rights legislation. Title VIII's history demonstrates that Congress would only pass a fair housing bill in which violations require a showing of discriminatory intent

The Supreme Court has expressed substantial concern with the potentially far-reaching effects of a racially disparate effect test and has, therefore, held that the adoption of such a standard can only be attained by a clear congressional choice:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.[4]

Perhaps in part as a result of this concern and in part from an awareness of the potential distance between the implications of sweeping phrases and the explications obtained in the nitty-gritty of Committee hearings, conference reports, and floor debates, the Supreme Court has been particularly willing in the civil rights area to be informed by legislative history, rather than confining itself solely to a statute's language.

In *Bakke,* the Court addressed what Congress intended in Title VI, and Justice Powell's keystone opinion marks the path for such an inquiry:

> The language of §601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:
>
> > No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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[3] *E.g., compare* Skillken & Co. v. City of Toledo, 528 F.2d 867, 879 (6th Cir. 1975); [*But see* United States v. City of Parma, Ohio, 661 F.2d 562 (1981), *cert. denied,* 102 S.Ct. 1972, *reh. denied,* 102 S.Ct. 2308 (1982). *Parma* leaves the state of the law in the Sixth Circuit unclear, as it affirms a lower court's order principally upon findings of intentional discrimination, but also because of discriminatory effects. *Parma* is discussed more fully below.]; ("The fact that some black people, but not all, are concentrated in a certain area of the city, is no proof of official discrimination, and the District Judge was in error in inferring it"), *vacated,* 429 U.S. 1068 (1977); *reaffirmed,* 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985, *reh. denied,* 434 U.S. 1051 (1978); *with* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) *(Arlington Heights II)* ("We therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent.").

[4] Washington v. Davis, 426 U.S. 229, 248 (1976) (emphasis not in original; footnote omitted).

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976) quoting *United States* v. *American Trucking Assns.,* 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1063–1064, 84 L.Ed. 1345 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to. . . .[5]

The four Justices who agreed with Justice Powell that "Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment"[6] devoted a lengthy first section of their opinion to legislative history.[7] They concluded with the same quoted material from *Train* v. *Colorado Public Interest Research Group* that was cited by Justice Powell in the previously quoted passage.[8] Finally, the opinion of the remaining four Justices also reviewed and relied upon the legislative history to support their view of Title VI.[9]

A year later, the Court was faced with deciding whether Title VII barred all race-conscious affirmative action plans. Respondent Weber's "argument rest[ed] upon a literal interpretation of" the statute. Justice Brennan, writing for the majority, highlighted just how critical legislative history can be, and when weighed in the scales against the literal language of the statute, can in fact outweigh such a reading:

> It is a "familiar rule, *that a thing may be within the letter of the statute and yet not within the statute,* because not within its spirit, nor within the invention of its makers." *Holy Trinity Church* v. *United States,* 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. See *Train* v. *Colorado Public Interest Group,* 426 U.S. 1, 10 (1976); *National Woodwork Mfrs. Assn.* v. *N.L.R.B.,* 386 U.S. 612, 620 (1967); *United States* v. *American Trucking Assn.,* 310 U.S. 534, 543–544 (1940). *Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected. United States* v. *Public Utilities Comm'n,* 345 U.S. 295, 315 (1953). See *Johansen* v. *United States,* 343 U.S. 427, 431 (1952); *Longshoremen* v. *Janeau Spruce Corp.,* 342 U.S. 237, 243 (1952); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907).[10]

Given these recent opinions, the Supreme Court has provided clear instruction that in determining the meaning of a statute, particularly one defining what is forbidden discrimination, it is necessary for courts to delve into the legislative history and determine Congress' purposes in passing the law.

What was eventually to become Title VIII took several years to be passed by Congress. The focus of the Fair Housing Act was always on private homes, principally their sale, but also their rental. In this setting, Congress addressed the issue that is of concern here: whether a violation of the act could be inferred from results, or whether it had to be established by evidence of an intent to discriminate. This concern surfaced early in the debates. The bill was introduced in July 1966. What would become Title VIII was Title IV of the 1966 bill.[11] It contained a provision for a Fair Housing Board that could hear and adjudicate complaints of violations under the act. In voicing his opposition to such a board (on the third day of House debate, July 27), Congressman Whitener quickly focused on the standard of proof he feared might be employed:

> Title IV, as has been said, leaves more questions unanswered than it answers.
>
> A provision was added in the committee about a fair housing board. At the time that seemed rather innocuous. As we look at it a little further it becomes objectionable. For example, it provides that we will use the NLRB procedure.

[5] Regents of Univ. of California v. Bakke, 438 U.S. 265, 284 (1978).

[6] *Id.* at 328.

[7] *Id.* at 329–40.

[8] *Id.* at 340.

> We have recently held that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976) quoting *United States* v. *American Trucking Assns.,* 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345, 1351 (1940) [footnotes omitted] [other citations omitted].

[9] *Bakke,* 438 U.S. at 414–19.

[10] Steelworkers v. Weber, 443 U.S. 193, 201–02 (1979) (emphasis added).

[11] *See* Schwemm, *Housing Discrimination Law* (1983), p. 32; Schwemm, "Discriminatory Effect and the Fair Housing Act," 54 Notre Dame Lawyer, 199, 202 (1978); Note, "Racial Discrimination—Fair Housing Act. . . .," 46 Geo. Wash. L. Rev. 615, 627 n.139 (1978); Note, "The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act," 1969 Duke L.J. 733, 749 n.84.

We know that under the NLRB if a man is fired from a job and he was engaged in union activity, proof of these two facts establishes a prima facie case, and thereby shifts to the employer the burden of showing that the employer was not engaged in an unfair labor practice.

I assume, if that is the procedure followed, this new fair housing board, as it is called, if a house were up for sale and a member of a minority group sought to purchase that house and that effort to buy the house was fruitless, then a prima facie case would be established and the burden would shift to the owner to show that he had not discriminated.

In the testimony before the Senate committee the Attorney General of the United States agreed that that would be the situation under the statement of facts I have just mentioned.[12]

When the House was getting ready to vote on the entire 1966 bill, there was a motion to recommit Title IV for further study, and that motion was narrowly defeated on a vote of 190–222.[13] This concern with a prima facie case being made on effects alone, in the context of the NLRB analogy, was also brought up in the Senate debate. The speaker was Senator Long, and he, in his role as a leader of the opposition, presented four detailed arguments against the passage of Title IV. It is the last of these that discussed the issue with which this paper is concerned:

A fourth reason for opposing the open housing section of the bill is that it would very likely result in the imposition of an unreasonable practical burden upon property owners—over and above the deprivation of basic property rights.

Prof. Sylvester Petro of the New York University School of Law, who testified before the Senate Subcommittee on Constitutional Rights, made some very interesting and appropriate comments on this aspect of the Senate bill. I should like to quote some of his remarks:

* * *

[Petro] As we shall see, it is likely that the burden of proof will come to rest swiftly upon the homeowner, rather than, as is traditional, at least in due process countries, upon the complaining party.

* * *

And what will happen at the trial? The law is vague, it forbids refusing to sell to any person because of race, color, religion, or national origin. How much proof is required? On whom will the burden of proof come ultimately to rest?

We have considerable experience with a similarly vague law. An analogous provision in the National Labor Relations Act prohibits discrimination by employers which tends to discourage union membership. The National Labor Relations Board considers itself as having a prima facie case of discrimination when a union man is discharged by an employer who has betrayed an antiunion sentiment. At that point the burden of proof shifts to the employer. He must show there was some good reason for the discharge—

* * *

The burden of proving lack of discrimination will fall upon the homeowner. . . .

* * *

[Senator Long] Mr. President, I feel that Mr. Petro's logic is unimpeachable. He has made it plain that this bill would impose a very serious and unwarranted burden upon those to whom its provisions would apply. The imposition of this burden is indeed a compelling argument for rejecting so-called fair housing.[14]

There is no doubt that this concern about the standard of proof played an important role in the defeat of the 1966 bill. Senator Dirksen, whose opposition to Title IV was critical to the defeat of the 1966 act,[15] was very concerned with the issue of proof of discrimination under Title IV. In the passage below, he was speaking in opposition to the fair housing section, shortly before the vote on cloture was to be taken. Dirksen began by endorsing the views expressed by Professor Petro and asking that his entire testimony, portions of which were quoted earlier, be read into the record. Then Dirksen went on to say:

Mr. Dirksen: Mr. President, this is a brilliant treatise.

* * *

What Dr. Sylvester Petro of New York University Law School says is that this is the greatest assault upon the due-

[12] 112 Cong. Rec. 17196 (1966).
[13] 112 Cong. Rec. 18739 (1966).
[14] 112 Cong. Rec. 22313–14 (1966).
[15] *See* Remarks of Senator Javits at 112 Cong. Rec. 23013–14 (1966), attributing Dirksen's support as indispensable if cloture were to be invoked and the act passed, and further stating that Senator Dirksen's support was not forthcoming "because Title IV was included in the bill." This assessment from a fellow Republican Senator seems unassailable, and Javits' acumen was verified when in 1968 Dirksen supported the amended fair housing provision; cloture was invoked, and the Civil Rights Act was passed. See below.

process clause of the Constitution that anybody has ever undertaken. . . .[16]

Though not as critical as a swing vote, Senator Sparkman of Alabama also referred to his concern that the result, the refusal to sell to a minority person, would be considered proof of discrimination. Here is a portion of his speech just prior to the cloture vote:

This comprehensive and ill-advised bill affords a good illustration of why cloture should be defeated.

With reference to Title IV, the situation was well presented in the statement made by the Alabama Real Estate Association, Inc., before Subcommittee. . . .and is as follows:

* * *

> Title IV is premised on the mistaken belief that any rejection of an offer to buy or rent from a member of a racial minority is necessarily an act of racial discrimination. . . .Even though race might not be the reason a home owner declines to sell, he could, under this bill, become involved in expensive and lengthy litigation trying to prove that his refusal to sell was not because of race.[17]

This same concern was voiced by several other opponents of the bill.[18]

After several efforts to invoke cloture failed, the leadership moved to lay aside consideration of this civil rights bill for 1966.[19]

Before moving on to the passage of a fair housing act in 1968, there is another point of interest in regard to the debate on the 1966 bill. Although the vast majority of the discussion focused on the bill's impact on individual homeowners and landlords, the equally enormous effect on governmental entities was not lost upon Congress.[20]

Finally, in regard to the 1966 legislative history, in all of the responses made by the sponsors and proponents, although most of the other issues of the opponents were addressed, there never was any rebuttal to the concerns about the Fair Housing Board, or what evidence would constitute a prima facie case of discrimination.[21]

When the bill was reintroduced in 1968,[22] this concern was among the ones principally addressed, and made up one of the major concessions of the sponsors in their efforts to gather the support they sought. Where the 1966 bill included a Fair Housing Board whose model was the National Labor Relations Board,[23] the 1968 bill deleted this provision totally.[24] Moreover, the sponsors were prepared to answer critics who would and did argue[25] that removing the Board would not alter the burden of proof; i.e., that a prima facie case would still be made whenever a minority person was turned down

[16] 112 Cong. Rec. 22618 (1966).

[17] 112 Cong. Rec. 22625 (1966).

[18] *See* Remarks of Senator Ervin of North Carolina at 112 Cong. Rec. 2302 (1966) ("A prima facie case could be made in every case in which two people of different race, color, religion, or national origin are parties to an unsuccessful real estate transaction.").

[19] 112 Cong. Rec. 22670 (1966) (1st cloture vote defeated); 112 Cong. Rec. (1966), at 23042–43 (2nd cloture vote defeated) and pp. 23046–47 (lay aside consideration for 1966).

[20] *See* Remarks of Senator Stennis of Mississippi, 112 Cong. Rec. 22300–01, 22304–05 (1966) ("Thus, in conducting investigations and filing complaints under the open housing provisions of Title IV, as well as in approving grants under Federal aid programs. . .the Secretary [of HUD] will be in a position to force the balancing of the races in every neighborhood throughout the land, on whatever basis he may have in his mind at that particular time." *Id.* at 22304–05.

[21] See, e.g., Remarks of Sen. Edward Kennedy, 112 Cong. Rec. 23010–11 (1966).

[22] In 1967 the House and Senate held further subcommittee hearings. As these become pertinent to following the course of the legislative history, they will be referred to.

[23] 112 Cong. Rec. 18112–13 (1966).

[24] 114 Cong. Rec. 2270–72 (1968).

[25] As noted earlier, *see* n.22, during 1967 subcommittee hearings were held on the bill. At the Senate hearings, there was, *inter alia*, a spokesman for the National Association of Real Estate Boards, who pilloried the now-abandoned Fair Housing Board, and then went on to insist that one of the evils it represented, the burden of proof being placed on the accused, was still a problem:

> It [Title IV of 1966] was subsequently revised in the House with a radical method of enforcement involving a Federal regulatory body with powers comparable to that of the National Labor Relations Board. Of course, this delighted the proponents but its oppressive terms were so manifest as to challenge the most objective analysis of the bill.
>
> Now in S. 1358, we have a third method of enforcement. . . .
>
> . . . .which vests in the Secretary of Housing and Urban Development the power to issue Complaints. . .to investigate with full subpena power, to make findings of facts to render judgment, and to enforce judgment. . . .
>
> All this to ascertain the subjective reasoning behind a property owner's decision not to rent a room in his home, or to sell his home to a certain individual. Due process dictates that he who alleges a fact has the burden of proving the fact.
>
> One would be most naive to believe that the Secretary or one of the thousands of employees who would be visited upon the public to enforce this law would accept as less than conclusive the mere denial of sale or rental as a fact of discrimination.

Hearings Before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency, United States, 90th Cong. 1st sess., *on S. 1358, S. 2114, and S. 2280, Relating to Civil Rights and Housing,* Aug. 23, 1967 p. 344 (hereafter cited as Senate Subcommittee Hearings).

in his attempt to buy or rent. To meet this argument, which was not attempted in 1966,[26] the sponsors prepared a series of questions and answers, one of which addressed this very point:

15. Will a person against whom a complaint of discrimination is issued have to prove that he did not discriminate?

No. The burden of proof rests on the Department of Housing and Urban Development, or the complaining person, to prove that the defending person *did* discriminate on the basis of race, color, religion or national origin.[27]

Clearly, this major concession was an effort to compromise so that a fair housing bill could meet some of its opponents' objections and thereby attract the votes necessary to invoke cloture and pass. In fact, during the hearings in the year between the bill's defeat in 1966 and its passage in 1968, several proponents repeatedly voiced such concerns. The following passages are typical:

Senator MUSKIE. . . .But we who have to struggle with the task of legislative achievement and progress do look for areas of compromise when we see we don't have the votes to achieve our principal objective. This is such a case.[28]

Senator PROXMIRE. One of the problems we have is trying to get support for this legislation. This is one of the reasons why many people thought the civil rights bill of 1966 failed, it contained this provision. . . .

* * *

Mr. MEANY. Well, I think like all other legislation, you shoot for what you think is proper and then of course when it gets down to the actual counting of noses, you may have to give a little.

Senator PROXMIRE. Well, there is no question about the principle, we agree on that. It is a question of, as Mr. Meany put it, have we got the votes.[29]

Senator PERCY. I have no questions, other than to say I think we all face a dilemma on this legislation. I would like as strong a bill as we can get, but I want something this year.[30]

Senator Mondale, who, along with Senator Brooke, was one of the two sponsors of the 1968 bill, was present every day of the hearings,[31] frequently in the capacity of presiding Chairman, and clearly was well aware of the pressure to compromise in order to get a fair housing statute enacted.

Returning to the Senate proceedings on the 1968 bill, the first effort to invoke cloture failed.[32] Prior to the second vote on cloture, active negotiations were reported by the principals involved to the effect that modifications in the fair housing provisions were ongoing in the hope of obtaining the support of Senator Dirksen. It was hoped that his support would result in closing down debate and in passage of the act.[33] Senator Mondale said that there were some changes in this latest effort at compromise and, at the request of Senator Ervin, then described these changes:

Last week's parliamentary tactics require us to put in a new version of the fair housing amendment today. With the exception of a few procedural changes, the new amendment is the same as the one voted on last week.

* * *

The changes that have been made in this amendment. . .are as follows:

We have included a provision to make clear that the burden of proof with respect to allegations of discrimination rests on the complainant.[34]

The second vote for cloture was again defeated,[35] thus making clear that additional compromises had to be made. The further concession that won Dirksen's support came in the area of which units would be covered and which exempted: Under Mondale-Brooke, the only exemption was the so-called "Mrs. Murphy exemption"; namely, owner-occupied units were also exempted.[36] Both Senators Mondale and Dirksen were clear that in all other ways the Dirksen amendment was consistent with Mondale-Brooke:

Senator MONDALE: . . .Thus, the essential difference between the Mondale-Brooke amendment and the amendment about to be introduced by the Senator from Illinois [Dirksen] is the coverage of approximately 7 million additional units, or 11.2 percent of the housing.[37]

[26] Remarks of Sen. Edward Kennedy, 112 Cong. Rec. 23010–11 (1966).
[27] 114 Cong. Rec. 2273 (1968).
[28] Senate Subcommittee Hearings, Aug. 22, 1967, p. 171.
[29] Senate Subcommittee Hearings, Aug. 23, 1967, pp. 389, 418.
[30] Senate Subcommittee Hearings, Aug. 23, 1967, p. 420.
[31] *See, e.g.,* Senate Subcommittee Hearings, Aug. 21, 1967, pp. 40–41; Aug. 22, 1967, pp. 170, 226; Aug. 23, 1967, pp. 419–20.
[32] 114 Cong. Rec. 3427 (1968).
[33] 114 Cong. Rec. 4049 (1968).
[34] *Id.* at 4060–61.
[35] *Id.* at 4065.
[36] *Id.* at 4568.
[37] *Id.*

Shortly thereafter, Senator Ervin describes Senator Dirksen as being unfair in pushing for cloture, which will bar further amendments of the Dirksen amendment. Dirksen responds that he tried to accommodate Ervin and other opponents in private meetings, but it soon became clear that compromise was not possible. In this context, Dirksen then says essentially what Mondale was saying, that for the most part (i.e., with the exception of coverage of owner-occupied single-family houses), the Dirksen amendment was the same as the earlier Mondale-Brooke amendment, which Ervin and others had ample opportunity to comment on and amend, if they had chosen to:

Senator DIRKSEN: . . .In this substitute, we do not go beyond the frame of the discussions or measures that have been before us. I think fairness dictates that I say that for the record, because I have not been wanting in grace and in my desire to bring everybody into the orbit, in the hope of having agreement on this matter.[38]

Shortly thereafter there is a dialogue between Senators Ervin and Jordan, two of the Fair Housing Act's staunchest opponents, which illustrates that even its opponents conceded that the old argument, that failure to sell to a minority person would make a prima facie case, was no longer an issue:

Mr. JORDAN of North Carolina. I commend my colleague [Ervin] for the fine explanation he has made of this Dirksen amendment, and the bill that it seeks to amend.

Because my colleague is an able lawyer and a good judge,. . .I ask him this question. I know of a case of a family which inherited some property. One sister inherited a specific piece of land, and it belonged to her by inheritance. Some people wanted to buy a lot, and she said, "No, I am not going to sell you that lot, because I want my brother to have it."

Under the Dirksen proposal, she would be violating the law in that case, would she not?

Mr. ERVIN: No, I do not believe she would, if she wanted to sell it to her brother. This is true because she would have a motive other than a racial motive.

But if she said, "I want to sell that lot, but I prefer to sell it to a person of his and my race because persons of our race inhabit this neighborhood," she would be violating the law.[39]

In 1966 an opponent like Senator Ervin would have replied that once the minority person's offer was refused, the owner would have had to prove the refusal was for nondiscriminatory reasons, but by 1968 even the opponents had recognized that the test for discrimination under the fair housing provisions was intent (racial animus), not effect.

The first cloture vote on the Dirksen amendment was defeated,[40] but on the second attempt, cloture passed.[41]

There was one last attempt to address the kind of proof necessary to prove discrimination, but this one focused on the issue of what kind of evidence could be employed to demonstrate an intent to discriminate,[42] rather than whether a violation could be established by proof of results alone.

Senator Baker proposed an amendment which provided "that an individual owner, otherwise exempted, may employ a real estate agent, but that he may not instruct that real estate agent to discriminate."[43] As drafted by Dirksen, the owner-occupant exemption was not available if the sale was negotiated through a broker.[44] Both Senators Percy and Mondale opposed the amendment, fearful that it was opening a major loophole.[45]

Obviously, one of the concerns with the Baker amendment was that it could offer protection to a racially motivated homeowner who placed his home for sale with a broker who was a recognized racist: The homeowner would be acting with a discriminatory intent, but under the Baker amendment could

[38] *Id.* at 4576.

[39] *Id.* at 4689–90. *See also* statement of Attorney General Ramsey Clark, testifying in 1967 hearings before Senate Subcommittee on Housing and Urban Affairs: "[This legislation] is aimed not at privacy, but at commercial transactions. It would prohibit no one from selling or renting to a relative or a friend. There is nothing in this bill to prevent personal choice where personal choice, not discrimination, is the real reason for action." Testimony quoted in Note, "The Federal Fair Housing Requirements," 1969 Duke L.J. 733, 751.

[40] 114 Cong. Rec 4845.

[41] *Id.* at 4960.

[42] This congressional interest in being able to present indirect evidence to establish racial motivation foreshadows similar concerns and discussions of the Supreme Court, which are discussed later in this paper. See Arlington Heights v. Metrop. Housing Dev. Corp., 429 U.S. 252, 266–68 (1977) and text accompanying notes 160–172.

[43] 114 Cong. Rec. at 5214.

[44] *Id.*

[45] *E.g., id.*, at 5216:

Percy. "If I understand this amendment, it would require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce. I feel that I must support the spirit of the compromise that was worked out. . . .I am for plugging every loophole in this bill and sticking closely to the spirit of the compromise I think the Senate is trying to accomplish."

See also Senator Mondale, *id.* at 5218.

argue that if he, the homeowner, did not instruct the broker to discriminate, the homeowner's own intent was no longer subject to attack as racially motivated.

Mr. MONDALE. Apparently the basic virtue that the Senator from Tennessee sees in the proposal is that the seller should not indicate publicly any preference on the basis of race. However, despite that, he may in fact discriminate himself, *or he may hire a broker to discriminate.*[46]

The Baker amendment was defeated.[47]

As one commentator has observed: "[T]he Senate rejected the amendment because it believed a plaintiff would encounter great difficulty proving the existence of discriminatory instruction, not because it believed plaintiff should not have to establish defendant's racial motivation."[48] "Thus, Senate rejection of the Baker amendment does not indicate congressional rejection of discriminatory intent as a condition of Title VIII relief."[49]

The only reason for paying this much attention to the Baker amendment is that a decision in the Third Circuit[50] cites its defeat as proof that Title VIII was intended to establish that discriminatory results establish a prima facie case of discrimination.[51] The court cites to nothing else in the 3 years of legislative history. Without dwelling on the point, the defeat of the Baker amendment did not resurrect the shifting burden of proof argument that Senators Mondale and Brooke went to such lengths to bury in the 1968 bill.

In the Senate debates that preceded the successful vote on cloture, the sponsors, Senators Brooke and Mondale, repeatedly stated that the only purpose of the bill was to prohibit "the right to consider race in selecting a tenant or buyer":[52]

Mr. President, finally, some are worried that this legislation will both invade their privacy and tamper with their right to sell their home to whom they please. On the contrary, this bill is aimed not at privacy but at commercial transactions. It will prevent no one from selling his house to whomever he chooses so long as it is personal choice and not discrimination which affects his action.[53]

But the one thing that I want to make absolutely clear is that we do not believe that anyone selling or renting property to the public should be permitted to discriminate. We are opposed to all of that. . . .

* * *

The bill permits an owner to do everything that he could do anyhow with his property—insist upon the highest price, give it to his brother or to his wife, sell it to his best friend, *do everything he could ever do with property, except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color, and that is all.* What we are determined to do is to remove this blight from American society.[54]

If one statement can be said to sum up the understanding that all shared of the Fair Housing Act, it is that all it was designed to do was to prohibit anyone from refusing to sell or rent based on a racial or religious motivation. This statement of principle, this description of what the statute did and did not do, was employed by a spokesperson for the administration supporting the bill (Attorney General Ramsey Clark),[55] by one of the two sponsors of the bill (Senator Mondale),[56] and by one of the bill's leading opponents (Senator Ervin).[57] There was thus a unity of perception that the statute's *only* purpose was to eliminate racial animus as a basis for transactions in residential real estate.

In the House of Representatives, the proponents again underlined the point made by Senator Mondale in the Senate: that the burden of proof rested on the complainant, i.e., that failure to sell to a minority person did not establish a prima facie case shifting the burden to the homeowner to prove that he did not intend to discriminate:

In addition, under the provisions of this legislation the burden of proof rests with the person alleging discrimination, who must in any court case which arises under this law, prove discrimination.[58]

Given the defeat of the 1966 act that would have allowed a prima facie case of discrimination to be

[46] 114 Cong. Rec. 5219 (1968) (emphasis not in original).
[47] *Id.* at 5221–22 (1968).
[48] Note, 46 Geo. Wash. L. Rev. 615, 630 (1978).
[49] *Id.*
[50] Resident Advisory Board v. Rizzo, 564 F.2d 126, 147–8 (3rd Cir. 1977).
[51] Resident Advisory Board v. Rizzo is discussed more extensively in text accompanying notes 81–103 of this paper.
[52] Note, 46 Geo. Wash. L. Rev. 615, 631 (1978).
[53] Remarks of Senator Brooke, 114 Cong. Rec. 2280 (1968).
[54] Remarks of Senator Mondale (emphasis added), *id.* at 5643.
[55] *See* n.39.
[56] *See* 114 Cong. Rec. at 5643, quoted immediately before in the text of this paper.
[57] *See* 114 Cong. Rec. at 4689–90, quoted above in text accompanying n.39.
[58] Remarks of Congressman Steiger of Wisconsin, 114 Cong. Rec. at 9573.

established by evidence of results alone, the deletion of the objected-to provisions in the act that passed in 1968, and the repeated statements by both Title VIII's advocates and opponents that its sole purpose was the barring of forbidden racial motivation, it is clear which standard of liability Congress intended to be applied in the Fair Housing Act.

Those circuit court decisions holding that a prima facie case is made out where there is evidence solely of discrimination results would only be justified had the 1966 act passed

The decisions of those circuits holding that a prima facie violation of Title VIII can be made by a showing of discriminatory effect alone can be divided into two groups: those decided prior to the Supreme Court's decisions in *Washington* v. *Davis*[59] and *Arlington Heights* v. *Metropolitan Housing Development Corp.*,[60] and those decided thereafter. Those falling into the first category are a series of decisions from the Eighth Circuit, *Williams* v. *Mathews Co.*,[61] *United States* v. *City of Black Jack, Missouri*,[62] and *Smith* v. *Anchor Building Corp.*[63] The reasoning in all three is identical, and each refers to its predecessors. Since *Black Jack* is the most frequently cited of the three cases, it will be the one reviewed.

The factual setting was that a biracial group obtained a feasibility go-ahead from HUD to construct a multifamily dwelling. Opposition grew and culminated in the passage of a city ordinance prohibiting "the construction of any new multiple family dwelling and [making] present ones nonconforming uses."[64] Statistical evidence showed that Black Jack was virtually all white, whereas the rest of the St. Louis area (Black Jack was initially part of St. Louis) had a substantial black population.[65]

The court set forth its understanding of the requirements of Title VIII:

(1) It analogized to the standards for Title VII set forth by the Supreme Court in *Griggs* v. *Duke Power Co.*[66] But as pointed out by the Supreme Court, Title VII is not the standard of proof of discrimination in all settings; Congress must indicate that the standard is discriminatory effect, or else the standard is the more prevalent one of discriminatory intent.[67]

(2) The holding is that "[t]o establish a *prima facie* case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[68] The Eighth Circuit then cites to a series of earlier decisions, a majority of which were later disapproved by the Supreme Court, for this very holding.[69]

In fairness to these pre-*Washington* v. *Davis*, etc., decisions, the Supreme Court had not yet decided the cases which would hold that (1) discrimination is not usually demonstrated by effect alone; (2) for a prima facie case of discrimination to be established by effect alone, Congress had to have the specific intention of establishing such a test; and (3) to determine congressional intent in the area of discrimination, it is necessary to review fully the legislative history.

Moreover, many of these cases, though their rationale was erroneous, could have been sustained on the correct standard given the facts found. For example, in *Black Jack* the court held that there was evidence that the zoning ordinance "was enacted for the *purpose* of excluding blacks."[70]

[59] 426 U.S. 229 (1976). *See* Note, "Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard," 27 U.C.L.A. Law Rev. 398, 403 (1979) ("Pre-*Washington* civil rights decisions are of limited precedential value in defining a standard of discrimination in Title VIII cases").

[60] 429 U.S. 252 (1977).

[61] 449 F.2d 819 (8th Cir), *cert. denied*, 419 U.S. 1021 (1974).

[62] 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 442 U.S. 1042 (1975), *reh. denied*, 423 U.S. 884.

[63] 536 F.2d 231 (8th Cir. 1976).

[64] *Black Jack*, 508 F.2d at 1183.

[65] *Id.*

[66] *Id.* at 1184.

[67] Washington v. Davis, 426 U.S. 229, 239, 248 (1976).

[68] *Black Jack*, 508 F.2d at 1184.

[69] *Id.* at 1184–85. *E.g.*, Hawkins v. Town of Shaw, Mississippi, cited disapprovingly in Washington v. Davis, 426 U.S. at 244–45 n.12; Kennedy Park Homes Ass'n v. City of Lackawanna, cited disapprovingly in Washington v. Davis, 426 U.S. at 244–45 n.12; and Village of Arlington Heights, 429 U.S. at 467, n.16, etc.

[70] *Black Jack*, 508 F.2d at 1185 n.3 (emphasis not in original). This is not intended to embrace all of the evidence relied upon by the Eighth Circuit as appropriate to proof of such official discrimination. The Eighth Circuit relied upon the opposition to the low-income project repeatedly being "expressed in racial terms by persons whom the District Court found to be leaders of the incorporated movement, by individuals circulating petitions, and by zoning commissioners themselves." *Black Jack*, 508 F.2d at 1185 n.3. Moreover, the court relied upon "[r]acial criticism of Park View Heights. . .[being] made and cheered at public meetings." *Id.* Clearly, opposition in racial terms by the public officials whose actions are attacked is highly relevant. *Arlington Heights*, 429 U.S. at 268. However, the statements of opponents, even if revealing a racial animus, would not necessarily demonstrate such motivation on the part of public officials unless the officials themselves had adopted such statements as their reason for taking the complained-of action. *Arlington Heights*, 429 U.S. at 257–58, 269–71. *Cf.* F.R. Evid. 801(d)(2)(B).

Turning to those cases decided since *Washington* v. *Davis, Bakke,* etc., one of the first of these was the Seventh Circuit's *Arlington Heights* opinion following the remand from the Supreme Court.[71] Since several circuits cite to it, and rely upon it, its reasoning is typical of these decisions.[72]

The first ground relied upon was a reading of the phrase "because of race."[73] The Seventh Circuit compared the use of the phrase in Title VII and Title VIII and concluded, without reference to the legislative history, that the only way to implement the policy of fair housing was to read the phrase broadly,[74] i.e., under a "statistical, effect-oriented view of causality."[75] The error in this reasoning is twofold. First, it is for Congress and not the courts to determine how to go about carrying out a particular policy.[76] This notion has been applied to civil rights actions where, as in the case of *Arlington Heights II,* the position is taken that the remedies sought will be more effective than the ones available.[77] Second, and most important, the Supreme Court has repeatedly held, particularly in regard to determining what establishes a forbidden discrimination, that the courts must look for all the help they can get in determining the meaning of the statutory language, particularly to the legislative history.[78] As demonstrated earlier, a fair housing act only passed when its proponents dropped a standard of proof in which results shifted the burden of proof to the defendant. Yet, *Arlington Heights II* and its progeny interpret the act as though the 1966 bill passed, a view at complete odds with the legislative history.

The Seventh Circuit went on to hold that "a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy."[79] As just noted, it is for Congress, and not the courts or an agency, to make the policy decision on how to implement a particular goal.[80]

It is interesting that in several major civil rights cases, brought among other things under Title VIII, an *intent* to discriminate by public officials was established.[81]

In any event, if the judgment is to be made that proof of discriminatory effect will shift the burden to a city or individual to show that the reasons motivating the complained-of actions were not discriminatory, it is for Congress and not the courts to make such a change. Once Congress rejected such a "shifting burden" test in 1966, it is only Congress who can now adopt a different legal standard.[82]

Before leaving the cases in which discriminatory effect has been held sufficient to shift the burden of proof, there are two bases for this conclusion relied upon in the Third Circuit that are in addition to the *Arlington Heights II* rationale.[83]

The first of these is the inference that is drawn from the Supreme Court in *Arlington Heights,* after reversing the Seventh Circuit for its ruling that discriminatory effect makes a prima facie showing under the Constitution, having remanded the case for consideration of the claim under Title VIII. The Third Circuit held that, in the act of remanding, the Supreme Court had considered all of the factors involved in whether Congress had a purpose to adopt a "discriminatory result" test, and implicitly held that it had:

> In *Arlington Heights* the lower courts had concluded that only discriminatory *effect* had been proved. If the same "impact-plus" test governed Title VIII actions, consideration on remand of the §3604(a) claim would have been unnecessary and a waste of valuable judicial resources, factors which could not have been lost upon the Supreme Court. In remanding rather than directing the dismissal of the *Arlington Heights* litigation, the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern Title VIII claims.[84]

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[71] Metrop. Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978) *(Arlington Heights II).*

[72] *See, e.g.,* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1037 (2nd Cir. 1979); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3rd Cir. 1977), *cert. denied,* 435 U.S. 908 (1974).

[73] *Arlington Heights II,* 558 F.2d at 1288.

[74] *Id.* at 1289.

[75] *Id.* at 1288.

[76] Emporium Capwell Co, v. Western Addition Community Org., 420 U.S. 50, 73 (1975).

[77] *Id.* at 73.

[78] Regents of Univ. of California v. Bakke, 438 U.S. 265, 284 (opinion of Powell, J.); 340 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) (1978); Steelworkers v. Weber, 443 U.S. 193, 201-02 (1979).

[79] *Arlington Heights II,* 558 F.2d at 1290.

[80] *Emporium Capwell Co.,* 420 U.S. at 73.

[81] United States v. City of Black Jack, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 136-37, 144 (3rd Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

[82] *See Emporium Capwell,* 420 U.S. at 73. *Cf.* Washington v. Davis, 426 U.S. 229, 248 (1976).

[83] *Resident Advisory Board,* 564 F.2d at 147-48.

[84] *Id.* at 147.

Both case law and commonsense dictate against such a conclusion.

The Supreme Court considered and rejected a similar argument in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations.*[85] The Supreme Court had earlier heard an appeal on Kansas' Industrial Relations Act, in which it struck down certain provisions relating to the fixing of wages, "with a direction that the case be remanded for further proceedings."[86] On remand, the State courts then addressed and upheld the provisions "permitting the fixing of hours of labor."[87] On the second appeal, Kansas argued "that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor we impliedly held the latter valid."[88] This is the very argument made by the Third Circuit: that by reversing the constitutional holding, but remanding as to Title VIII, the Supreme Court "at least implied" that Title VIII could be established by proof that would not sustain an equal protection claim. The Supreme Court's response in *Wolff* is, therefore, equally applicable to the Third Circuit's reasoning: The "contention[]" is "wrong."[89]

This canon of judicial interpretation is particularly appropriate in the area involved here: determination of what a particular civil rights statute requires to be proved to show a violation. Considering the efforts that the Supreme Court has gone through to answer this question statute by statute (e.g., *Bakke,*[90] *Fullilove,*[91] etc.), it is inconceivable that the Supreme Court would have resolved this same question cavalierly for Title VIII by a remand, without any stated guidance. In fairness to the Third Circuit, in 1977 when *Resident Advisory Board* was decided, the Supreme Court had not yet handed down its opinions in *Bakke*[92] (1978), *Weber*[93] (1979), or *Fullilove*[94] (1980).

The second basis relied upon in *Resident Advisory Board* that is not present in *Arlington Heights II* is a smattering of Title VIII's legislative history. The Third Circuit held that this history demonstrated that Congress intended a prima facie Title VIII violation to be established by discriminatory effect.[95]

Considering the earlier review of the legislative history in this paper, it is fair to ask whether the Third Circuit is reviewing the same history. The answer is that it is not. The Third Circuit considered that the Fair Housing Act appeared full born in 1968.[96] This may have been as a result of the parties not having properly briefed the court on the extensive history in both houses in 1966 and in committee in 1967.

Perhaps the court's lack of awareness of the 1966–67 history, particularly the reasons for the defeat of a fair housing act in 1966, led to its misreading of the meaning of the defeat of the Baker amendment in 1968. The background of this amendment has been described earlier. To get Senator Dirksen's endorsement, Senators Brooke and Mondale had made certain concessions. First, they deleted the Fair Housing Board and with it the concern that once a homeowner refused to sell to a minority person, the burden of disproving discrimination would shift to the homeowner. Then, to make this even clearer, they represented and then amended the act to state that the plaintiff would always have the burden of proving discrimination. The final concession that Senator Dirksen demanded was to exclude from the act's coverage single-family owner-occupied homes.

Thereafter, Senator Baker introduced his amendment, which would have provided that the homeowner would not lose his exemption if he employed a real estate broker, so long as he did not "instruct that real estate agent to discriminate."[97]

[85] 267 U.S. 522 (1925).
[86] *Id.* at 560.
[87] *Id.* at 562.
[88] *Id.*
[89] *Id.* at 562. See also Mutual Life Ins. Co. v. Hill, 193 U.S. 551, 553–54 (1904) ("Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.") *Accord,* Imperial Chemical Industries, Ltd., v. Nat'l Distillers & Chem. Corp., 354 F.2d 459, 463 (2nd Cir. 1965); Sherwin v. Welch, 319 F.2d 729, 732 (D.C. Cir. 1963).
[90] 438 U.S. 265 (1978).
[91] Fullilove v. Klutznick, 448 U.S. 448 (1980).
[92] 438 U.S. 265 (1978).
[93] 443 U.S. 193 (1979).
[94] 448 U.S. 448 (1980).
[95] *Resident Advisory Board,* 564 F.2d at 147.
[96] *See id.* 564 F.2d at 147 n.29.
"Title VIII was adopted by Congress from Senator Mondale's floor amendment to the 1968 Civil Rights Act." Given that the Third Circuit was apparently unaware of the extensive debates in both the House and Senate in 1966, and the 1967 efforts in Senate Subcommittees to come up with a compromise bill that could pass, it is thus, and only for this reason, believable that it could characterize "the legislative history of Titile VIII" as "somewhat sketchy." *Id.* at 147.
[97] 114 Cong. Rec. 5214 (1968).

Among others, Senator Percy became concerned that the Baker amendment would limit a court as to what evidence of discriminatory intent it could consider, and Senator Baker never responded to those concerns:

Mr. PERCY. Before I would vote on such an amendment, I would want to be sure that I understood what the author of the amendment has in mind. I am concerned that there are any number of subtle signals that go between a real estate broker and a seller or a renter in an informal conversation unrelated even to the rental or the sale agreement. If, for instance, the renter or seller said to the broker, "Aren't these riots terrible things? I suppose you know where I stand on civil rights?" Would that not constitute, in the judgment of the distinguished Senator from Tennessee, an instruction to the broker that he could not fail to interpret?

Mr. BAKER. In answer to my colleague, once again let me say that I do not feel I should cast myself in the role of making preliminary, previous judicial interpretations of any set of facts. . . .

* * *

In answer to the Senator's suggestion that the amendment might not be practical, in the sense that there are subtle and devious ways for a customer to convey his discriminatory purpose to his real estate agent, I might also point out that the world abounds in opportunities to devious, dishonest, and indirect circumvention of this or any other statute.[98]

Given this, all that was involved was a rejection of limiting what evidence of intent a court could consider;[99] there is no indication that what was at stake in this one narrow dispute was the total reinstatement of the shifting burden test so objected to in 1966.

In fact, the Third Circuit misquotes the very language it relies upon. The Third Circuit stated that "Senator Baker's amendment was rejected, 114 Cong. Record 5521–22 (1968), with Senator Percy maintaining that if 'racial preference' was to be an element of the new legislation, 'proof would be impossible to produce.' *Id.* at 5216,. . ."[100] What Senator Percy had, in fact, said related not to racial preference being an element, but if proof was required that the homeowner had specified racial preference, such proof would be impossible to produce:

Mr. PERCY. If I understand this amendment, it would require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce.[101]

When this is taken in context of what Senator Percy was talking about, subtle signals—e.g., "Aren't these riots terrible things?"—and Senator Baker's refusal to acknowledge this as competent evidence of intent—it is clear that Senator Percy's concern is specific and not global: He is concerned with what will constitute proof of intent, not eliminating the need for such proof.

In addition to the example provided by Senator Percy himself, one other comes to mind to illustrate this distinction, and the source of Percy's concerns. If a homeowner sought out a real estate agent who had a reputation for never selling to blacks in a white neighborhood, his selection of such an agent would ordinarily be some evidence of intent, but under the Baker amendment would not be admissible, as the selection of a biased real estate agent is not an instruction to that broker to discriminate.

In light of all of the legislative history, *Arlington Heights II, Resident Advisory Board,*[102] and their progeny[103] are wrongly decided.

The Sixth Circuit's reasoning on Title VIII is well supported in the legislative history

The Sixth Circuit's position is:[104] "The fact that some black people, but not all, are concentrated in a

[98] *Id.* at 5216.

[99] *See* n.42.

[100] *Resident Advisory Board,* 564 F.2d at 147.

[101] 114 Cong. Rec. 5216 (1968).

[102] "If the courts in *Arlington Heights II* and *Resident Advisory Board* had not relied upon Congress' general purpose in passing Title VIII but had scrutinized the legislative history of the housing proposals more carefully, they would have recognized that Congress associated 'because of race' with actual racial motivation or conduct so extreme as to evidence overt racial motivation." Note, 46 Geo. Wash. L. Rev. 615, 630 (1978).

[103] *See e.g.* Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036–38 (2nd Cir. 1979); and United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1981), all of which cite to and rely upon *Arlington Heights II* and/or *Resident Advisory Board* as the basis for holding that a violation of Title VIII is established by evidence of discriminatory effect, and proof of intent is not required.

[104] As noted earlier, the Sixth Circuit's position on Title VIII is ambiguous. See n.3. The source of this lack of clarity is United States v. City of Parma, 661 F.2d 562 (1981), *cert. denied,* 102 S.Ct. 1972, *reh. denied,* 102 S.Ct. 2308 (1982). The Department of Justice brought the suit under 42 U.S.C. §3613, urging that official actions of the town constituted "a pattern or practice of resistance to the full enjoyment" of the right granted under Title VIII. *Parma,* 661 F.2d at 565 and 565 n.2. The official actions involved opposition to all forms of public and low-income housing, denial of building permits for a privately sponsored low-

certain area of the city, is no proof of official discrimination, and the District Judge was in error in inferring it."[105] Although the Sixth Circuit did not review the legislative history in reaching this conclusion, its reasoning, in fact the specific example it relied upon, is well supported by discussions in committee by both the bill's proponents and opponents. During the year between the defeat of a fair housing act and the year it passed, hearings were held in Senate subcommittees in which this very issue was discussed. Under questioning, even proponents of the bill readily acknowledged that, although they sought to provide the opportunity to any citizen to live wherever he chooses, many people lived in ethnic or racial clusters as a matter of choice; i.e., the fact that there are concentrations of groups, as the Sixth Circuit held, "is no proof of official discrimination."

For example, hearings were held before the Senate Subcommittee on Constitutional Rights. The following exchange was had between Senator Ervin, one of the bill's strongest opponents, and Monsignor George G. Higgins, one of the spokespersons for the Leadership Conference on Civil Rights, proponent of the bill:

Senator ERVIN. Your answer indicates, to a very substantial degree, that you hold the same views I do, in that it is natural for people of the same race or the same national origin to congregate together in residential sections.

Monsignor HIGGINS. Perfectly true, especially with new immigrant groups. You have had your "little Italys," and you have had your Jewish and Irish neighborhoods, but the fact is that when somebody from "little Italy" wanted to move into a suburb he could move, but if he is a Negro in Harlem, in many cases he cannot move.[106]

Following out Monsignor Higgins' point, to look at statistics and find that a section of a city has a concentration of Italians, Jews, or Irish does not establish that this clustering is caused by other sections of the city discriminating; it is just as likely, if not more likely, to have resulted from choice. Although the purpose of the Fair Housing Act, from Monsignor Higgins' point of view, was to ensure that a black family could choose to live elsewhere, the clear implication is that, with the choice available, substantial numbers of blacks would still choose to live together; and therefore, statistical patterns would not support an inference of discrimination.

The point that the persons for whom protection was sought would be likely to choose to continue living in areas where they were already present in high percentages was also made a few weeks later before the Senate Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency. The witness was HUD Secretary Weaver, an administration spokesperson for the bill. He was being questioned by Senator Mondale, one of the two authors of the Fair Housing Act.

Senator MONDALE. Do you have any way of estimating demand in nonghetto housing that would be opened up if an effective fair housing law was enacted? Or, to put it differently, how many Negro families capable of purchasing decent housing other than in the ghettos would be in the market elsewhere if it were not for the discrimination?

Do you have any way of knowing that?

Secretary WEAVER. I don't think you can estimate that. You can estimate statistically the number of nonwhite families, as I have done some years ago in an article I wrote on this, in 1955 I think it was, in the Journal of Land Economics, where I pointed out the number of nonwhite families say, with incomes of over $5,000 a year.

And you can also estimate the proportion of those that are now living in areas of nonwhite concentration.

But the next step, to assume that every one of them or what proportion of them would move into other areas were this available to them, is something that you cannot estimate accurately.

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income housing development, etc. *Parma,* 662 F.2d at 556.
The district court found that these official actions established both racially discriminatory intent and racially discriminatory effect. *Parma,* 662 F.2d at 668.
Through most of the majority opinion, the Sixth Circuit reviews the actions relied upon by the trial court in regard to their establishing discriminatory intent. *See, e.g., Parma,* 661 F.2d at 574–75. However, on one matter the circuit panel notes, with apparent approval, that "zoning decisions which have a racially discriminatory effect have been held to violate the Fair Housing Act," citing to *Black Jack. Id.* at 576.
However, the reason for discussing *Skillken* in this paper is only secondarily that it reflects the position of the Sixth Circuit; the main purpose is to show how the reasoning there is consistent with the legislative history, and thus is of substantial precedential value.

[105] Skillken & Co. v. City of Toledo, 528 F.2d 867, 879 (6th Cir. 1975), *vacated,* 429 U.S. 1068 (1977), *reaffirmed,* 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985; *reh. denied,* 434 U.S. 1051 (1978).

[106] *Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate on S.1026, S.1318, S.1359, S.1362, S.1462, H.R. 2516 and H.R. 10805,* Aug. 8, 1967, p. 127.

There are many who for political reasons, sometimes for business reasons, or for other reasons would elect to stay, even if they had the opportunity to move.[107]

Thus, in contrast to *Arlington Heights II* and *Resident Advisory Board,* the analysis in *Skillken* is consistent with the legislative history.

The assessment of Title VIII in the law reviews relies erroneously on policy arguments

The Fair Housing Act, and the cases that have addressed the impact versus intent issue, have generated a fair number of articles and comments in the law reviews. For the most part, there is little, if any, discussion of the legislative history in these writings. The one piece that devotes any significant effort to determining which test Congress intended to be applied under the act correctly concludes that it was designed to prohibit racially motivated decisions. However, even this writing succumbs to the temptation to have the act enforced on the very basis that Congress considered and rejected.

Those articles that purport to pass on which standard of proof Title VIII requires fall into different categories. There are some that never discuss the legislative history.[108] These articles assert "that the provisions of Title VIII do not require a plaintiff to prove that defendant acted with the specific intent of violating fair housing laws; a discriminatory effect is only required."[109] The basis on which they ground this assertion is the decisions of the circuit courts discussed earlier in this paper: the Eighth Circuit's pre-*Davis* decisions in *Williams* and *City of Black Jack,*[110] the Seventh Circuit's decision in *Arlington Heights II,*[111] and the Third's in *Resident Advisory Board.*[112] For the reasons previously set forth, none of these is persuasive; all of them could only be justified if the 1966 version of the act had been passed.

A second group of these published writings does make some mention of the legislative history, though the extent of the exploration varies from piece to piece.[113] Some ignore the events of 1966 and 1967 and address only the 1968 legislative history.[114] Others acknowledge the committee hearings in 1967,[115] and still others the full history of the effort to achieve a fair housing act beginning in 1966.[116]

What is most significant about these efforts to dabble in the legislative history of the Fair Housing Act is not the years that are omitted or included, but the omission of the clear landmarks in every year to Congress' rejection of an effects test and its adoption of an intent test. Not one of these seven articles or Professor Schwemm's book discusses the importance of the proposed Fair Housing Board to the rejection of a fair housing act in 1966; only one of the seven discusses Attorney General Clark's assurance in 1967 to the Subcommittee on Housing and Urban Affairs that "[t]here is nothing in this bill to

[107] *Hearing Before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency,* U.S. Senate, 90th Cong. 1st sess., *on S.1358, S.2114, and S.2280,* Aug. 21, 1967, pp. 40–41.

[108] *See e.g.,* Rice, "Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate," 27 How. L.J. 227 (1984), and Calmore, "Fair Housing and the Black Poor: An Advocacy Guide," 18 Clearinghouse Review 609 (1984).

[109] Rice, 27 How. L.J. at 233. See Calmore, 18 Clearinghouse Review at 625.

[110] *Id.*

[111] Calmore, 18 Clearinghouse Review at 625.

[112] *Id.*

[113] *See* Dubofsky, "Fair Housing: A Legislative History and A Perspective," 8 Washburn L.J. 149 (1969); Note, "The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act," 1969 Duke L.J. 733; Comment, "Applying the Title VII Prima Facie Case to Title VIII Litigation," 11 Harv. Civ. Rights–Civ. Lib. L. Rev. 128 (1976); Note, "Title VIII Litigation: Demise of the Prima Facie Case Doctrine in the Seventh Circuit," 15 Urban L. Annual 325 (1978); Comment, "A Last Stand on *Arlington Heights:* Title VIII and the Requirement of Discriminatory Intent," 53 N.Y.U. L. Rev. 150 (1978); Schwemm, "Discriminatory Effect and the Fair Housing Act," 54 Notre Dame Lawyer 199 (1978); Note, "Housing Discrimination—The Appropriate Evidentiary Standard for Title VIII of the Civil Rights Act of 1968," 51 Temple L.Q. 929 (1978); Note, "Justifying A Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard," 27 U.C.L.A. L. Rev. 398 (1979); and Schwemm, *Housing Discrimination Law,* chap. two, "Title VIII: Legislative History, Constitutionality, and Congressional Intent" (1983).

[114] Note, 15 Urban L. Annual at 325, n.2; Comment, 53 N.Y.U. L. Rev. at 158–59 n.58; Note, 51 Temple L.Q. at 936, n.49; and Note, 27 U.C.L.A. L. Rev. at 426–27, n.136.

[115] Dubofsky, 8 Washburn L.J. at 149–50.

[116] Note, 1969 Duke L.J. at 749–51. ["The House had in 1966 approved H.R. 14765, the Civil Rights Act of 1966. 112 Cong. Rec. 18739–40. *Title IV of that bill encompassed housing provisions similar in many respects to the scope of the 1968 legislation.*" Note, 1969 Duke L.J. at 749 n.84 (emphasis not in original)]; Schwemm, 54 Notre Dame Lawyer at 207–09.

> [Title VIII of the Civil Rights Act of 1968 represents the culmination of three years of congressional consideration of housing discrimination legislative.
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> [* * *
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> [Fair housing legislation was first before the Congress in 1966 as a result of a proposal made by President Johnson. . . ." Schwemm, 54 Notre Dame Lawyer at 207 (emphasis added)]; and Schwemm, *Housing Discrimination Law,* p. 32.

prevent choice where personal choice, not discrimination, is the real reason for action";[117] not one discusses Senator Ervin's acknowledgment in 1968 that only a rejection based on racial motivation constitutes a violation of the act;[118] and not one discusses Senator Mondale's classic summary of the act, which demonstrates a remarkable consistency with the comments of both Attorney General Clark and Senator Ervin:

> The bill permits an owner to do everything that he could do anyhow with his property. . ., except refuse to sell it to a person solely on the basis of his color. . . .*That is all it does.* It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color and that is all.[119]

Given the absence of discussion of these consistent and continuing congressional concerns in the 3 years of debate and resolution, these writings are of limited usefulness to any meaningful appraisal of effects versus intent under Title VIII.

The one law review writing that examines the legislative history with some depth is the Note found in volume 46 of the *George Washington Law Review.*[120] To its credit, it correctly points out that the legislative history of the Fair Housing Act began with Title IV in 1966,[121] and it recognizes Mondale's, Ervin's, and other Senators' understanding that Title VIII was designed to bar actions based on racial animus.[122] It does not discuss any of the *reasons* why Title IV was defeated in 1966 (e.g., the NLRB analogy with its prima facie case based on proof solely of refusal), nor does it present the significant remarks of Attorney General Clark, so consistent with the views of both Senators Mondale and Ervin. Based on the legislative history it does examine, there is more ample basis for its correctly concluding that Title VIII was intended by Congress to create an intent test, and that those decisions which concluded otherwise are not persuasive:

> If the courts in *Arlington Heights II* and *Resident Advisory Board* had not relied upon Congress' general purpose in passing Title VIII but had scrutinized the legislative history of the housing proposals more carefully, they would have recognized that Congress associated "because of race" with actual racial motivation or conduct so extreme as to evidence overt racial motivation. Congressmen repeatedly stated that the housing proposals only reached a private party motivated by discrimination.[123]

Despite understanding that Congress was establishing an intent test, the Note goes on to argue that courts are, nonetheless, justified in administering Title VIII under an effects standard. This position is supported by two interlocking arguments, both of which are contrary to well-established precedents.

First, it is contended that Congress was silent with respect to the standard to be applied to municipalities alleged to have discriminated, and where Congress is silent, the courts are free to forge an appropriate policy:

> Although the legislative history of Title VIII suggests that Congress perceived racial motivation to be the touchstone of a private Title VIII violation, Congress did not consider whether evidence of discriminatory effect would be sufficient in suits against municipalities.[124]

> Consequently, absent a contrary congressional directive for municipalities, the courts correctly held that evidence of discriminatory effect would establish a prima facie case against municipalities.[125]

The rule, however, is to the contrary: In the area of discrimination, the ordinary test requires intent, unless Congress specifically states that the test to be applied is discriminatory effect.[126] This standard is particularly appropriate with respect to the actions of municipalities, since the rule arose out of cases involving municipal actions. In *Washington* v. *Davis,* where the rule was announced, the lawsuit turned on a screening test in a police department. The standard was followed in *Arlington Heights,* which involved zoning decisions by a local planning commission.[127]

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[117] Note, 1969 Duke L.J. at 751.

[118] 114 Cong. Rec. 4690.

[119] 114 Cong. Rec. 5643 (1968). [Emphasis added.]

[120] Note, 46 Geo. Wash. L. Rev. at 615–37.

[121] *Id.* at 627 n.139.

[122] *Id.* at 630–31, text and nn. 153 and 155.

[123] *Id.* at 630. As the author of this Comment points out: "Senator Mondale, a primary sponsor of Title VIII, acknowledged that section 3601 should not be read out of context; the specific provisions of Title VIII determined its scope." *Id.* at 627. He then cites to the remark by Mondale that "[The language in §3601] is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing, for the housing described and under the circumstances provided in the Dirksen substitute. 114 Cong. Rec. 4975 (1968)." *Id.* at 627, n.138. 42 U.S.C. §3601 is the declaration of policy, "to provide, within constitutional limitations, for fair housing throughout the United States."

[124] *Id.* at 631.

[125] *Id.* at 633.

[126] Washington v. Davis, 426 U.S. 229 at 234–37, 248 (1976).

[127] *Arlington Heights,* 429 U.S. at 257–58.

For these reasons, congressional silence as to public, as opposed to private, action requires that the test in both cases be the same: evidence of intentional, racially motivated discrimination.

Commonsense would also dictate that Congress, in the absence of explicit statutory direction, would not have created one standard for private action and a very different standard for public action, and have had this dual standard subsumed within a single statutory directive. In fact, there is clear indication in the act itself that Congress intended the standard that applied to private action (intent) to apply to public action. Title VIII's central operative provision is 42 U.S.C. §3604, which prohibits a series of actions involving real estate (e.g., refusing to sell, rent, etc.) "because of race, color, religion, sex, or national origin." As has been demonstrated, and as the Note in the *George Washington Law Review* acknowledges, Congress clearly intended this language to bar racially motivated actions. In section 3603 the statute provides that "the prohibitions against discrimination in sale or rental of housing set forth in section 3604 of this title shall apply. . .to. . .dwellings owned by the Federal Government" as well as dwellings receiving Federal funds, including those owned or managed by States and cities. The statute could not be clearer: The standard of prohibited discrimination applying to private actions[128] applies to public actions.[129]

The other argument which this Note puts forth is that an effects test is justified, in the writer's opinion and that of some of the circuits, because an intent test may not be as effective in rooting out discrimination as an effects test:

> Because an intent standard could emasculate Title VIII, courts are justified in embracing an effect standard in suits against private parties, notwithstanding Congress' perception of racial motivation as a condition of Title VIII liability.[130]

For the sake of this argument, and only for that purpose, it will be assumed that an effects test, which favors plaintiffs, is for that reason a more effective tool in eliminating racial discrimination.[131] The question is whether a court has the authority to administer a statute under a different standard than the one selected by Congress on the basis that the standard endorsed by the court will more effectively achieve the statutory goal than the standard chosen by Congress. The Supreme Court considered this issue in *Emporium Capwell Co.* v. *Western Addition Community Organization,*[132] an analogous setting also involving racial discrimination, and held that the power to change such legislatively selected means lies only with Congress.

The Emporium was a department store, several of whose minority employees felt that it discriminated against them. These employees brought this complaint to their union. The union leadership decided to pursue the complaints, but to do so through individual grievances. Some of the minority employees wanted to negotiate directly with the Emporium for storewide systematic changes. These employees refused to participate in the proposed grievances, picketed the store, and were fired. The NLRB held that their picketing was not protected activity under the National Labor Relations Act and allowed their discharges to stand. The court of appeals reversed the board's decision, holding that:

> concerted activity directed against racial discrimination enjoys a "unique status" by virtue of the national labor policy against discrimination, as expressed in both the NLRA,. . .and in Title VII of the Civil Rights Act of 1964,. . .and that the Board had not adequately taken account of the necessity to accommodate the exclusive bargaining principle of the NLRA to the national policy of protecting action taken in opposition to discrimination from employer retaliation. . . .In formulating a standard for distinguishing between protected and unprotected activity, the majority held that the "Board should inquire in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means.*"[133]

On appeal to the Supreme Court, the discharged employees argued that the NLRA should be modi-

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[128] 42 U.S.C. §3604.

[129] 42 U.S.C. §3606.

[130] 46 Geo. Wash. L. Rev. at 634.

[131] One counterargument would be that if a particular action has differing effects upon blacks and whites, but is not racially motivated, it does not constitute discrimination "because of race"; it is the racial animus that is the nexus to racial discrimination. To illustrate, Congress passes tax legislation providing that the interest paid on mortgages is deductible, but rent is not. Assuming that blacks and other minority persons rent more than and own homes less than whites, this tax legislation would favor whites and would not benefit minority persons. Although this provision discriminates, it is not on the basis of race. *Cf.* Washington v. Davis 426 U.S. 229, 248 (1976). Therefore, while an effects test might be more effective in striking down such legislation, it would be eliminating discrimination against renters, not racial discrimination.

[132] 420 U.S. 50, 73 (1975).

[133] *Id.* at 58–60 (footnotes and citations omitted, emphasis in original).

fied to allow individual employees to pursue direct negotiations with employers, rather than being limited to strategy choices by the union leadership, "because established procedures under Title VII, or, as in this case, a grievance machinery, are too time consuming."[134]

The court's response was to hold that "*[t]his argument confuses the employees' substantive right to be free of racial discrimination with the procedures available under NLRA for securing these rights.*"[135] The eight-member majority concluded that the argument put forth by the fired workers:

> is properly addressed to the Congress and not to this court. . . .In order to [endorse plaintiff's position]. . .we would have to override a host of consciously made decisions well within the exclusive competence of the legislature. This, obviously, we cannot do.[136]

The argument presented in the *George Washington Law Review* is that a disparate impact test is far more effective in combating discrimination than an intent test. Here again, there is a confusion between the "substantive right to be free of racial discrimination with the procedures available under. . .[Title VIII] for securing these rights."[137] In 1966 Congress consciously rejected an effects test, and the courts lack the authority to overturn that legislative choice.

The Test Under 42 U.S.C. §§1981 and 1982

The Supreme Court has held that "§1981. . .can be violated only by purposeful discrimination."[138] Although the Court has not yet ruled definitively whether the 13th amendment to the Constitution and section 1982 "reach[] practices with a disproportionate effect as well as those motivated by discriminatory purpose,"[139] it has strongly hinted that liability will not be imposed under section 1982 without proof of intentional discrimination. The Court's discussion of this issue is found in three decisions: *Jones* v. *Mayer Co.*,[140] *City of Memphis* v. *Greene*,[141] and *General Building Contractors Association* v. *Pennsylvania*.[142]

The principal issue in *Jones* was whether section 1982 applied to private as well as governmental discrimination, and the Court held that it did. Sprinkled through the discussion of this point, there is language that section 1982 applies to intentional, racially motivated discrimination:

> Indeed, even the respondents seem to concede that, if §1982 "means what it says"—to use the words of the respondents' brief—*then it must encompass every racially motivated refusal to sell or rent* and cannot be confined to officially sanctioned segregation in housing.[143]

> Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that §1 was meant to prohibit *all racially motivated deprivations* of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" [governmental] were to be criminally punishable under §2.[144]

The Court next had the opportunity to discuss which standard of liability applied in the case of *Memphis* v. *Greene*. A street was closed by the city of Memphis for the declared purpose of reducing the flow of traffic and to increase safety to neighborhood children. The street cut off the access of a predominately black area of the city to a neighboring white residential community. At trial, the district court held that racially discriminatory intent had not been established and found for the city. On appeal, the Sixth Circuit reversed, holding that the effect of the closing was to affect adversely the black residents' ability to hold and enjoy their property.

Justice Stevens, writing for the majority, noted that Memphis had asked the Court to resolve the intent versus disparate impact issue under "§1982 and the Thirteenth Amendment."[145] However, he concluded that neither issue applied to "this street closing case"[146] and, therefore, left the question of the liability standard unresolved.

However, in a concurring opinion, Justice White directly confronted the issue and determined that the Court has "no basis for concluding anything other than that a violation of §1982 requires some showing of racial animus or an intent to discriminate on the basis of race."[147]

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134 *Id.* at 65.
135 *Id.* at 69 (emphasis added).
136 *Id.* at 73.
137 *Id.*
138 General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982).
139 *Id.* at 390, n.17.
140 392 U.S. at 409 (1968).
141 451 U.S. 100 (1981).
142 458 U.S. 375 (1982).
143 *Jones*, 392 U.S. at 421–22 (1968) (emphasis not in original).
144 *Id.* at 426 (some emphasis added).
145 *Memphis*, 451 U.S. at 119.
146 *Id.* at 120, 128–29.
147 *Id.* at 135.

The route he took to reach this conclusion was to point out that section 1982 was derived from the Civil Rights Act of 1866[148] and then to examine the latter's legislative history.[149] From this review he concluded that the focus of the post-Civil War Congress was solely upon eliminating intentional discrimination:

> But nothing in the legislative history of this Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves. On the contrary, the theme of the debates surrounding this statute is that the former slaves continued to be subject to direct, intentional abuse at the hands of their former masters. That was the problem Congress intended to address and that focus should determine the reach and scope of this statute. We have no basis for concluding anything other than that a violation of §1982 requires some showing of racial animus or an intent to discriminate on the basis of race.[150]

The Supreme Court's most recent comments on the standard for liability are found in *General Building Contractors Association* v. *Pennsylvania.*[151] There the Court held that liability may not be imposed under 42 U.S.C. §1981 without proof of intentional discrimination.[152] In reaching this conclusion, the Court analyzed "the evolution of this statute [§1981] and its companion, 42 U.S.C. §1982. . . ."[153]

In the course of this examination, the majority opinion implies strongly that section 1982 will be determined to incorporate the same standard of liability. Both section 1981 and section 1982 derive from the Civil Rights Act of 1866. The majority twice cites approvingly to Justice White's portrayal of this act's legislative history in his concurring opinion in *Memphis* v. *Greene,* discussed earlier.[154]

In *dicta* the majority all but says that section 1981 and section 1982 *both* require proof of deliberate, intentional discrimination:

> We have held that both §1981 and §1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. at 436. See *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459–460 (1975); *Runyan* v. *McCarey,* 427 U.S. at 168. Nevertheless, the fact that the prohibitions of §1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relevant opinions are hostile to such an implication. Thus, although we held in *Jones, supra,* that §1982 reaches private action, we explained that §1 of the 1866 Act "was meant to prohibit *all racially motivated* deprivation of the rights enumerated in the statute." 392 U.S. at 426 [emphasis on "racially motivated" added].[155]

Given these statements in an opinion representing the view of six of the nine present Justices,[156] the disclaimer about deciding the scope of the 13th amendment with respect to intent versus effect[157] provides no basis for presuming that the Supreme Court will rule that liability under section 1982 can be established by proof of disproportionate effect. For one, all that the Court said was that it had not ruled how far the 13th amendment goes. There is clearly no indication in the legislative history of the 1866 act that Congress went this far, even if it was authorized to do so by the 13th amendment. Secondly, as demonstrated in the discussion of the legislative history of the Civil Rights Act of 1866 in all three Supreme Court opinions,[158] all that the post-Civil War Congress was seeking to establish was liability for racially motivated discrimination.

Given the handwriting on the wall, even the most ardent of plaintiffs' advocates in the housing field acknowledge that "it is advisable to anticipate that the federal district courts will require an allegation of intentional discrimination in a section 1982 complaint. . . ."[159]

Proof of Intent: Guidelines from Arlington Heights

Reaching the conclusion that liability under Title VIII and sections 1981 and 1982 requires proof of

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[148] *Id.* at 131.
[149] *Id.* at 131–35.
[150] *Id.* at 134–35.
[151] 458 U.S. 376 (1982).
[152] *General Bldg. Contractors,* 458 U.S. at 391.
[153] *Id.* at 383–84.
[154] *Id.* at 387, n.14, and text preceding it at 386–87 and *id.* at 388.
[155] *Id.* at 387–88.
[156] Chief Justice Burger and Justices Rehnquist, White, Blackmun, Powell, and O'Connor.
[157] *General Bldg. Contractors,* 485 U.S. at 390, n.17. ("We need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery. See *Memphis* v. *Greene,* 451 U.S., at 125–126. We conclude only that the existence of that Amendment, and the fact that it authorized Congress to enact legislation abolishing the 'badges and incidents of slavery,' *Civil Rights Cases,* 109 U.S. 3, 20 (1883), do not evidence congressional intent to reach disparate effects in enacting §1981.")
[158] *Jones,* 392 U.S. at 426; *Memphis,* 451 U.S. at 131–35 (White, J., concurring); and *General Bldg. Contractors,* 458 U.S. at 384–91.
[159] Calmore, "Fair Housing and the Black Poor: An Advocacy Guide," 18 Clearinghouse Review 609, 665 (1984).

intentional discrimination does not end the discussion of how a court is to resolve lawsuits brought under them. It is equally important to determine what evidence will establish such liability. In order for this Commission, or ultimately for Congress, to appraise what, if any, changes are needed in fair housing legislation, both bodies require a grasp of the kind of evidence that can be introduced to establish intent.

As has been noted earlier, there was some concern with what kind of evidence should be available to prove intent when Title VIII was being debated in the Senate. Most of the concern with the Baker amendment focused upon the need to be able to present indirect evidence of intent, for direct evidence would be difficult to obtain.[160]

The Supreme Court has been equally concerned and has provided guidelines for how the lower courts are to resolve such issues. These guidelines favor plaintiffs and make it difficult for parties accused of discrimination to have a case dismissed without there having been an exhaustive review of the factual setting giving rise to the allegations.

One of the strongest of these plaintiff-oriented tools is that there need not be proof that racial animus was the sole, the dominant, or even the primary purpose behind the complained-of action.[161] Once there is "proof that a discriminatory purpose has been a motivating factor in the decision,"[162] then the plaintiff has established a prima facie case.

The Court in *Arlington Heights* went on to discuss some of the factors that go into assessing whether intent has been established. Justice Powell, writing for the majority, began with an overall standard that, as a practical matter, commands the trial court to immerse itself in the facts of the case:

> Determining whether invidious discriminatory purpose was a motivating factor *demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.*[163]

Here is a listing of some of the factors the Court advised were relevant to assessing official actions:

1. *Impact of the action*—"whether it 'bears more heavily on one race than another'. . . .—may provide an important starting point."[164]
2. *Historical background of the decision*—"particularly if it reveals a series of. . .actions taken for invidious purposes."[165]
3. "[S]pecific *sequence of events leading up to the challenged decision. . . .*"[166]
4. "*Departures from the normal procedural sequence. . . .*"[167]
5. "*Substantive departures. . .*particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached."[168]
6. "[*L*]*egislative or administrative history. . . .*especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports."[169]

Most of these factors are equally applicable to private conduct as well. This can be illustrated by use of a hypothetical example that is a variation on the concerns raised in Congress with respect to the Baker amendment. Instead of an individual selling his own home through a broker, consider a developer selling 30 homes through a broker. If this developer in the past had been adjudicated to discriminate intentionally in selling off his real estate projects, and he now selects a broker with a similar reputation, the first three factors cited above would all point to his action being evidence of intentional discrimination. If a qualified black family's offer is rejected, and an identical white family's offer is accepted, that would fit under the fifth factor, "substantive departures."

Not to stray too far afield, the point that is relevant to this discussion is that the factors that Congress intended,[170] and the Supreme Court implemented,[171] to establish intentional discrimination are sensitive to the reality that private persons

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[160] *See* discussion in text accompanying notes 42–51 and 97–103 of this paper.

[161] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977). While *Arlington Heights* arose under the constitutional standard, its focus is upon the same liability standard required under Title VIII, §1981, or §1982 intent), and therefore is equally pertinent.

[162] *Arlington Heights,* 429 U.S. at 265–66.

[163] *Id.* at 266.

[164] *Id.* at 266.

[165] *Id.* at 267.

[166] *Id.* (emphasis not in original).

[167] *Id.* (emphasis not in original).

[168] *Id.* (footnote omitted) (emphasis not in original).

[169] *Id.* at 268 (emphasis not in original).

[170] *See* discussion of Baker amendment in text accompanying notes 43–51 and 97–103 of this paper.

[171] *Arlington Heights,* 429 U.S. at 265–68.

and public institutions are not likely to announce that they are discriminating on the basis of race.[172]

Suggestions for This Commission

In reviewing the appropriateness of continuing or changing the test for liability under Title VIII, this Commission and Congress are faced with the curious situation that the act, which Congress viewed as requiring racial motivation to violate, has been administered under a standard requiring only proof of disparate impact. Given this anomaly, the question arises whether there is a procedure available for appraising the experience of 17 years of litigation under the Fair Housing Act. Here are some suggestions for how to go about such an evaluation.

First, there is the issue whether Congress has the power to create a statute that forbids racial discrimination and establishes that the standard for proving such discrimination is disparate impact. The Supreme Court has held that Congress possesses such power.[173]

Given that Congress has the constitutional power to create such a standard, the question remains how an evaluation can be accomplished of the need or desirability of changing Title VIII to an effect standard or of choosing to maintain the existing intent test. The following procedure may aid this Commission and Congress in intelligently assessing the experience under Title VIII.

(1) Review the case law for those cases that would have had the same result if the test were confined to direct evidence of discriminatory intent.

There are many cases decided under Title VIII that purport to have applied a test of disparate impact, but clearly would have found violations even if the test had been confined to *direct* evidence of racial animus.[174]

(2) Then select out those cases that would have been decided the same way if the test had been intentional discrimination, to be determined by either direct or indirect evidence.

With the Supreme Court having placed its *imprimatur* upon courts making "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"[175] it is appropriate to review for those cases decided under Title VIII that would have found violations under the Supreme Court's standards in *Arlington Heights.* These is evidence that this category may make up a majority of the cases in which housing discrimination violations have been found. The two major books on fair housing both conclude that "most of the lower court decisions adopting the discriminatory effect standard have also contained substantial proof that the defendant intended to discriminate."[176]

(3) Examine the cases that remain to identify the situations in which violations of Title VIII have only been established by a disparate impact test.

The cases that remain, in which Title VIII was held to have been violated, will describe those situations in which there would not be a finding of discrimination without use of an effects test. Once these are identified, the Commission and/or Congress could hold hearings in which a full range of experience can be brought to bear on these situations: persons who have been turned down for housing, and landlords or renters sued for discrimination; private and public real estate developers; administrators of local community development agencies and public housing authorities; spokespersons for tenants in public housing; attorneys who have represented parties on both sides of such cases; judges; administrators of fair housing boards and antidiscrimination agencies; bankers, etc.

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[172] Nonetheless, there are cases where that is exactly what occurs. *See e.g.,* Resident Advisory Board v. Rizzo, 564 F.2d 126, 136 n.14 (3rd Cir. 1977):

> Testimony before the district court revealed the following: . . .Mayor Rizzo stated that he considered public housing to be the same as Black housing in that most tenants of public housing are Black. . . .Mayor Rizzo therefore felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving in with them,. . . .Futhermore, Mayor Rizzo stated that he did not intend to allow PHA [Philadelphia Housing Authority]" to ruin nice neighborhoods. . . .[Transcript references omitted.]

[173] Fullilove v. Klutznick, 448 U.S. 448, 479–92, 510–16 (Powell, J. concurring), 519–21 (Marshall J. concurring). *See* Lau v. Nichols, 414 U.S. 563 (1974). *Cf.* Washington v. Davis, 426 U.S. 229, 248 (1976).

[174] *See e.g.,* Resident Advisory Board v. Rizzo, 564 F.2d 126, 136 n.14 (3rd Cir. 1977) [See n. 172 for summaries of some of the direct evidence of Mayor Rizzo's racial motivation.]; United States v. City of Black Jack, 508 F.2d 1179, 1185, n.3 (8th Cir. 1974).

". . .Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone. . . ."

[175] Village of Arlington Heights v. Metrop. Housing Dev. Corp., 429 U.S. 252, 266 (1977).

[176] Schwemm, *Housing Discrimination Law,* p. 62 and n.75; Kushner, *Fair Housing,* p. 56 and n.17 at pp. 56–57 (1983).

Congress can then intelligently create policy; it can choose, on an informed basis, whether to maintain the present test for liability, proof of an invidious discriminatory intent, or it can exercise its right to change the standard to one of disparate impact.

A Perspective on Legal Issues in Housing Discrimination

By Otto J. Hetzel*

The Debate on the Effects and Intent Standards

One of the major areas of discussion for this panel will be on the question of whether an "intent" or an "effects" standard should be utilized in determining existence of violations under Title VIII of the Civil Rights Act of 1968. Although I originally didn't intend to focus much attention directly on that subject for discussion in this paper, it turns out I may have some useful observations to contribute to the discussion. The remainder of the paper will address some of the legal issues that appear to have currency in the area of housing discrimination.

There are several reasons that I initially did not intend to address this issue of the appropriate standard to establish a prima facie case for litigation. First, this issue is a major focus of the consultation by two others on this panel and is one of the issues addressed by the Assistant Attorney General for Civil Rights, William Bradford Reynolds, in his testimony. Thus, I intend to limit my comments primarily to the issue raised by another of my panelists regarding the applicable legislative intent.

Second, there is at least a reasonable doubt as to whether the issue is as critical as the debate that it has generated implies.[1] In many cases, proof of discriminatory intent will be available even where discriminatory effect is being used as the standard.[2] The reversal of the burden, as some have described it, will probably not have a great significance in the results of many of those cases actually litigated. On the other hand, since the Commission has indicated specifically that it wished to address this area—and it turns out that I may be able to make a contribution to the dialogue—I have included substantial comments on the issue of legislative intent in this paper.

Moreover, to the extent that an attempt is made either to discredit the reasoning of the courts that have utilized an effects standard[3] or to change the

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[1] Assistant Attorney General Reynolds in his testimony at these hearings indicated that he feels an intent standard is the proper basis for proof in proceedings under the act. Nevertheless, he indicated that proof of disparate impact is by itself sufficient to provide a prima facie case even when proceeding under an intent standard. On such reasoning, it really doesn't seem to matter which standard is used.

[2] *E.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); *See,* R. Schwemm, *Housing Discrimination Law* (1983), p. 61.

[3] Marshall D. Stein, "The Fair Housing Act of 1968 and the Civil Rights Act of 1966: The Test for Liability in Housing Discrimination Cases," Paper submitted to the U.S. Civil Rights Commission at consultation hearings, Nov. 12, 1985, nn. 102 and 103 and accompanying text. Mr. Stein's paper contains an analysis of the legislative history of the 1968 act and its ancestors as part of his argument that the reasoning in decisions by the Second, Third, Fourth, Fifth, and Seventh Circuits on this issue is erroneous and in conflict with the act's legislative intent. It is not clear whether the Sixth Circuit is also in this group, since he points out the

standard by legislation,[4] such actions could have symbolic significance as a further weakening of civil rights enforcement. I feel obliged, therefore, to comment.

I believe one can ask whether a case has been made for a change from an effects standard. Unless that standard has caused an unreasonable problem for defendants in litigation, before administrative agencies or the courts, why should so much attention be focused on an effort to change from an effects standard? Its application is primarily as to actions of institutional defendants, usually local governments. It seems unlikely to arise in the context of an individual's refusal to sell, and it is only slightly more likely to arise in the case of individual discrimination in rentals except in large complexes. Major, private institutional lessors will quickly find they are subject to the act and, as a practical matter, will be subject to an effects standard.

If the issue is subjecting a defendant to an action that might otherwise not be brought, local governments not only have the ability but also the resources to meet such challenges to their actions. Where they may have affected the rights of individuals, providing a forum for airing of that decision does not seem inappropriate. Actions that have the apparent effect of imposing disparate treatment based on race would seem to justify requiring an explanation.

Providing an opportunity for challenge when racial discrimination may be the basis for the action seems a reasonable means to avoid arbitrary, unconstitutional state action. Since cities have many other problems with greater significance than this,[5] it would seem difficult to justify legislation primarily on their behalf on this issue. Similarly, it seems appropriate for major private institutions that may have acted improperly to be subject to the need to justify actions that may have disparate racial impact.

On the personal basis, there are several good reasons for my being drawn into this discussion. These are triggered by the key role argued for legislative history in resolution of the controversy by one of my fellow panelists.

Title VIII of the 1968 Civil Rights Act has had personal significance for me. Starting in 1967, I was a participant in the legislative process on the fair housing legislation (as departmental liaison for the Department of Housing and Urban Development) on the bills that ultimately became the Fair Housing Act. My perceptions, thus, will not only be tinted by my personal perspective, but I will also suffer from the fact that I was involved and, thus, feel I have some knowledge of what was intended and what was not addressed, both from the perspective of those from the Justice Department and HUD who helped with the drafting of the legislation, as well as from the Members of Congress for whom we provided assistance in their deliberations. (This may also be the best reason for my deferring to others on the merits of this subject, since a participant's post-enactment recollections are often not sufficiently reliable for use as legislative history!)

The Methodology of Legislative Intent

With this introduction, let me address the intent issue. It is necessary to comment briefly on the methodology being used to try to establish that there was a conscious majority intention by Congress to adopt an "intent" standard when it used the term "because of race" as the basis for enforcement actions under Title VIII of the 1968 Civil Rights Act.[6]

In part, I feel impelled to make these observations because of my role as a professor of law who teaches legislation and as the author of a casebook on *Legislative Law and Process.*[7]

Simply stated, I have a great deal of difficulty giving credence to a number of the "logical proofs" behind the assertions that are part of the syllogism upon which the proposition is based that the legislative history is *conclusive* on this point.

Thus, if I understand the argument as presented, it is based upon the following assertions:

decision in *United States* v. *City of Parma, Ohio,* 661 F.2d 562 (6th Cir. 1981), may also come within the erroneous interpretation of the above circuits. On the other hand, *Skillken & Co.* v. *City of Toledo,* 528 F.2d 867 (6th Cir. 1975), is cited for the correct reasoning regarding intent, even if not based on the legislative history.

[4] *See,* S.139, introduced by Sen. Orrin Hatch in January 1985.

[5] Perhaps the more significant reach of the decision in *Jones* v. *Mayer* was opening up local governments in actions for violations of civil rights under color of State law pursuant to 42 U.S.C. 1983.

[6] *See,* Stein, n.2 and accompanying text. My comments on the extensive research of Mr. Stein are not based upon my own analysis of the legislative history of the 1966, 1967, and 1968 legislation. My statements should not be read, in any way, to imply any lack of thoroughness on his part in his research. My concern has been with methodology. Any critique of his selections for legislative history will require another separate analysis and another forum for discussion.

[7] The Michie Co., 1980.

1. that some legislative history relating to an earlier version of the bill in 1966 should be considered in interpreting the 1968 act;
2. such legislative history points up opposition to an effects standard, *and* that standard is assertedly contained in that earlier, 1966 legislation;
3. the rejection by Congress of the 1966 legislation was because of the incorporation of an effects standard rather than an intent standard;
4. that the 1968 legislation passed because it did not contain an effects standard, as contrasted to the 1966 legislation which was rejected;
5. that the 1968 legislation, thus, must include an intent standard, even if not explicitly set forth, but by recourse to the legislative history; and
6. that this conclusion is possibly supported by the rejection by the House of Representatives of Senator Baker's amendment to the 1968 legislation.

On the basis of the above, it is contended that decisions of a number of courts of appeal and their progeny are wrongly decided. It is argued that, Congress having consciously rejected an effects test, the courts lack the authority to overturn that legislative choice. Moreover, since assertedly Congress only wanted an intent standard, if an effects standard were desired, amendment of the current legislation would be required.

One lesson I have learned over the years is never to be too sure of anything. That may apply in this instance. A number of the elements in the above argument stand upon extremely fragile foundations. One of the essential elements is the assessment of the legislative intent and the use of legislative history.

Only if the language of the statute is not clear is it appropriate to resort to legislative intent for guidance. The phrase "because of race" does not necessarily imply a standard of proof, one way or another. If one puts aside the question of whether there is any ambiguity at all,[8] the exercise here is, obviously, to be directed toward discerning legislative intent. The appropriateness of using legislative history for that objective is a proposition for which no citation of authority should be needed.

In general, however, one must be careful not to extend the concept of legislative history too far in the search for legislative intent. Not all of the legislative proceedings prior to the enactment of particular legislation necessarily have application to discerning legislative intent. Intervening changes in the legislation may have made earlier statements irrelevant to what is finally enacted, rather than constituting evidence of the basis for a change in a bill.

Care must also be taken not to assume that individual pieces of legislative history are conclusive. It is also important that legislative history be accorded appropriate weight; i.e., not all legislative history is equal. It depends upon whose statements are involved, i.e., the degree that the body itself has adopted a convention to look to such leaders' statements for guidance[9] and when such statements occurred in the legislative process.

First, it would be difficult to establish exactly the reasons that Congress rejected the 1966 legislation. Some might conjecture that a number of considerations, some even unrelated to this particular portion of the legislation, may have influenced the congressional leaders. Strategic decisions to attempt to get other portions of the civil rights agenda enacted may have been at the root of actions to put aside the fair housing effort. To attempt to relate, even in part, that decision to the fact that the earlier bill may have contained a provision reversing the burden of proof, requires an enormous leap in logic.

At the heart of the argument over whether Congress "adopted" an intent test is the proposition that the earlier bill, in fact, contained an effects test. That fact is not so clear, nor is the related question of whether the body perceived it to do so. Professor Petro's analysis of the impact of the 1966 legislation, that the burden of proof may "come to rest" on the

[8] A reasonable argument can be made that there is no ambiguity in the terms used. The question, rather, is what standard was to be used in making that determination. The rationale of courts that have had to address that question has been based, in part, on the general objectives of the legislation: to eliminate racial discrimination. Using legislative history on what was meant by the term "because of race" to resolve what standard of proof should be applicable may assume too prescient a capability of a legislative body attempting to deal with a society where race discrimination was often the basis for actions by institutions, both public and private, as well as individuals.

The theory on this issue that seems most applicable is that it would be entirely logical to expect Congress to anticipate that the standard for such proof in Title VI and Title VII measures, also dealing with discrimination, would be applicable to Title VIII as well.

[9] A useful discussion of the theory upon which such weight is accorded statements of the participants in the legislative process is contained in Professor Dworkin's piece in the *New York Review of Books*, Dec. 20, 1979, no. 20, pp. 37–43, entitled "How to Read the Civil Rights Act."

defendant cited in support of this position, was based on the vagueness of the law.[10] If anything, the basic argument now being made for an intent standard is that the term "because of race" is vague; therefore, we must look to the legislative history; i.e., that is the only reason for recourse to legislative intent.

It is hard to tell the difference on such grounds between the 1966 legislation and that passed in 1968. In either event, it could be said that Congress has left us with indefinite criteria for purposes of allocating the various burdens of proof. The act says little about what proof will be required and how those burdens are to be imposed on the parties.

Judge Richard A. Posner has recently pointed out the need for understanding of and careful attention to the legislative process in using legislative history to discern legislative intent.[11] In this situation, for instance, one should note that the unsuccessful cloture vote in 1966 was taken on the entire legislation, not simply Title IV, dealing with fair housing. Legislative history reflecting intent in the context of a cloture vote and on an entire bill, of which Title IV was only a part, must be carefully differentiated from that on the vote for adoption of the provisions of Title IV.

Obviously, once a bill is passed by a majority vote, one needs to be careful in selecting those sources that are to be used to determine the majority's intent. If one relies upon statements of those in the opposition for purposes of legislative history—and the even smaller group who may be able to prevent cloture in the Senate—these antagonistic sources may not be very reliable for questions of the majority's legislative intent.

The legislative history from opponents (referred to by Mr. Stein) seems to have, at its base, a general rejection of the concept of fair housing. Thus, their statements do little to set up the concept that a later change in subsequent legislation was sufficient to overcome the opponents' objections to any legislation on the subject, or that it resulted in their voting for the bill. The question, rather, is how did the majority understand the bill?

That some of the history referred to speaks to a specific provision may reflect some intent of some of those considering the bill at that time. Such comments, however, do not indicate what weight should be accorded their statements, i.e., whether they had a leadership position in favor of the bill so that one can assume some reliance on their statements by the majority voting for it. Nor does it necessarily mean that 2 years later, with a *different* Congress, the specific commentators' views would hold any sway or were even brought to the body's attention at this later stage.

We look to legislative history to discover, if we can, what leaders of the body, on whom others may rely, may have said so that we can understand what those voting for the bill understood its scope to be. Only a portion of the record is appropriate for such purposes.

Marshall Stein's careful culling of the record has unearthed at least one piece of legislative history that has arguable application to the issue.[12] It gains little support, however, from the discussion of the earlier legislative history cited, for the reasons noted above.

Clearly, Senator Mondale was one of the leaders on this legislation, as was Senator Hart. Mondale's stating that the burden of proof rests on the complainant may be significant, but one would need to relate his comments more specifically to the provision to which he refers.[13]

His statement would require further analysis to determine its applicability. It would need to be taken in context with other statements, by both Mondale and others, over the months that the bill was being considered. Secondly, since burden of proof can refer either to pleading, production, or persuasion, there is need for some clarification on that point.

The issue of burden of proof in the context of this legislation provides a good example of the need for care in the use of legislative history. For instance, the issue of whether disparate impact is sufficient for a plaintiff to establish a basic case, requiring the defendant then to present evidence, is certainly not directly dealt with by the legislative language of the statute itself. Mondale's general statement does not resolve that issue either.

[10] 112 Cong. Record, 22313–4 (1966).

[11] Richard A. Posner, *The Federal Courts: Crisis and Reform* (Harvard University Press, 1985) p. 338.

[12] Stein, n.34, the statement of Sen. Mondale at the time of negotiations with Sen. Dirksen over a compromise, 114 Cong. Record, 4060–61 (1968).

[13] It is, similarly, not within the scope of this paper to cull the legislative record for statements of Mondale or other leaders of the legislative effort here to determine if other statements may be available to assist in determining legislative intent. Without such an effort, however, it is difficult to accord great significance to this one statement.

One needs to ask, "Was this statement of Mondale's consistent with the understanding of the majority on this particular issue? Was it related to the provision under discussion? If so, was that provision significant in the compromise to that point?" The major concern of the leadership was to enact effective legislation to deal with housing discrimination and to prevent private and public discrimination. Although this statement does provide an insight from the legislative history, it needs to be better connected to assess more accurately its significance.

Even when the term "burden of proof" is used in the legislative history, the problem is to determine what was meant. Did it mean all proof was to be supplied by the plaintiff? That seems doubtful. Did it mean that a prima facie case would have to be presented by the plaintiff? Probably. Does it determine what proof will be required? Clearly not. Is disparate impact a sufficient basis for a prima facie case? Why not; isn't it sufficient for Title VII relating to employment discrimination?

Did Mondale's statement in the record help us on this issue? Not really. So where are we? Probably back to the policy judgments behind the act that seemed to have motivated at least a number of courts of appeal decisions in a number of circuits to interpret congressional intent consistent with the desire of Congress for effective legislation. To resort to this statement of Mondale's as the key basis for adopting a policy judgment that imposing an intent test will restrict judicial or administrative interventions on institutional defendants to circumstances where discriminatory animus is initially shown by plaintiff seems unmerited.

Clearly, the statement of Mondale's and some of the others Stein refers to are not enough legislative history to force the conclusion that the legislative intent on this issue is so clear that courts have no choice on this issue. If a change is required, Senator Hatch's legislation (discussed subsequently) provides an ample vehicle.

Much of the legislative history referred to is concerned with whether a defendant may have had to present proof that he did not discriminate. That objection has, at its roots, a concern whether the individual defendant can avoid being hauled into court; it does not provide us with much support for whether Congress intended that discriminatory motive be part of the proof in the action.

As noted above, Professor Petro was clearly indicating that the natural result of a vague test would likely be to place a part of the burden ultimately on the defendant. When allegations of even a mixed racial motive are presented, the same is certainly true. Clearly, the practical placement of the burden on defendants does not climb to the level of a due process deprivation as is alleged. The question is not whether Congress has the power to impose an effects standard,[14] but whether it did so.

The argument for congressional intent to adopt an intent standard also relies on the assumption that there was an initial compromise on this issue after 1966, and that this understanding was embodied in the 1968 bill. Further, it implicitly requires that this issue was the, or at least one of the, primary issues involved in the Dirksen compromise. Again, there is little support for that proposition, or for that matter any other basis that generated that compromise. Note also that the Mondale statement referred to was apparently pre-Dirksen compromise.

Some legislators may have thought the crucial issue in the compromise with Dirksen was the elimination of administrative, "cease and desist" power enforcement, leaving the complainant to either judicial action or administrative conciliation. This is simply to say that we are limited, when we attempt to make these historical analyses, to the recorded sources that have some reliability. As a result, we should be careful, when we have recourse to this record, that we do not assume too much.

Senator Dirksen finally agreed to a compromise bill and, after two tries, cloture was voted. It should be noted, however, that a number of amendments were proposed and considered after the cloture vote and before the bill's final adoption in the Senate. There were no hearings on the bill in the House—which adopted the Senate bill a few days after Reverend Martin Luther King, Jr.'s, death while riots were still ongoing in many American cities.

It is hard to ascribe passage of the act to changes on this issue of burden of proof, to the variations between the compromise version as enacted and the 1966 version. The 1966 bill and the initial 1967 bill

[14] The authority of Congress to authorize an effects standard in the context of Title VI was upheld in *Guardians Association of N.Y. Police Dep't* v. *Civil Serv. Comm'n of N.Y.*, 103 S.Ct. 3221 (1983). I am unable to find any basis for the assertion of a 14th amendment restriction on congressional power to do so, as asserted by Professor Kmiec in his consultation testimony.

both involved administrative enforcement as a primary enforcement approach. The 1968 initial bill had also contained provision for HUD administrative enforcement of the act. That does not constitute a major change in approach.

Without going into details at this point, it should be apparent that there were a number of significant changes that occurred from the 1966 to the initial 1967 bill that became the 1968 act, and that further changes occurred at the time of the Dirksen-induced compromise. It would be difficult to assume that with so many changes any one provision was instrumental, if changed, to cause the 1968 adoption.

In addition, it is important to be careful when citing legislative history to note at what point in the legislative process it occurred and to which version it was addressed. Comments before the Dirksen compromise might have very little application to the bill after that compromise.

Another area of legislative history has also been referred to in several contexts. The rejection by the Senate of Senator Baker's amendment is apparently cited as support for the effects test by the Third Circuit[15] —and ascribed by a student in the *George Washington Law Review* Note[16] —to a concern by the Senate that the existence of a discriminatory intent would be made more difficult. It is hard to determine a sufficient basis to justify either reading on the legislative history provided.

In general, one should be extremely wary of ascribing any specific intent by a legislature for rejection of an amendment. It may be rejected, if for no other reason, because the existing legislation might already be seen as sufficient or even more specific on the subject. Rejection should not be interpreted as evidencing legislative intent except in very rare instances where the intent is crystal clear.

There were obviously a number of reasons why Senator Baker's amendment might have been rejected. And, for the moment assuming the burden to provide a possible rationale, one procedural explanation might have been simply not to allow any more amendments than possible given the large number pending that might have gutted the bill if the "camel's nose" had been allowed to intrude.

All of the above is to say that the basic premise—that by rejecting the 1966 legislation, Congress indicated it did not accept an effects standard in 1968—has little real support. That there was a legislative intent, as such, is dubious. There may have been one—and certainly a thorough effort has been made to document it. But there are simply too many other rationales for what happened to make rejection of the 1966 legislation the basis for imposing an intent test, based upon the record provided of the legislative history over the 3-year period.

Enforcement of the Fair Housing Laws

Turning from the issue of the standard of proof to be applied, I wish to address some comments regarding the issue of enforcement of the laws against housing discrimination. Thus, this paper will address issues that have arisen following the adoption of the Civil Rights Act of 1968 and the landmark decision in *Jones* v. *Alfred E. Mayer Co.*,[17] that revitalized 42 U.S.C. 1982.

It has now been 17 years since these major vehicles for enforcement of civil rights in the housing field were respectively enacted and resurrected. An initial observation, before examining enforcement issues, is that the more critical issue has now become that of obtaining access to housing, generally, rather than those issues involving enforcement of an individual's rights to specific housing. Those latter complaints seem to be adequately addressed by the existing enforcement machinery, even if not with dispatch because of the limited funding for enforcement agencies. Improvements are obviously always needed.

It is important to understand the perspective being proposed. Stated another way, the problems of enforcement are relatively minor compared with the difficulties being experienced with expanding the availability of units to which minorities have access. The latter issue deserves more of our attention.

What has happened is that much discussion has gone into how to assure minorities access to the shrinking number of housing units for which they are eligible. Although that is important, it is far less so than increasing the pie, i.e., expanding the numbers of units for what has been a segment of the population that is also extremely poor. Over one-third of all blacks are below the poverty line. Without more housing opportunities, options that

[15] Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), p. 147.
[16] Note, "Racial Discrimination—Fair Housing Act. . .," 46 Geo Wash. L. Rev. 615 (1978) at 630.
[17] 392 U.S. 409 (1968).

the government must provide in the last analysis, enforcement of access to existing units will only be a shallow achievement.

Enforcement efforts have some significant overall implications in assuring a just society. To achieve more effective enforcement, the goal that the Commission would seem appropriate to spearhead is for swift, certain, and relatively simple enforcement procedures when racial discrimination becomes part of the process of denying individuals access to housing.

A major ingredient for such an effort will be adequate funding for enforcement, including the use of experienced testers. Funding for civil rights enforcement has always been one of the means by which the impact of the substantive law has been blunted.[18] Expeditious handling of individual complaints prevents denial of justice because of delay. Moreover, the ability to delay proceedings encourages resistance to enforcement efforts.

In looking at these problems of enforcement, it may be more appropriate to divide the analysis into private acts of discrimination, either by individuals or institutions, and those where the Federal Government, the States, or local governments are the instruments of invidious discrimination.

It is true that, while society has more generally accepted the notion that individual units of housing are to be available on a nondiscriminatory basis, the sophistication of those who would continue patterns of racial discrimination has increased. Even individual discriminatory acts on the sale or rental of their own units have become more subtle, less blatant. For these reasons, it seems all the more important that, where private individual and institutional discrimination exist, enforcement be readily available, i.e., accessible, simple, and expeditious.

Senator Hatch's Proposed Legislation

It is in this context—and assuming that the 1968 legislation does not require an intent standard—that the appropriateness of Senator Hatch's proposed legislation should be addressed. The notion that apparently underlies his proposed legislation is that an effects test involves an overreach of governmental authority, without justification. His rationale is that an effects test burdens those who have acted without discriminatory intent with the need to defend their actions in court. If that is his rationale, it seems to have little basis in fact.

It is useful to focus on the impact of the legislation. Essentially, the effects test has significance only with institutional actors. Once the disparate impact on minorities is established, it operates basically to transfer the burden to show a nondiscriminatory basis for the action to the defendant at that point in the process. A quite reasonable argument exists to justify that transfer of the burden of proof, here intended to mean production and persuasion.

We do so in other areas of law where, from experience, there is a reasonable basis to have a party justify its own conduct. In torts, therefore, we require in many jurisdictions that the plaintiff make an affirmative showing of lack of contributory negligence. Those jurisdictions that have done so, in part, have acted out of concern that without plaintiff's shouldering that obligation, it is too difficult for the other side, there the defendant, to probe that issue. That showing of due care in the torts context is not entirely unrelated to the need of an alleged discriminator to identify the legitimate basis on which its actions were taken in the context of allegations of housing discrimination.

The objection to a defendant's doing so seems more an objection to having to justify one's actions in an administrative or legal proceeding. In actions for housing discrimination, more than adequate protections for the defendant are in place. First, in order to obtain a judgment, the plaintiff must initially establish that defendant's actions have had a disproportionate impact on minorities. Further, once past that hurdle—and it has not always been an easy one to surmount—plaintiff is still required to counter any showing of the nonracially motivated grounds the defendant may have presented to justify his actions.

A proceeding with these types of burdens that must be met by each side seems relatively well balanced in the circumstances. If administrative action precedes legal action, the administrative agency will be initially asking for the basis for the action defendant has taken. Proceedings are unlikely where any reasonable, nondiscriminatory basis for defendant's actions exist.

In the context of a contested proceeding, the current standard provides for a simple and expedi-

[18] In the appropriations bill following the 1968 adoption of Title VIII, Congress refused to provide any new funding to HUD for the enforcement of the act. The backlogs of EEOC, HUD, and local and State enforcement units are testimony to this problem.

tious approach to the determination of racial discrimination, but leaves to each side the need to shoulder a burden that it is in the best posture to handle. It requires the plaintiff to present only that evidence that he may have reasonable ability to assemble regarding the disproportionate impact. Defendant, on the other hand, is able to contest even plaintiff's attempt to show disproportionate burdens on minorities.

Once past the initial issue over disproportionate effects, because the burden then reverts to the defendant, he can then provide the rationale used for his action. These are matters, obviously, with which he is most familiar. Again, the proceeding seems to ask each party to assume the burden on the issues for which they, ultimately, have best access to facts.

The Need for Effective Enforcement

Aside from the issue of burden allocation that is at the heart of the effects-intent debate, one should not lose sight of nor denigrate the significance of the issue of reasonable access to the machinery. Solutions to achieving societal acceptance of racial integration and neutrality on racial issues will require an acceptance of the laws that dictate an end to racial segregation in housing. Undercutting either the effectiveness of enforcement or its availability will only tend to lead individuals to resist the message of our civil rights laws.

There is no empirical study that indicates that defendants have been unfairly found liable for discrimination where they have had a nonracial basis for their actions. Although it is true that some minorities may abuse their right to file allegations of racial treatment, both our legal and administrative handling of these cases do not seem to have generated many that have proceeded, even to adjudication, where the defendant's actions can be justified on nonracial grounds.

Overall, rigorous civil rights enforcement can generate trust in government and in its fairness. Surely, the fact that in our society, we often look to the applicability and sureness of sanctions rather than the substance of the laws to guide our conduct has equal application in the field of housing discrimination. Thus, anything that would undercut those sanctions that exist and would make enforcement less effective will only delay the day when equal rights become a reality.

Private Versus Public Discrimination

It seems clear that the issue of the source of the discrimination, whether private or public, should receive separate treatment, at least in the form of standards and remedies. Although private actions may be those of individual property owners, rental agents, brokers, or lenders, the pattern and practice authority of the Attorney General is available to deal with repetitive or large-scale practices by private actors.

There should be little difficulty in affording individual members of minority groups with redress against individual acts of discrimination. Where problems are more significant, the full resources of the Justice Department are theoretically available to deal with widespread practices. These areas of enforcement, although not perfect, have not raised the difficult issues that have been encountered where public actions have been involved.

Discrimination that results from public actions is all the worse. This is true whether it occurs by acts of school districts, local governments, States, or even the Federal Government. Confidence in the fairhanded treatment of all is not generated where government itself becomes the instrument of oppression.

In its analysis related to the above discussion about the effects and intent test, the *George Washington Law Review* Note points out the appropriateness of using a standard of disproportionate discriminatory effects, especially in the context of governmental action.[19] Obviously, it is in the case of governmental action that the greatest racially discriminatory impact can occur. Governmental policies can affect housing location, affordability, and numbers of units that can be built through zoning and land-use decisions. Provision of public services and assistance have much wider impact than individual decisions. Issues involving such decisions as school boundaries and inclusionary zoning requirements also may have a significant bearing on access to housing.

In particular, local government decisions to encourage or prevent additional housing in the community have obvious effects on access to housing, in the broader sense. Exclusionary actions (discussed later in this paper), where there is a shortage of safe, sanitary, and affordable housing, are an invidious illustration of governments' major role in issues of housing discrimination.

[19] 46 Geo. Wash. L. Rev 615, n.12, at 631–33.

It is in the area of public sector decisions that greater enforcement activities are called for and perhaps recourse to new theories to evaluate the acceptable basis for public actions. It seems clear that Title VIII applies to governmental actions, both at the Federal level and by those State and local governments that receive Federal housing and community development funds. Title VI of the 1964 act applies where government funds are involved. The question is what additional efforts must be generated for government to acquit itself of the responsibility for creation of many of the badges of slavery that still exist.

In this process of addressing discrimination, government, at all levels, must come to grips with the issue of access to housing. Greater availability of housing for those with the lowest incomes, those who are most in need, many of whom are minorities, is the key issue. For minorities, of course, the barriers of racial discrimination, however subtle, impose even greater difficulties in obtaining access to affordable housing.

Given majoritarian pressures on local elected governments, it is probably necessary for the courts to provide protections for the minorities who are denied such access. Federal legislation can play an important role in setting objectives. Such legislation can help support those efforts that have occurred in several States to attempt to increase the construction of units to meet these problems. It is to this issue that this paper now turns.

Developing a Right to Housing

The Supreme Court has determined in *Lindsey* v. *Normet*[20] that there is no constitutional right to housing. In *James* v. *Valtierra*,[21] the Court determined that lack of wealth does not constitute a suspect classification for equal protection purposes. This decision was further reinforced by the Court's decision in *San Antonio Independent School District* v. *Rodriguez*.[22] There is no magic, however, with recognition of a constitutional right to housing. It can be provided, as well, by a legislatively created set of rights and, as such, it could be fashioned with more care and precision in its application than could a constitutional doctrine. In fact, it is the potential of overly broad implications to a suspect or quasi-suspect classification system that was certainly one of the major reasons for the Court's refusal to extend that doctrine.

At present, a number of States have experimented with either statutorily or judicially created rights of access to housing involving the need to provide more opportunities for housing, either by eliminating restrictions on housing development in individual communities through "fair share" criteria or by imposing a right to housing for the homeless.

During the last 50 years the Federal Government has provided several general policy statements supportive of the need to provide decent, safe, and sanitary dwellings for persons of low income. The experience of the British Government provides a useful example for setting up a legislative standard in its provision to deal with the homeless. Its legislation requires that local governments provide housing to the homeless, leaving to local governments the responsibility to meet these needs. Although its approach has generated considerable litigation, the idea of setting a legislative standard deserves study. Essentially, a general policy provision is used to set up a legally enforceable requirement that can be imposed on State and local governments.

In this country, such a program could require that action be taken by local governments to meet the needs of homeless in their communities.[23] Imposition of such a responsibility would seem appropriate in conjunction with the Federal Government's making financial assistance available. Thus, local government would provide, in essence, for broader access to a greater number of dwellings.

Obviously, other Federal actions can be significant in assisting development of housing in areas where there is a significant need for such assistance. Many urban areas suffer from lack of housing for those with low and moderate incomes, for the elderly, and for large families. Federal assistance that can provide an incentive for private construction of such units is needed. In combination with such a supply response, the concept of adequately funded housing allowances can provide the means to make affordable either such additional construction or those units that are vacated as others take advantage of the new construction.

[20] 405 U.S. 56 (1972).

[21] 402 U.S. 137 (1971).

[22] 411 U.S. 1 (1973).

[23] The problem of determining who is eligible in a particular community has been one of the issues that has had to be addressed by the British program through litigation, since the legislation was not detailed on such issues. Rather than a case-by-case approach, a more detailed set of eligibility requirements might be more appropriate if developed in advance.

The fact that such measures will have a significant impact on minorities, over one-third of whom are below the poverty level, reflects the appropriateness of addressing these issues of greater access to housing in the context of responses to racial discrimination in housing. Housing allowances, or vouchers, moreover, can provide an effective tool in dealing with problems of housing discrimination.[24]

Neither space nor time limitations have permitted full development of the potential approaches to dealing with concepts to deal with expanding access to housing in this paper. Clearly, however, there are adequate examples either internationally or on the State and local level[25] to provide a basis for generating a greater commitment to house the homeless as well as low- and moderate-income families.

It is that desire to facilitate access to housing, especially for minorities and the poor, that has generated much litigation over the issue of exclusionary zoning and other local restrictions that make increased levels of housing development difficult to achieve.

In that area, it is important that we consider additional approaches to legal concepts that will require greater justification of local governments for actions that restrict or limit affordable housing. These restrictions may relate to: construction moratoriums, limits on multiple housing development, prevention of use of less costly manufactured housing, minimum lot size, density limits, dwelling size, or inclusionary requirements other than low-income development.

At present, local governments are afforded great flexibility in development of these controls because they are generally only required to justify their actions on a rational-basis standard except where the classification directly has a disproportionate impact on minorities and generates suspect-classification analysis. The deferential review under the rational-basis test enunciated in *Dandridge* v. *Williams*[26] is almost outcome determinative in result. Local government actions are upheld. Similarly, the suspect-category analysis from the other side of the spectrum has an equivalent result, since less restrictive options can generally be envisioned in hindsight.

What seems needed is an intermediate basis for analysis, where some responsibility for justifying the classifications determined is required of government. The discontent with the two-tier approach was perhaps best set forth by Justice Marshall in his dissent in the *Rodriguez* case.[27] Thus, the Court has seen there is a need for more than the two outcome-determinative approaches.

In responding to this need, the Court has fashioned a somewhat different standard, or midlevel review that it has applied in the area of gender discrimination. In its decision in *Craig* v. *Boren*,[28] the Court determined that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives" if it were to survive equal protection challenge. The Court, however, has not been willing to expand the areas to which this standard will be applied. In *Boren*, the classification in question discriminated against men by permitting women

[24] Vouchers can help minorities move to areas of lower minority racial composition while avoiding the restrictions of local housing agencies whose jurisdiction is limited to specific jurisdictional boundaries. Similarly, vouchers can avoid part of the problem confronting housing authorities who wish to manage occupancy in particular projects by proportional racial composition, by assuring that no one on the waiting list will be denied housing assistance, even if access to a particular unit or project is denied.

[25] The District of Columbia passed an initiative to require that the local government assume responsibility for housing the homeless. Although that provision has been the subject of continuing litigation that has prevented its implementation, State and local, rather than Federal Government, action has occurred. In New Jersey, judicial action has created a fair-share approach through the various *Mt. Laurel* decisions, starting with *Southern Burlington County NAACP* v. *Township of Mt. Laurel*, 67 N.J. 151 (1975), and *Mt. Laurel II*, 456 A 2d 390 (N.J. 1983); *Madison, Inc.* v. *Township of Madison*, 72 N.J. 481 (1977); New York, in *Berenson* v. *Town of New Castle*, 38 N.Y. 2d 102 (1975) and Pennsylvania, in *Surrick* v. *Zoning Hearing Bd.*, 476 Pa 182 (1977), have also followed suit. One State, Massachusetts, also passed legislation that was to have a similar effect of spreading the burden of housing low- and moderate-income families through local assumption of fair-share responsibilities.
Neither the judicial nor legislative attempts to impose such requirements on local governments have met with great success to date. Since such initiatives have occurred at a time when the Federal role has been drastically cut, resistance to imposition of such burdens by local governments should not have been surprising.

[26] 397 U.S. 471 (1970).

[27] Justice Marshall stated:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

[28] 429 U.S. 451 (1976).

over 18, but only men over 21, to be sold 3.2 percent beer.

In another recent decision, the Court, in *City of Cleburne, Texas* v. *Cleburne Living Center,*[29] while rejecting expansion of the *Boren* type treatment to exclusion of a group home for the retarded by means of local zoning laws, found an equal protection violation even while applying the rational basis test. In effect, the Court seems to have adopted Professor Gunther's "rational basis with a bite" analysis.[30] The Court refused to hold mental retardation a quasi-suspect classification, calling for a more exacting standard of judicial review than normally accorded economic and social legislation. At the same time, however, because the record did not reveal any rational basis for believing the home would pose any special threat to the city's legitimate interests, the Court held the ordinance invalid as applied.

Cleburne involved the type of local government exclusionary action that the Court has upheld in the past on a rational-basis analysis. Based on the Court's approach in that case, therefore, it would seem that the Court may be willing to look more closely at the actual rationale that the local government has used to justify its actions. In fact, the opinion even suggests that the legislative body should consider incorporating in its legislation some specification of the basis for its decision. As a practical matter, such reasons for enactment may have to be presented in the course of defending the governmental action if it is challenged through litigation.

Including such reasons in the legislation, rather than conjecturing up a possible rationale after the fact, may have the salutary benefit of requiring local governments to think through their actions. The need to articulate the basis for the action taken could limit the potential for discriminatory actions or, at least, would require more sophisticated responses from local governments; but these would be on the record.

What appears to be occurring is that the Court is going to apply some form of "rational basis with a bite," i.e., some type of "midlevel scrutiny," where the interests involved are significant enough. Such an approach will tend to be fact sensitive, as the Court's decision in *Moore* v. *East Cleveland*[31] demonstrates. There, the Court invalidated a zoning ordinance limiting occupancy of a dwelling to members of a single "family" where the term family had been narrowly defined so as to justify conviction of a grandmother who shared her home with two grandsons.

Another alternative to readjusting the basis for review to require closer justification of means with ends utilized by courts has been to circumscribe more narrowly the scope of the police power exercised by local governments.[32] It seems inappropriate to limit the legitimate police powers of local governments in an attempt to address improprieties in the exercise of such powers. The analysis should not be public purpose, but rather the demonstrated relationship between objectives and means.

Several judicial approaches to exclusionary practices seem to be developing, although the number of jurisdictions currently adopting such approaches is limited. It seems clear, nevertheless, that some formulation to require greater justification of exclusionary actions is underway, at least from the perspective of the courts. A number of State

[29] 87 L. Ed. 313 (1985).

[30] Professor Gerald Gunther's seminal article that described his "newer equal protection" theory was in 86 Harv. L. Rev. 1 (1972). He suggests that the Court will begin to take seriously the need to determine that the legislative means substantially further lawful legislative ends. In effect, the model involves an intensified means scrutiny.

[31] 431 U.S. 494 (1977). Interestingly, Justice Powell's plurality opinion invalidated the ordinance on substantive due process rather than equal protection grounds. Methodologically, the approach was to carefully examine the importance of the government interests advanced and the extent that the regulation was seen to serve those interests. From the standpoint of technique, it is not apparent that it matters whether the challenge is on due process or equal protection grounds.

[32] Several decisions have held economic considerations sufficient to invalidate specific application of local housing codes, contrasting unfavorably the cost of compliance with the public objectives to be obtained. *See,* City of St. Louis v. Brune, 515 S.W. 2d 471 (1974); Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. App. 1970). In *Gates Co.* v. *Housing Appeals Bd.* 10 Ohio St. 2d 225 (1967), the Ohio Supreme Court rejected enforcement of a provision requiring bathroom facilities and hot water in tenements, lacking a factual determination that the continued use of the property without the improvement constituted an immediate peril to the public health, safety, or morals. The court analogized the determination to that required to establish existence of a nuisance. In effect, the challenge was to the public purpose of the measure required to sustain the exercise of the police power. These cases are the exception, but they provide ample basis for questioning the courts' attack on police powers where the real objection is to a lack of demonstrated relationship between ends and means. To the extent that marginal standards cannot be related to police power objectives, a due process challenge may lie. Exclusionary practices that similarly fail to relate to legitimate police power objectives would also seem subject to challenge. The focus should be on the factual justification for the exclusionary practice rather than on the public purpose behind the police power being exercised.

supreme court decisions have invalidated local government exclusionary actions.[33] Since these actions of local governments have a disproportionate impact on minorities and are often racially motived, these are areas where the Commission's hearings may stimulate a renewed assessment of our treatment of these problems.

[33] For instance, per se exclusion of manufactured housing was struck down in Michigan in *Robinson Township* v. *Knoll,* 410 Mich 293 (1981). An extensive discussion of the evolving more aggressive evaluation of local government actions by State courts often using substantive due-process analysis is set forth in Professor Robert A. Sedler's article in 16 Toledo L. Rev. 465 (1985), "The State Constitutions and the Supplemental Protection of Individual Rights."

Exclusionary Zoning and Purposeful Racial Segregation in Housing: Two Wrongs Deserving Separate Remedies

By Douglas W. Kmiec*

Introduction

Purposeful racial segregation in housing is legally and morally wrong. Not surprisingly, therefore, the Supreme Court has indicated that the intentional use of race in land-use decisionmaking would clearly run afoul of constitutional guarantees to equal protection.[1] Constitutional litigation, however, is costly and cumbersome, and unfortunately, unlikely to deter those bent upon implementing their racial motivations. For this reason, vigorous Fair Housing Act enforcement against intentional discrimination is essential. Moreover, the statutory penalties currently provided for in the Fair Housing Act should be increased significantly,[2] and greater emphasis should be placed upon the use of testers to ferret out racial intent in property transactions.[3] However, it must be recognized that even with increased penalties and testers, those discriminated against can never be truly compensated for the assault upon their human dignity. More pragmatically, seldom will the act even result in the award of the precise housing sought by the injured party. Housing needs invariably must be met more expeditiously than either conciliation procedures or court dockets permit.

Although intentional discrimination, in either its individual or institutional forms, must be rooted out, it must not be confused with racial segregation in housing that results either from market forces or nonracially motivated land-use restrictions. Citizens of all races do, and should be able to, express cultural and environmental preferences in the marketplace. Given the high mobility of the residents of our Nation, it is highly inconceivable that any legal or administrative effort could, even if it were advisable, thwart market preferences.

Beyond cultural preferences, it must be recalled that wealth is not a suspect classification under the Federal Constitution.[4] Unless we are prepared to

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[1] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

[2] At the request of HUD Secretary Samuel Pierce, former Sen. Howard Baker introduced into the 98th Congress a bill to greatly strengthen the current provisions of the Fair Housing Act. The bill was given the legislative number of S.1612, and would have increased the civil penalty for fair housing violations to $50,000 for the first violation and $100,000 for any subsequent violation. The bill was not acted upon by the Senate.

[3] Secretary Pierce has asked Congress for a $10 million fair housing initiative program, of which $4 million would be allocated to conducting of investigations or tests to determine the existence of housing discrimination. *See generally,* "HUD Aide Touts Anti-Bias Testing," *Los Angeles Times,* Aug. 25, 1985, p. 2.

[4] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (differential property tax support for education not in violation of Federal equal protection).

adopt draconian measures to redistribute personal talents, it would be ludicrous to suggest that wealth should be a suspect class. Thus, to the extent that wealth-expressed preferences lead to the segregation of races in housing, that outcome may be best modified by directly increasing the wealth of those most in need—preferably through government policies that foster economic growth or, where appropriate, a well-designed housing allowance program.

As mentioned, zoning and other land-use regulations may also result in housing segregation. If governmental action is purposely designed to exclude on the basis of race, it can and should be struck down under the Federal Constitution. The more difficult case, however, deals with land-use controls that are not racially motivated but, because of the distribution of income, are said to yield a discriminatory result. This is a treacherous area, since it is virtually impossible to say with any certitude that the racial impact results from a specific regulatory barrier rather than, as noted above, merely choice or income. In addition, a finding of discrimination premised upon statistical evidence that is itself in doubt raises serious questions pertaining to the proper relationship of the Federal Government to the States and the competence of the judiciary compared to that of the legislature.

With respect to the Federal-State relationship, it is evident that neither States nor their localities may disregard Federal constitutional prerogatives—hence, the prohibition against racially motivated exclusionary zoning. However, where a land-use control emanates from the nonracial concerns of economic regulation, the Federal Constitution has been interpreted as giving great deference to State policy.[5] Many, including myself, think that deference has been too great, with the consequence that land-use regulation has been put to purposes that are well beyond any reasonable conception of the police power. Thus, it is very tempting to pierce the distinction between economic and civil liberties—which the Supreme Court itself has said is largely artificial[6] —and propose that the State police power as it relates to the regulation of land use be placed within more acceptable limits through any available mechanism, including the equal protection clause and the civil rights laws.

I believe this approach would be wrong for a number of reasons. First, it taints as "racist" decisions that bore no consideration of race, but instead were derived from a benign—if often misguided and inefficient—desire to impose some planner's conception of the "ideal community" through public land-use controls. This racist characterization would not only be unfair to thousands of municipalities and their citizens, but it would be a misuse and waste of civil rights energies that may lead to resentment on all sides. Second, a Federal civil rights attack upon nonracial land-use measures would be overinclusive, and hence, insufficiently directed at the real problem: namely, that land-use authority has extended beyond health and safety concerns to matters of esthetics that are best left to the private marketplace. Third, it would displace the State laboratory mechanism first heralded by Justice Brandeis,[7] thereby imposing a nationally uniform solution on a problem that calls for highly varied local treatments.

For all these reasons, it was neither remarkable nor erroneous for the Supreme Court both to limit access to the Federal courts on exclusionary zoning issues through the standing mechanism,[8] and when standing is found, for the Court to confine itself to providing a constitutional remedy for land-use decisions premised intentionally on race. This is especially true given the increasing number of Federal circuit courts that interpret the Fair Housing Act as applying more liberally to include a remedy for zoning which, in conjunction with several other factors that provide a legitimate basis for inferring racial intent, has a disproportionate racial impact.[9]

The result of this Supreme Court deference to the States has fostered, as expected, a variety of approaches to the problem of exclusionary zoning implemented through both State legislatures and State courts. Most notably, the Supreme Court of

[5] *See generally,* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[6] In the words of the Court:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . .In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[7] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting): "It is one of the happiest coincidences of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

[8] Warth v. Seldin, 422 U.S. 490 (1975).

[9] Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 11025 (1978).

New Jersey has led the way in judicially crafting remedies for exclusionary controls,[10] and other States have explored the merits of such mechanisms as the mandatory planning for low- and moderate-income housing or the feasibility of inclusionary zoning programs.

To some degree, this leaves unanswered the question of whether there is any meaningful constraint on the exercise of nonracially initiated land-use authority. I believe a proper understanding of existing judicial precedent suggests that land-use authority is properly limited to health and safety questions or—in the words of a recent Presidential commission—vital and pressing governmental interests. Unfortunately, contemporary Supreme Court decisions have clouded that interpretation of precedent. It would be worthwhile for the Court to remove the cloud of uncertainty and, once again, fully embrace a more limited notion of the police power. However, should the Court do so, it should not be an area dominated by the Court for the federalism reasons stated above as well as for reasons of proper judicial restraint. Moreover, if the Supreme Court continues to neglect the area, the adverse economic effects of exclusionary zoning are best addressed through the State democratic process, by means of amendment of existing land-use enabling authority.

Racially Motivated Exclusionary Zoning—A Denial of the Federal Guarantee of Equal Protection

Early in this century, the Supreme Court found zoning ordinances premised upon race or ethnicity to be unconstitutional.[11] Subsequently, efforts to employ private covenants and servitudes for discriminatory purposes met a similar fate.[12] The practice of exclusionary zoning under examination in this paper may be, but frequently is not, racially motivated.

Exclusionary zoning includes a broad range of land-use controls that, as a natural consequence of their enactment, raise the cost of land development, and that cost—if passed forward to the consumer—makes housing less affordable.[13] Regularly included in the exclusionary category are large minimum lot requirements, minimum house sizes, restrictions against manufactured homes and apartments, and a variety of other growth controls that may be implemented pursuant to zoning ordinances, subdivision laws, or mandatory planning measures.

When exclusionary zoning is challenged, it is normally done so under the equal protection clause. As a general matter, an equal protection challenge of local legislation will fail because of the regulator's presumption of validity and the deference to the rational basis test. Only where the local law affects a suspect classification, such as race, or a fundamental right, such as the first amendment guarantee of free speech, will a more compelling State justification be required. Since housing is not a fundamental right in Supreme Court jurisprudence,[14] the focus has naturally turned to the impact exclusionary zoning has on suspect classifications. The Supreme Court explicitly addressed this question in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*[15]

In *Arlington Heights,* the Court determined that a constitutional challenge to exclusionary zoning must be premised upon a demonstrated discriminatory purpose. In that case, the Court found that the Chicago suburb's denial of a necessary zoning change to build a federally subsidized, low-income housing project did not evince the requisite discriminatory purpose or intent. Significantly, the Court did not require that the zoning decision be based exclusively, or even primarily, upon the discriminatory purpose; it was enough if the proscribed purpose existed at all.[16] Thus, the Court appeared to obviate concerns, at least in terms of the plaintiff's prima facie case, that otherwise might be raised over a local government's mixed motivations. In adopting this approach the Court was following the advice of a large number of commentators who also concluded that some sort of motivation requirement was necessary for a Federal constitutional violation.[17]

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[10] *See, e.g.,* Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[11] Buchanan v. Warley, 245 U.S. 60 (1917).

[12] Shelley v. Kraemer, 334 U.S. 1 (1948)

[13] Whether or not the cost can be passed to the consumer largely depends upon the availability or unavailability of similar communities in which the consumer may find housing. The more unique the community involved, the more likely the cost of zoning can be placed on the consumer. *See,* Ellickson, "Suburban Growth Controls: An Economic and Legal Analysis," 86 Yale L.J. 385 (1977).

[14] James v. Valtierra, 402 U.S. 137 (1971).

[15] 429 U.S. 252 (1977).

[16] *Id.* at 265–67.

[17] *See, e.g.,* Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 Sup. Ct.

Although finding an impermissible legislative motivation is never an easy matter, the zoning process, being largely administrative at bottom, presents more opportunity for discovering an improper motivation than perhaps other contexts. Where illicit motivations have been kept out of the public record, however, a plaintiff may wish to turn to the disproportionate impact of a zoning measure for the purpose of having the court draw an inference of intent. Impact, however, is not dispositive, but rather, in the words of the Court, "an important starting point."[18] Beyond this, the Court may draw an inference based upon either a background of discriminatory actions or an unusual sequence of events. Thus, suspiciously quick rezonings, or incorporating a new municipality to exclude multifamily uses,[19] or adopting a general moratorium on permit approvals after receiving word of a low-income project[20] may allow a court more easily to infer an improper purpose. Moreover, if the plaintiff can show that the municipality acted out of a desire to further private racial prejudice extant in the community, that, too, will bolster the case.[21]

Although these objective factors of intent may be successfully gleaned from the typical zoning procedure, where the community employs a referendum device for enactment, that will not be the case. Here, the plaintiff may have to rely upon racial motivations expressed as part of the campaign for passage. The Court's decision in *Reitman* v. *Mulkey*,[22] invalidating a California initiative that would have prohibited legislative interference—by way of open housing laws—with a private seller's freedom to choose his buyer, is a case in point. As one comment put it, "*Reitman*...stands as prominent authority that referendum results may be challenged in terms of historical context."[23]

Purposefulness or racial intent is an entirely appropriate Federal constitutional standard for evaluating exclusionary zoning cases. The suitability of specific intent can be singularly premised on the fact that the 14th amendment was intended by its drafters to free the Nation of immoral racial distinctions that impede human dignity; the amendment was not intended as a license to remake society according to the preferences of those who wield judicial power. Since, as will be discussed below, zoning may be but a minor actor in comparison to income and personal choice in the ultimate division of a community, proof that a community is racially segregated tells us very little in itself about the causal relationship between a given zoning ordinance and the composition of the community. *A fortiori*, it tells us virtually nothing about the motivations of the enacting body.

Given the unreliability of impact-based evidence in the exclusionary zoning context, it is important not to bootstrap the sufficiency of that evidence into an attenuated definition of intent. In this regard, the suggestion of one commentator that intent be defined in accordance with a modified tort standard[24] —such that intent may be determined from the natural, foreseeable consequences that result—is nothing more than an impact standard in disguise. The commentator's suggestion that the test might be improved by adding the words "substantially certain"[25] as a modifier of consequence also fails, since it again skirts the Court's fundamental point that intent cannot be inferred from impact or consequences alone.

However, there is one extremely troubling aspect of the *Arlington Heights* decision, and that is the Court's discussion of the nature of the defense which may be raised by a municipality. Once the plaintiff satisfies his burden of proof by showing that a zoning decision was motivated by an improper racial purpose, the burden shifts to the municipality to demonstrate "that the same decision would have resulted even had the impermissible purpose not been considered."[26] Implicitly, and I believe improperly, this suggests that the presence of a mixed motivation may exempt a community from constitutional liability. Such a position runs counter not only

Rev. 95, 115–18, 130–31; Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 Yale L.J. 1205, 1281–84 (1970).

[18] 429 U.S. at 266.

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

[20] Kennedy Park Homes Ass'n v. City of Lackawana, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[21] *Compare* Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970) (local officials found to be effectuating the discriminatory designs of private individuals) *with* Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *aff'd*, 564 F.2d 126 (3d Cir. 1977) (opposition not traceable to racial motivations, but rather valid structural and safety considerations).

[22] 387 U.S. 369 (1967).

[23] Note, "Developments in the Law—Zoning," 91 Harv. L. Rev. 1427, 1675 (1978).

[24] Kushner, "Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States," 22 How. L.J. 547, 646–52 (1979).

[25] *Id.* at 649–50.

[26] 429 U.S. at 270 & n.21.

to Justice Powell's articulated concern in the majority opinion that a court search for purposeful discrimination even if it is not the dominant motivation,[27] but also to basic constitutional practice that demands a compelling State interest where a suspect classification is affected.

In truth, most municipal justifications will not meet the compelling interest test. So much of zoning is premised upon speculation and the predilection of the decisionmakers that it is extremely rare to get two zoners or planners to agree that a given policy is essential to the community's welfare. Certainly, the traditional verbiage about "spot zoning" or maintaining property values or the existing "small town or rural character" of a community falls well short of the mark.

Even if a municipality has a compelling (health or safety related) interest, it should show that it has been consistently applied in the past, and has not just been selectively discovered for this occasion. Moreover, the policy itself should be strictly scrutinized to determine if no less intrusive regulation could have accomplished the same result.

Before concluding this section, I wish to mention a point I initially raised in the introduction pertaining to the inadequacy of Federal constitutional litigation to reach intentional discrimination in housing. If nothing else, the above discussion should reveal some of that difficulty, and indirectly, the delay and cost of the constitutional course, especially to a private and often poor litigant. The limitations in this area were well anticipated by Congress in its enactment of the Fair Housing Act,[28] which allows for a host of administrative as well as judicial means to attack discrimination in housing-related transactions, including exclusionary zoning.

To meet more fully the burden on an individual litigant, however, the act should be amended to authorize the Justice Department to litigate individual discrimination suits and to seek injunctive relief during the conciliation process. At one point, HUD Secretary Samuel Pierce had such an amendment introduced into the Senate, but no action was taken.[29] The interests in favor of fair housing can only hope that the measure will be reintroduced and expeditiously enacted. The reintroduction of a strengthened Fair Housing Act would coincide well with the Secretary's budgetary request for approximately $4 million for a nationwide "testers" program—departmentally entitled the "fair housing initiative program"—to ferret out racial bias.[30] The Supreme Court's endorsement of the use of minority testers and the standing of white testers who reside within the community affirms the acceptability of the approach.[31]

Given the judicial recognition of testers in the sale-transaction context, it may also be possible to employ them to ferret out intentional discrimination in zoning practice through selective rezoning and permit applications. In my judgment, a "test" land-use proposal should be sufficient to satisfy the Federal constitutional standing requirement of a specific project articulated in *Warth* v. *Seldin,*[32] which is discussed below. Admittedly, however, the constitutional standing of testers is an open question, since the Court's discussion of testers occurred within the context of an application of the Fair Housing Act.

The Voluntary and Involuntary Causes of Racial Segregation

Segregation in housing has always reflected voluntary and involuntary forces.[33] This was true with respect to white ethnic immigrants to the United States, and it is true today for new immigrants, and in terms of race. Of course, describing what is voluntary and what is involuntary is problematic. If there is a cultural aversion or dislike of a given race or ethnicity in some housing markets, as there most surely is, it is hard to describe the decision of a

[27] *Id.* at 265–66.

[28] 42 U.S.C. §§3601–3619, 3631 (1982).

[29] Section 6(d)(1) of S.1612 introduced at the request of Secretary Pierce in the 98th Congress provided that:

> Whenever a complaint is filed with the Secretary,. . .,and the Secretary determines on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this title, the Secretary may refer the matter to the Attorney General with a recommendation that a civil action be filed on behalf of the United States for appropriate temporary or preliminary relief pending final disposition of a complaint by the Secretary.

The provision would substitute for §3610(d) of the current act, which largely places the burden of Federal fair housing enforcement on the person aggrieved.

[30] *See* n.3.

[31] Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

[32] 422 U.S. 490 (1975).

[33] Lieberson and Carter, "A Model for Inferring the Voluntary and Involuntary Causes of Residential Segregation," 19 Demography 511 (1982). *See also,* Erbe, "Race and Socioeconomic Segregation," 40 Am. Soc. Rev. 801; Farley and Taeuber, "Population Trends and Residential Segregation Since 1960," 159 Science 953 (1968); A. Schnare, *Residential Segregation by Race in U.S. Metropolitan Areas: An Analysis Across Cities and Over Time* (1977).

member of the disliked group as "voluntary," even if it was not blocked by institutional action. For example, with respect to black-white interaction in the housing market:

> the fears members of each group have of each other, especially when "trespassing" their residential turf, suggest that one group's choices or dispositions may easily reflect the other group's preferences and desires as well.[34]

Recent studies do suggest, however, that "there is no reason to believe that the level of residential segregation observed between two groups purely and simply reflects the totality of only one group's demands."[35]

Idiosyncratic prejudices are not very good subjects for the law, but are better addressed through the moral education provided directly by families, and secondarily through formal education. In this regard, although much attention has been properly expended upon ridding the law of racially motivated provisions, regrettably little attention has been focused by public and moral leaders, including those in the established churches, on inhibiting the development of prejudice and bias within the family structure itself.

In our society, preferences are expressed largely through income. Since there is a disproportionately large number of blacks in lower income ranges, it is not unreasonable to conclude that much of the black-white segregation between city and suburb reflects this income difference. Were incomes to be brought more into parity through economic growth and development, there is significant empirical evidence to suggest that blacks and whites would face home prices that are roughly equal when controlled for quality.[36] Relatedly, it has been shown that "middle- and upper-income blacks experience relatively little price discrimination in more affluent white areas."[37] Nevertheless, it is reasonable to conclude from the direct augmenting of housing incomes which has occurred through section 8 and housing voucher programs that even with increased resources, some black families would not *freely* choose a white neighborhood.[38]

My research has not found any source which can reliably approximate the relative significance of factors that make up current housing patterns. For example, some studies indicate that as much as one-half of a racially segregated housing pattern may result from income differentials.[39] Although other research reveals that "whites are willing to pay significantly more to live in a white neighborhood than blacks,"[40] there is also reasonable data to suggest that both blacks and whites would be "comfortable" in mixed neighborhoods of varying percentages.[41]

Several unpublished or incomplete studies indicate that using a colorblind income model, one would expect higher percentages of blacks in suburban areas,[42] yet these same studies are totally uncertain as to what accounts for the divergence in expectation. Certainly, it would not be unwarranted to attribute some of the divergence to illegal discriminatory barriers in the real estate, insurance, and financial industries. Again, here is where testers and Secretary Pierce's fair housing initiative program are most ideal. It is also not unwarranted to attribute some of the divergence to differing black-white opinions over the relative importance of such things as schools, proximity to work, shopping, and recreation. Again, empirical information tells us that there are racial or cultural differences as to what combination of neighborhood features is important.[43] In this regard, one harsh critic of housing practices in America has described the suburban lifestyle as "culturally myopic. . ., predicated on the

[34] Lieberson and Carter, n.33. p. 524.

[35] Ibid.

[36] Mieszkowski and Syron, "Economic Explanations for Housing Segregation," New Eng. Economic Rev. 33, 38 (March-April, 1978).

[37] Ibid., p. 39.

[38] Margulis, "Housing Mobility in Cleveland and Its Suburbs, 1975–1980," 72 The Geographical Rev. 36, 38 (1982). *See also,* Kushner and Keating, "The Kansas City Housing Allowance Experience: Subsidies for the Real Estate Industry and Palliatives for the Poor," 7 Urb. Law 239 (1979), suggesting that the absence of a "social service network" keeps minorities out of the suburbs even with the augmented income of a housing allowance. It should be pointed out, however, that the adequacy or inadequacy of a given "network" is in the eye of the consumer, and therefore, nothing in this experience directly refutes personal choice as being a highly significant factor.

[39] Mieszkowski and Syron, n.36, p. 35, commenting on the wide variation in empirical evidence with regard to the influence of income on housing choice.

[40] Ibid.

[41] Farley, Bianchi, and Colasanto, "Barriers to the Racial Integration of Neighborhoods: The Detroit Case," 441 Annals of the Am. Acad. Pol. & Soc. Sci. 97 (1979).

[42] Zelder, "Racial Segregation in Urban Housing Markets" (unpublished paper presented at the University of Chicago Conference on Housing) (1968); Johnston and Johnston, "Housing Segregation and the Open Housing Laws: The Case of Gary and Lake County, Indiana" (unpublished paper on file with the author) (1985).

[43] Lake, "Racial Transition and Black Home Ownership in American Suburbs," 441 Annals of the Am. Acad. Pol. & Soc. Sci. 142 (1979).

automobile and the split-level house with its attached two-car garage."[44] Surely, this statement implicitly if not explicitly suggests that in the perspective of some the suburb isn't everything it is cracked up to be. In this regard, the "gentrification" or return to the city movement pattern now found in major metropolitan areas suggests that a good number of household moves may be predicated on factors perhaps not only unrelated to race, but also indifferent to the disparaging things that are written about central cities.[45]

In all of this I have said very little about zoning and other land-use controls. As has often been recognized, every zoning ordinance is inherently designed to exclude. Given that, it would be foolhardy for anyone to deny that those land-use controls, such as minimum lot sizes, that add to the cost of the finished home product do not impede some black—and for that matter, white—entry into the suburbs. But, I would submit, it is currently impossible to state what percentage of exclusion those controls account for in respect to the large number of other variables, both voluntary and involuntary, identified above.

More fundamentally, since these exclusionary zoning measures—in order to survive constitutional scrutiny—must be intended for white and black alike, there is little basis for employing Federal constitutional or statutory assurance of equal treatment to invalidate such measures. As I argue later, blacks and whites are equally disserved by land-use measures that *unnecessarily* raise the cost of housing. To know whether a specific land-use measure is "unnecessary," however, one has to inquire as to what purposes are served. Are they economically rational? Do they pertain to the community's health and safety? Such questions are quite different from the issue of the statistical impact of a given regulation on a given race or income, and such inquiries are not well suited to the judicial process.

Constitutional Standing to Challenge Exclusionary Zoning

Thus far it is been argued that segregation in housing results from a confluence of factors, some voluntary, some not. That segregation which results from governmental barriers that are intentionally erected to exclude on the basis of race violated constitutional guarantees to equal protection. The various plaintiffs in the case of *Warth* v. *Seldin*[46] — considered in this section—wanted to push the analysis one step further, such that any land-use control that resulted in the exclusion of persons of low and moderate income would also be considered to violate the Federal constitutional guarantee of equal treatment. Although the Court in *Warth* refused to reach the merits, it did so later in *Arlington Heights*[47] (which was discussed in the section of this paper entitled "The Voluntary and Involuntary Causes of Racial Segregation"). As indicated, the Court denied the plaintiffs' constitutional claim in the absence of a showing of purposeful racial discrimination.

Briefly considered here is whether the Court properly refused to decide the merits in *Warth* by finding that none of the plaintiffs had the requisite standing. Obviously, this procedural issue is of considerably less significance in view of the substantive answer given in *Arlington Heights.* In addition, in *Arlington Heights* both the disappointed developer and a potential resident of the sought-after development were found to have met the standing test articulated in *Warth.*

Factually, *Warth* involved a challenge to the zoning ordinances of Penfield, New York, a suburb of Rochester, by present and potential residents of Penfield, Rochester taxpayers, a home builders' association, and two public interest organizations concerned with low-cost housing. To determine the standing of these plaintiffs, the Court considered constitutional and prudential limitations. The constitutional standards are derived from the Article III case and controversy requirement; prudential limitations are court-developed limits which ensure that the rights asserted are not of a generalized nature, but rather are personal to the plaintiff and not dependent upon the interests of third parties. Based upon these considerations, Justice Powell, speaking for the majority in *Warth,* imposed two requirements on the nonresident plaintiffs: first, the allegation of "specific, concrete facts demonstrating that the challenged practice harms *him,*" and second, that

[44] Kushner, "Apartheid in America," n.24, p. 567.

[45] Gentrification, of course, brings with it a number of unanticipated problems, including the dislocation of the residents of the gentrified neighborhood. *See* LeGates and Hartman, "Gentrification-Caused Displacement," 14 Urb. Law. 31 (1982). Nevertheless, it is undeniable that the vast majority of those seeking housing in central city and minority neighborhoods are white.

[46] 422 U.S. 490 (1975).

[47] 429 U.S. 252 (1977).

the remedial action prayed for will redress the alleged injury.

Both were absent in *Warth.* First, the plaintiffs failed to allege that any specific project was impeded by the zoning practices of Penfield—a failing the *Arlington Heights* plaintiffs rectified by focusing upon the denial of a rezoning for a federally subsidized housing development. Second, the Court found that the remedies available would not assure the plaintiffs the ability to live in Penfield, since their inability was largely a function of income and market conditions outside the scope of judicial relief. In the Court's own words:

> [The plaintiffs'] inability to reside in Penfield is the consequence of the economics of the area housing market, rather than [the town's] assertedly illegal acts. In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury.[48]

The second prong of the Court's standing test has been criticized as overlooking the obvious, if not precisely provable, cost relationship between restrictive zoning and the availability of affordably priced housing. Many speculate that the Court was simply unwilling to involve itself in "the complicated reordering of perceived local decisionmaking."[49] Given that economics or income (and not race) is the gap between the plaintiffs' injury and the desired remedy, the Court's reluctance is quite understandable. Nevertheless, this aspect of the opinion has produced a torrent of law review criticism, which echoed Justice Brennan's dissent to the effect that the Court was actually reaching the merits.[50] Whether it was or not, the confusion no longer exists, since the merits were reached in *Arlington Heights* where the absence of racial intent vitiated any hoped-for Federal constitutional remedy. Significantly, perhaps, to reach that decision the Court accorded a nonresident plaintiff standing in the context of a specific project, but without actual proof that he would actually be able to move into the proposed project. Thus, following *Arlington Heights,* one can conclude that the second prong of the test has been considerably relaxed.

Given the relaxed second prong, the Supreme Court has not had to decide squarely whether other plaintiffs with standing, primarily builders' groups, should have the ability to raise the interests of third parties who are excluded from the community. A Seventh Circuit decision suggests that the answer should be yes.[51] As long as the specific project requirement of the first prong of the *Warth* test is met, a good argument can be made that an individual builder or housing association should be allowed to raise the claims of the third parties who have been excluded. In such a case, the *Warth* Court's concern against deciding "abstract questions" would be less serious, since at least one proper party is before the court and judicial efficiency would speak in favor of entertaining strongly related claims.

Without a specific project, however, the other plaintiffs in *Warth* were also denied standing. Since the taxpayers of neighboring Rochester were asserting the legal rights of those excluded to get relief for their own separate injury—that is, the increased tax burden related to providing low-income housing—they fit squarely in the prudential rule against third-party standing. As to the associational plaintiffs, the Court found the home builders association to have no existing controversy with Penfield other than its generalized arguments against exclusionary zoning. Similarly, the housing council was also denied standing since, except for an earlier denial of a land-use variance for a low-income project which was no longer advanced by the council, there was no basis for finding that a concrete dispute remained alive.

Perhaps the most criticized denial of standing in *Warth* related to the allegations of Metro-Act, one of the two public interest groups concerned with housing. Metro-Act claimed standing on the basis that a percentage of its membership which was already resident in Penfield would be denied the benefits of living in a racially and ethnically integrated community. In stating this claim, Metro-Act relied on the Court's earlier decision finding standing on this basis in *Trafficante,*[52] where white residents of an apartment complex were given standing to challenge the landlord's discriminatory rental practices. What Metro-Act, and most of the

[48] 422 U.S. at 506–507.

[49] Note, "Developments in the Law—Zoning," 91 Harv. L. Rev. 1427, 1663 (1978).

[50] 422 U.S. 519, 520, 521.

[51] Hope, Inc. v. County of DuPage, 717 F.2d 1061 (7th Cir. 1983) (granting standing to a fair housing organization and 10 individuals of modest income in a suit against the County of DuPage for land-use policies that were alleged to have intentionally excluded members of racial minorities).

[52] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

Court's critics overlook, however, is the fact that *Trafficante* was a claim premised on Title VIII (not the Federal Constitution). Congress has conferred liberal statutory standing under the Fair Housing Act, which virtually prompted Justice Powell to wonder aloud as to why the plaintiffs did not raise the statutory claim.[53]

As a purely legal matter, standing was properly denied in *Warth* for a number of reasons. First, as already stated, the plaintiffs failed to allege a sufficient personal stake in the outcome. Absent a specific project, the plaintiffs' complaint amounted to no more than a generalized complaint against the outcome of the local political process. Such complaints ought not to invoke the jurisdiction of the Supreme Court. As one commentator has noted:

> The nominal defendant in *Warth* was the Town of Penfield. But the real defendant was a system of governmental land use controls. . . .Not even the most zealous advocate of reform is likely to maintain that the [Federal] constitution should be read to invalidate an otherwise valid regulation of land use merely because it prevents persons of low and moderate income from acquiring housing in a particular municipality.[54]

The key words in the above quotation are "otherwise valid regulation." The difficulty for many of the critics of *Warth* is that they cannot see past their own personal desires to use the Federal Constitution to redistribute wealth to the fact that the 14th amendment says nothing about that subject. Rather, the guarantee of equal protection is importantly and necessarily limited to denials of that fundamental right on the basis of race. In the hindsight of *Arlington Heights,* the matter should be put to rest.

Several other factors counsel against expanding constitutional standing. First, Congress has opened the Federal courthouse door to racially premised exclusionary zoning claims under the Fair Housing Act.[55] Even if it had not, the State tribunals increasingly grant standing to all of the types of plaintiffs present in *Warth.* Given the local nature of land use, State courts are the far superior forum for addressing the topic. In this regard, it has been noted that: "the U.S. Supreme Court could not possibly formulate meaningful and sensible standards for determining whether the supply of land for moderate- and low-cost housing is unduly restricted in the variant conditions of each of the nation's 200-odd metropolitan areas."[56]

Standing and the Fair Housing Act

The Fair Housing Act makes it unlawful to "refuse to sell or rent. . .or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."[57] By virtue of the congressional findings upon which the act was drafted, standing has been broadly conferred upon all "persons aggrieved." This classification has been interpreted as including the nonresident, minority, and associational plaintiffs denied standing in *Warth.*[58] In addition, representation of the interests of potential residents can be raised by developers, since the act forbids interference with those siding with or encouraging others in the exercise or enjoyment of their right to fair housing.[59]

The lower Federal courts have employed the liberalized standing requirement in the act to address exclusionary zoning issues. Although there is disagreement among the circuit courts on the issue of whether racial effect alone is sufficient to grant relief under the act,[60] and the Supreme Court has yet to directly address the issue, a significant number of courts have taken that course.[61] In this regard, on remand in *Arlington Heights,* the Seventh Circuit held that the village's refusal to rezone a particular piece of property for multifamily use could violate the act, even without direct proof of racial animus.[62] The Seventh Circuit, however, was unwilling to accept the proposition that "every action which produces discriminatory effect is illegal," because

[53] 442 U.S. at 513.

[54] Sandalow, "Comment on Warth v. Seldin," 27 Land Use Law & Zoning Digest 7, 8, (1975).

[55] In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Supreme Court found "a Congressional intention [in the fair housing act] to define standing as broadly as is permitted by Article III." *Id.* at 209.

[56] Sandalow, n.54, p. 8.

[57] 42 U.S.C. §3604(a) (1982).

[58] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

[59] 42 U.S.C. §284.

[60] *Compare* Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied,* 419 U.S. 1021 (1974) (effect alone sufficient), *with* Boyd v. Lefrak Organization, 509 F.2d 1110 (2d Cir.), *cert. denied,* 423 U.S. 876 (1975) (showing of discriminatory purpose required). It may be that the conflicting decisions in the circuit courts can be reconciled by focusing on the difference between individuals and municipalities as defendants. A stronger case can be made for discriminatory purpose in the context of individuals to avoid the wrongful identification of a private landowner as a racist, whereas the same considerations do not apply with the same force to an inanimate municipality that has an obligation to apply the law equally to all citizens.

[61] J. Kushner, *Fair Housing,* §3.02 & n.13 and accompanying text.

[62] 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).

that position would lead to "untenable results in specific cases."[63]

Given the discussion of the manifold causes of racial segregation in housing, one can readily understand the Seventh Circuit's judicial restraint in this area. In essence, the Seventh Circuit's approach might be characterized as "racial effect—plus" since, in addition to the strength of that factor, the court considered the presence or absence of racial intent, whether the zoning decision was arguably within the legitimate sphere of the municipality's discretion, and whether the plaintiff was seeking merely to remove government restrictions or require the local government to take affirmative steps to construct the housing desired. Whether the Seventh Circuit's thoughtful analysis or some even more encompassing impact standard will ultimately prevail, it is abundantly clear that the Federal courthouse remains a viable forum for challenging racially related exclusionary zoning.

Exclusionary Zoning and the States

Below the Federal level, the States have by no means been quiescent. Indeed, it is entirely plausible to argue that the Supreme Court's judicious handling of the 14th amendment issue is largely responsible for affording the States sufficient breathing space to construct a wide variety of remedial approaches to exclusionary zoning.

State action to remove exclusionary zoning has occurred on both the legislative and judicial fronts. Legislatively, the best known statute may be Massachusetts' antisnob zoning act.[64] Originally enacted in 1969, the act authorizes the sponsor of low- or moderate-income housing to appeal a local denial of a necessary permit to a State committee. By and large, the actions of the State committee in overturning local decisions found to be "unreasonable and not consistent with local needs" have been sustained by the State courts.[65]

Another statutory approach is exemplified by California, perhaps the Nation's most restrictive land-use State. In 1979 the California Assembly required that local governments enacting zoning ordinances or subdivision controls "consider the effect. . .on the housing needs of the regions in which the local jurisdiction is situated and balance the needs against the public service needs of its residents."[66] In recent years, the California Legislature has used the planning process to put more emphasis upon the needs of low- and moderate-income families. For example, the legislature requires that every California city and county prepare a general plan that contains a housing element, which "shall identify adequate sites for housing, including the rental housing, factory-built housing, and mobile homes, and shall make adequate provision of the existing and projected needs of all economic segments of the Community."[67] Other statutes require that both zoning and subdivision standards of local communities not be inconsistent with these planning requirements.[68]

The State courts, too, have been open to those challenging exclusionary zoning. As a general matter, standing at the State level has never been a severe impediment, as the definition of "person aggrieved" in State enabling acts has frequently been given the broadest of interpretations.[69] That point was underscored by what is perhaps the most-noted State opinion on this topic, *Southern Burlington County NAACP* v. *Township of Mt. Laurel.*[70] In *Mt. Laurel,* the State court granted standing to present residents of the township residing in dilapidated housing, former residents who were forced to move elsewhere because of the absence of suitable housing, nonresidents desiring affordable housing in the region, and several public interest organizations devoted to housing issues and racial integration. Reviewing a zoning ordinance that allowed virtually no residential use other than detached, single family, the New Jersey court found the local control to be contrary to every municipality's obligation to accept its fair share of regional housing needs within its boundaries. The court mandated that the township revise its zoning ordinance accordingly and provided site-specific relief to the developer who challenged the ordinance in order to allow a mobile home park.

Other State courts have echoed the New Jersey approach in different ways. In Pennsylvania, large

[63] *Id.* at 1290.

[64] Mass. Gen. Laws Ann. ch. 40B §§20–23 (1978 Supp.)

[65] Note, "The Massachusetts Zoning Appeals Law," 54 B.U.L. Rev. 37 (1974).

[66] Cal. Gov't. Code §§65863.5, 66412.2 (West Supp. 1980).

[67] Cal. Gov't. Code §65583, (West, 1983).

[68] Cal Gov't. Code §§65913.1–65913.2 (West, 1983).

[69] R. Ellickson & A. Tarlock, *Land-Use Controls,* 872 (1981). *See also,* D. Kmiec, *Zoning and Planning Deskbook,* 7.01[3][ii] (1985).

[70] 67 N.J. 151, 336, A.2d 713, *appeal dismissed and cert. denied,* 423 U.S. 808 (1975).

minimum lot sizes have been invalidated, with the court noting that "a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities can not be held valid."[71] Pennsylvania has also invalidated ordinances that unreasonably exclude nonnoxious uses like apartment houses[72] and mobile home parks.[73] The Pennsylvania courts are aided by liberal statutory authority to modify local zoning actions where the court determines that they reveal that the municipality has not "acted in good faith or made a bona fide attempt. . .to meet the statutory and constitutional requirements for nonexclusionary zoning. . . ."[74]

Similarly, New York and Michigan have invalidated zoning measures because they inadequately reflect regional housing needs. In New York, the State courts have been less willing than in New Jersey to mandate specific housing goals, but they have nevertheless provided site-specific relief to developers of multiunit structures who have been wrongly excluded and mandated general revisions of local zoning.[75] In Michigan, the State supreme court has struck down arbitrary exclusions of mobile homes from residential districts;[76] they may now be excluded only if the home fails to satisfy reasonable standards designed to assure favorable comparison of mobile and site-built structures.

Not all State courts have been satisfied with local progress in removing exclusionary elements in local regulation. Clearly, the most dissatisfied has been the activist New Jersey Supreme Court, which in 1983 issued a far reaching, 120-page review of its first *Mt. Laurel* opinion.[77] In *Mt. Laurel II,* the New Jersey court expanded a local government's obligation not only to eliminate impediments to low- and moderate-income housing, but also to undertake affirmative governmental measures to produce it. Every municipality indicated to be in a growth area on a State plan must provide a realistic opportunity for a fair share of the region's present and prospective low- and moderate-income housing need. To do this, municipalities must seek out available subsidies, allow for mobile homes, and employ various inclusionary zoning methods, which include both mandatory set-aside requirements and density bonuses for developers willing to undertake the effort. The entire process was put into the hands of specially selected *Mt. Laurel* judges who were empowered to award a "builder's remedy" to any developer who successfully challenges an exclusionary ordinance and whose project would be at least 20 percent devoted to lower income housing.

Now, there are plenty of problems in the *Mt. Laurel II* approach, not the least of which is the wholesale judicial encroachment upon State legislative functions. The State legislature in New Jersey has recently passed legislation to resume control of land-use decisionmaking,[78] but it remains to be seen whether the *Mt. Laurel* court will curtail its appetite for judicial legislation. More substantively, the inclusionary methods relief settled upon by the New Jersey court has been found by other State courts to be constitutionally infirm[79] and may, ironically, actually be exclusionary.[80] If developers are mandated to set aside a given percentage of units well below cost, the effect of the regulation is similar to that of a construction tax which both reduces the number of new units constructed and raises the cost of existing units by constricting supply.

At this point, however, it is not my purpose to dispute any of the State legislative or judicial approaches to the problem of exclusionary zoning. I have done that at considerable length elsewhere,[81] and I briefly indicate below what I consider to be the desired approach to placing all land-use control within acceptable limits. Rather, the point to be underscored here is the significant and highly varied directions of a great many States to the problem

[71] National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

[72] Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

[73] Nicholas, Heim & Kissinger v. Township of Harris, 31 Pa. Commw. Ct. 357, 375 A.2d 1383 (1977).

[74] Pennsylvania State. Ann. Tit. 53, §11011(1)(a) (Purdon Supp. 1979).

[75] Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975)

[76] Robinson Township v. Knoll, 401 Mich. 293, 302 N.W.2d 146 (1981).

[77] Southern Burlington NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[78] Pub. L. No. 1985, ch. 222 (approved July 2, 1985).

[79] Bd. of Supervisors v. DeGroff Enters. Inc., 214 Va. 235, 198 S.E.2d 600 (1973).

[80] *See* Ellickson, "The Irony of 'Inclusionary' Zoning," 54 S. Cal. L. Rev. 1167 (1981).

[81] D. Kmiec, *Zoning and Planning Deskbook* (1985); Kmiec, "Implementing the Recommendations of President's Commission on Housing," 8 Zoning and Planning Law Report (forthcoming 1985). For an extensive critique of the unfairness and inefficiency of the zoning process, *see* Kmiec, "Deregulating Land Use: An Alternative Free Enterprise Development System," 130 U. Pa. L. Rev. 28 (1981).

under examination. Had *Warth* and *Arlington Heights* "federalized" the issue, these State developments may very likely have not occurred. As one commentator put it:

> *Mt. Laurel* may be proof of the soundness of the *Warth* Court's rationale. It illustrates both the state court's superior perception of the local situation and its understanding of how planning jargon is used to cover prejudice. In addition, *Mt. Laurel* also indicates that the state courts, more than the federal courts, have the ability to supervise a major restructuring of land use policy.[82]

Nonracially Motivated Exclusionary Zoning

Throughout this paper I have argued for a separation of the issues of exclusionary zoning that is racially motivated and exclusionary zoning that is not. The former, I have stated most clearly, must be rectified and can be properly so under either the Federal Constitution or the Fair Housing Act. I have also hinted throughout that nonracially motivated exclusionary zoning must also be subject to serious examination. In part, that serious examination has been fostered by the report of the President's Commission on Housing,[83] which is discussed briefly.

Quite apart from its racial implications, zoning in America is out of control. Within our constitutional system, zoning and other land-use measures are economic regulations entitled to great deference by the courts so long as they do not exceed their intended mandate. In this regard, zoning was first found to be constitutional in the case of *Village of Euclid* v. *Ambler Realty*[84] over 50 years ago. Over that half-century, however, the meaning of that decision has been stretched not only to properly authorize land-use measures that prevent harm, but also those that merely enact—primarily at the expense of low- and moderate-income households—the esthetic standards of the affluent.

To indicate how *Euclid* has been misapplied, it is important to recognize that even though *Euclid* upheld the general constitutionality of zoning, it expressly left open the question of challenging specific applications of a zoning ordinance. Indeed, shortly thereafter the Court invalidated a specific application of an ordinance in *Nectow* v. *City of Cambridge.*[85] Nevertheless, many overlook the standard by which the *Euclid* court said specific applications of zoning measures are to be evaluated. The standard the *Euclid* court employed was *sic utere two lut alienum non laedes* (use your own property in such a manner as not to injure that of another).[86]

Commentary contemporaneous with the *Euclid* decision suggests that while the Court may not have believed that common law nuisance and the police power were exact equivalents, the Court surely viewed the police power as principally concerned with the prevention of harm. Thus, Professor Freund, writing 20 years before *Euclid,* could state that "under the police power [the state takes property] because it is harmful";[87] and James Metzenbaum, the foremost advocate of zoning who represented the village of Euclid, wrote 4 years after that historic case that, "[u]nless a [zoning ordinance] is enacted for the purpose of protecting the public safety, health or welfare, it cannot be expected to meet with the approval of the courts. And this is as it should be."[88]

The very facts of *Euclid* support this narrow interpretation. This too has been obscured, however, because the Court accepted in that case an ordinance which segregated single family homes from apartments, a segregation that is unjustifiable in view of modern construction practices. But the Court was not reviewing modern construction practices, but rather, tenements that, in the Court's own words, "[came] very near to being nuisances."[89]

Contemporary Supreme Court interpretation has clouded the original purpose of zoning expressed in *Euclid* and greatly expanded it. To comprehend how far the present Court has strayed, one need only remember the Court's modern-day rejection in *Penn Central Transportation Co.* v. *City of New York*[90] of the landowner's attempt to distinguish an esthetically based landmark preservation ordinance from earlier decisions concerned with the noxious use of land. Without support, the Court commented, "these cases are better understood as resting not on any

[82] Walsh, "Alternatives to Warth v. Seldin: The Potential Resident Challenger of an Exclusionary Zoning Scheme," 11 Urb. L. Ann. 223, 253 (1976).

[83] *The Report of the President's Commission on Housing,* ch. 15 (1982).

[84] 272 U.S. 365 (1926).

[85] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[86] 272 U.S. at 387.

[87] E. Freund, *The Police Power,* §511 (1904).

[88] J. Metzenbaum, *The Law of Zoning,* 7 (1930).

[89] 297 U.S. at 395. *See* Babcock and Bosselman, "Urban Zoning and the Apartment Boom," 111 U. Pa. L. Rev. 1040–49 (1963).

[90] 438 U.S. 104 (1978).

supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce widespread public benefit. . . ."[91]

Of course, unlimited police power and uncontrolled land-use authority do not necessarily produce widespread public benefits. As the two decisions of the New Jersey Supreme Court in *Mt. Laurel* reveal, it can just as easily result in widespread regulatory abuse, abuse which means that communities like Mt. Laurel are free to place over one-third of its developable land into an industrial holding zone and set aside the rest of its land for expensive, single-family homes on large lots.

In 1982 the President's Commission on Housing issued the following recommendation in order to place zoning back within the limitations—which, I contend, can be explicitly found in *Euclid,* and which other prominent scholars have traced to the provisions of the 5th and 14th amendments:

> To protect property rights and to increase the production of housing and lower its cost, all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a vital and pressing governmental interest. In litigation, the governmental body seeking to maintain or impose the regulation should bear the burden for proving it complies with the foregoing standard.[92]

Since the Commission's recommendation, there has been much discussion within the legal community pertaining to means of implementation. The Commission itself suggested three approaches. Optimally, States will respond to the challenge by incorporating the vital and pressing governmental interest standard into State zoning enabling acts.[93] If States fail to act, the Commission urges localities to employ the standard in local ordinances.[94] The Commission also recommends that the Attorney General consider utilizing the standard in appropriate litigation in order to have it judicially sanctioned as constitutional doctrine.[95]

Clearly, the first alternative, State enactment, is to be preferred. Not only is it more expeditious than the piecemeal local approach, but it is also more cognizant of the proper roles of the legislature and the judiciary. Although Supreme Court recognition of the proper limits of the police power would be welcome, strong traditions of federalism suggest that individual States should give content to the exact meaning of the vital and pressing governmental interest standard. A number of the Commissioners stated exactly this view.[96]

Of course, that does not mean that those concerned with the affordable housing crisis should not help the State legislative drafting along. Along these lines, following this paper, is a model statute that represents this draftsman's attempt to have the vital and pressing governmental interest standard enacted into law. In brief, this statute seeks to accomplish the following:

1. It expressly limits land-use authority to "the enactment of regulations which promote a vital and pressing governmental interest." The express statement is meant as a substitute for the vague, and often undefinable, "general welfare" standard that currently exists in most State zoning enabling acts.
2. It defines vital and pressing governmental interests as dealing primarily with collective public goods and infrastructure, and not primarily the design or location of private improvements. Thus, local governments would continue to be authorized to regulate and provide for the availability of sanitary sewer, water, street, utility, and other public infrastructure, but they could not impose site design requirements with only an esthetic justification.

The standard proposed in the model statute also allows for "the segregation or exclusion of noxious, nuisance-like or subnormal uses. . .which create a substantial and unreasonable risk of harm to the person or property of others." As a classic study of the nonzoned city of Houston reveals, most of this segregation will occur quite naturally pursuant to market choice.[97] The marginal cases that do not will be covered by this provision. Although there may be disagreement as to what is noxious or nuisance-like, there is considerable common law in the nuisance area to provide guidance. Those dissatisfied with the

[91] *Id.*

[92] *The Report of the President's Commission on Housing,* p. 200 (1982).

[93] Ibid.

[94] Ibid.

[95] Ibid., p. 201.

[96] Ibid., p. 202.

[97] Siegan, "Nonzoning in Houston," 13 J.L. & Econ. 71, 142–43 (1970).

vagaries of common law nuisance may wish to expressly define a standard of normalcy in terms of existing development within the community.[98] In fact, the model statute does just that.

A few matters are expressly set out as not being in furtherance of a vital and pressing governmental interest. These include highly restrictive and generalized growth controls, the placement of costs attributable to the community at large upon a specific landowner, esthetic regulation, and insupportable differentiations between site-built and manufactured housing.[99] It allows landowners and neighbors a reasonably expeditious way to challenge regulations enacted under the model statute.

There is perhaps nothing more unsatisfactory than the current judicial remedies available to landowners harmed by regulatory abuse. The litigation is costly and unlikely to result in any definitive relief. Nevertheless, the late Don Hagman suggested that in taking cases municipalities need to have their attention focused.[100] Professor Hagman relied upon administrative exhaustion for this purpose; the model statute employs a more informal notice of alleged invalidity to which the local governing body is given a limited statutory period for response. If the response is unsatisfactory, it may be appealed promptly to a hearing examiner and then to the courts.

In accordance with the Commission's recommendations,[101] neighbors within 300 feet of the regulated property are afforded the same opportunity to challenge a regulation as the landowner.

3. The model statute places the burden of proof or justification on the regulatory body. This is in accordance with the Commission's recommendations, and it is also the approach taken in exclusionary zoning cases under present law. Generalizing the requirement not only is more likely to result in less exclusion of low- and moderate-income families, but also properly places the burden of proof upon the party most likely to have the best information at the least cost.
4. Finally, the statute provides the landowner with monetary compensation for any period of time in which his property is the subject of regulation that does not promote a vital and pressing governmental interest. This is a simple matter of fairness, currently recognized by several members of the Court, most notably Justice Brennan, and long overdue.

The model statute, of course, is just one proposal. It is anticipated that if States choose to adopt this statute, or something like it, consideration will be given to including within it other specific provisions related to local practice, such as those functions currently carried out by the planning staff or commission in the review of proposed subdivision plats. However, the actions of any administrative body, like its legislative counterpart, should always be expressly limited to promoting a vital and pressing governmental interest.

Conclusion

What all this amounts to is the conclusion that racial segregation in housing is a fact born of many causes. Because of that, it is not easily overcome. Surely, legal means derived from both the Federal Constitution and statute can and must be employed to end intentional discrimination in housing. In this regard, notwithstanding carefully drawn tests for justiciability and standing, precedent suggests that the Federal courthouse remains open to the claims of those injured by purposeful racial discrimination. What we must be certain of is that the cases of intentional discrimination are brought to court. Disingenuous arguments against strengthening the Fair Housing Act or employing testers ought not deter us in this effort.

The Federal courthouse door closes, however, as the cause of discrimination becomes attenuated from considerations of race. This is as it should be. The Federal courts have not been empowered to remake society; indeed, they would fail greatly if they tried. Questions pertaining to the distribution of income are matters that are either beyond all governmental power or, in appropriate cases, for the legislature. In the housing field, Congress has not been neglectful as its generous funding of urban policy programs indicates. Today, one of the most significant issues in the tax reform debate concerns the impact any such

[98] Prof. Robert Ellickson has elaborated on the importance of distinguishing between above normal, normal, and subnormal uses in pursuit of an efficient land-use control system. *See* Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls," 40 U. Chi. L. Rev. 681, 728–31 (1973).

[99] On reasons why not to discriminate against manufactured housing, see Kmiec, "Manufactured Home Siting: A Statutory and Judicial Overview," 6 Zoning and Plan. L. Rep. (March & April 1983).

[100] Hagman, "Temporary or Interim Damages Awards in Land Use Control Cases," 4 Zoning & Plan. L. Rep. 129, 134 (1981).

[101] *The Report of the President's Commission on Housing*, p. 201 (1982).

reform will have on housing, and in particular, the construction of low- and moderate-income housing.

Beyond intentional racial discrimination and the distribution of income, however, two other factors play a role in the segregation of housing—nonracially motivated exclusionary zoning and personal choice. Serious questions have been raised with respect to exclusionary land-use measures that have not been adopted on the basis of race. Yet, these questions relate more to the scope than the motivation of a local government's police or regulatory power, and unlike racial zoning which the Federal Constitution rightly makes intolerable, the remedy for overregulation lies principally with the States. The model legislation that follows and that builds upon the important work of President Reagan's Commission on Housing may help in that effort. In addition, we can expect that the State courts will continue to fashion varied responses and remedies to the problem of nonracially motivated exclusionary zoning.

As to the other cause of racial segregation in housing—personal choice—so long as that choice is not premised on race, but rather on matters truly related to cultural, environmental, or other community amenities, no one can object. If, however, these articulated concerns are but a ruse, then we are left with the most difficult task of all, and that is educating ourselves and our children in the ways of Dr. Martin Luther King, Jr., so that a person is judged not by the color of his skin, but by the content of his character.

Proposed Model State Land-Use Enabling Statute (for enactment by State legislatures)

Section I

Land Use Authority Generally—Vital and Pressing Governmental Interests

In order that cities, counties and other political subdivisions of this state (hereafter collectively referred to as "political subdivisions") shall be well designed in a manner which secures the general welfare of both existing and prospective residents thereof, such political subdivisions are hereby empowered to enact only such regulations as can be shown by the political subdivisions by a preponderance of evidence to promote one or more of the following vital and pressing governmental interests:

1. The assurance of the availability of adequate sanitary sewer, water, street, utility and other public infrastructure resources;
2. The mitigation or prevention of damage from natural hazards, including fire or flood; or
3. The segregation or exclusion of noxious, nuisance-like, or subnormal uses (by standards of existing development within the political subdivision), or such other uses which create a substantial and unreasonable risk of harm to the person or property of others.

Section II

Land Use Authority—Specific Regulatory Power

To carry out the above vital and pressing governmental interests, political subdivisions may:

1. Plan and build streets, parks, public buildings, schools, storm and sanitary sewers, water mains, and such other facilities of public infrastructure as may be required;
2. Impose development fees, dedication requirements, servitudes, user fees and special assessments as may be necessary to cover the specific and unique fiscal costs of any proposed improvement or development;
3. Regulate and limit the height, area, bulk and use of improvements to be erected hereafter; and
4. Regulate the intensity of use of land and lot areas.

Provided, however, that no such regulation may be adopted which does not serve a vital and pressing governmental interest as defined in Section I, including without limitation, regulations which result in a generalized discouragement of the growth and development of the political subdivision; the placement of costs attributable to the political subdivision at large upon a specific landowner; the promotion of merely aesthetic or other subjective preferences unrelated to health and safety; or the differentiation of site-built and manufactured homes unrelated to health and safety.

Section III

Land Use Authority—Challenge by Landowner or Neighbor

The validity of any land use regulation enacted pursuant to this Title may be challenged by the regulated landowner or adjoining neighbor within 300 feet of the regulated property by filing a written notice of challenge with the governing body of the political subdivision. Such notice shall state why the

landowner or neighbor believes the regulation either fails to promote a vital and pressing governmental interest as defined in Section I or is contrary to those interests.

Within 30 days of receipt of the notice from a landowner or neighbor, the political subdivision shall respond by either justifying the sufficiency of the regulation under one or more of the specific vital and pressing governmental interests defined in Section I of this Title or by modifying or repealing the regulation.

If after 30 days the political subdivision has not responded or the regulated landowner or neighbor further disputes the validity of the original or modified regulation, the regulation may be appealed to a hearing examiner acceptable to the landowner or neighbor or both and the political subdivision. The hearing examiner shall conduct a hearing with representatives of the landowner or neighbor or both and the political subdivision and enter a written finding supported by substantial evidence as to whether the challenged regulation promotes a vital and pressing governmental interest.

The decision of the hearing examiner may be appealed to a court of appropriate jurisdiction. In all proceedings, the political subdivision shall bear the burden of proving by a preponderance of the evidence the existence of a vital and pressing governmental interest as defined in Section I and the manner in which such regulation promotes that interest.

In the event that the disputed regulation is partially or totally invalidated by a court of last resort, the landowner shall be compensated by the political subdivision for the full loss of market value suffered by the landowner during the period the regulation shall have been in effect, plus costs.

Section IV

Land Use Authority—Effect on Existing Regulation

Any zoning classification or designation of vacant or improved land among agricultural, industrial, commercial, residential, and other uses and purposes, as well as any land use regulation dependent upon such classification or designation, including without limitation, regulations, pertaining to height, area, design, bulk and use of land or improvements, yards, or open space, enacted prior to the effective date of this Title shall be advisory only unless reenacted by the political subdivision after the effective date thereof.

Section V

Land Use Authority—Effective Date

This Title shall be effective 6 months following the date of its Enactment.

RACIAL OCCUPANCY CONTROLS

Racial Occupancy Controls

By Roger Starr*

The litigation that has arisen in New York City over the efforts to promote racial integration in Starrett City, a large-scale moderate rental State-subsidized project, has national implications. The factual situation can be summarized briefly.

Starrett City is a 5,581-unit project erected in the 1970s on vacant land in Brooklyn, New York. It consists of 46 separate buildings, all of them elevator apartment houses of moderately high-rise design. The site is near one-family home areas developed since World War II; the homes are expensive. Yet Starrett City's location is far from ideal. It lies under one of the busiest flight paths to and from Kennedy airport. It adjoins land that has been used for years for sanitary fills; hundreds of thousands of tons of solid waste have been deposited. It lacks ready mass transit service direct to the Manhattan job market; residents must take buses to the nearest subway station. Jamaica Bay, the nearest and most appealing natural feature, once a source of shellfish and a place for swimming and recreation, remains untouchable. It is polluted by sewage effluents, particularly after rainstorms overload New York City's combined storm and sanitary sewers.

Previous major housing developments, notably Linden Plaza, in the same general area, rent for less money and, over the years since initial occupancy that began before completion of Starrett City, have become almost entirely nonwhite. An extension of nonwhite preponderance or exclusivity in Starrett City would have subjected nearby areas to a possible, though possibly temporary, loss in the value of homes. The prospect was unacceptable politically and governmentally. It would have been very destructive to ratable values, at least in the short run, and would have engendered enough opposition to make approval of Starrett City by the city's controlling body, the board of estimate, problematical.

Indeed, the several difficulties with the site, already alluded to, had discouraged its development for years. Economic analysis of development costs made clear that rents could not be kept low enough to make the area attractive as a cheap housing resource. The provision of special amenities, including swimming pool, year-round recreational facilities, extensive community space, and a power plant that would utilize methane collected from the adjacent sanitary landfill, would have required unusually heavy capital requirements. The investment would have resulted in rents near the upper limit of what analysis suggested as the probable range of rents acceptable in the area in which the project was to be located.

Accordingly, then, the plan of the private sponsors for marketing Starrett City was to rent it as an

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interracial development. The plan relied on the amenities and open space, and its semisuburban character, to make Starrett City attractive to white families. They had some measure of housing choice at the time the development came on the market. Its availability and rental range made it attractive to minority and especially to black families whose greater need for housing and smaller span of choices made them more natural applicants. It was also assumed that if the project was indeed to attract white families, its marketing plan would require that white families be convinced that they would be a substantial majority of Starrett City's residents. In fact, the marketing plan stressed that white families would be signed up as tenants before black families, and that the white families would occupy 65 to 70 percent of the apartments in the development. Because nonwhite families were expected to be of larger size than white families, it was understood that nonwhite individual persons, including children, would comprise more than 35 percent of the people living in Starrett City.

The program for marketing Starrett City was admirably designed to achieve its objectives. By building the best located buildings first and restricting blacks, it did succeed in starting with a preponderance of whites. Once they were in residence, the project was allowed to fill with tenants in which the major racial groups were represented on more than a token basis. Though not all of the minority families were in fact black, some being Hispanics and Asians, the project can fairly be described as an "integrated" project. A fair definition of project integration is a resident population in which the several races now living in New York City (or any other place where such a project happens to be) in numbers that reflect their presence in the general population. Further, they live in such social comfort that when a family of one racial group leaves, it will be replaced without difficulty with a family from the same racial group whose name appears on the waiting list. In short, racially, the population mix continues to be stabilized after the initial rent-up is completed.

As such, Starrett City's marketing program has not only achieved integration within the projects, but also has achieved community objectives. There has been no decrease in property values in adjacent or nearby homes. The project and its population have been accepted as a generally undamaging part of the wider community. And the substantial benefits of housing integration are offered by the development, or so it may be assumed. Specifically, the presence of the several races in one development will have an effect on the local schools. It is more likely to be able to exert pressure on the city board of education for smaller classes, better teachers, and budgetary changes than might be the case if the development were entirely filled with minority-group members.

In addition, it may be assumed that relationships between residents of different racial groups will be different from what they might have been if they did not know each other as neighbors. To this some might object that good fences are presumed to promote good neighbors. Living too close to other people may promote unfriendliness instead of harmony. Interracial friction in mixed housing in New York is not unknown but, given the distance that is common in heavily settled areas of Manhattan between those in which black families are concentrated, and those in which whites are, it can be assumed that, though there are risks in propinquity, anything that tends to overcome or offset traditional separation must be considered helpful and constructive.

Unless the interracial housing program at Starrett were to end in a publicized outbreak of hostility along racial lines, the effort to maintain the racial balance must be expected to make a significant contribution. There has been none. Although there are differences, cultural differences at any rate, between the traditions and interests of the races taken as a whole, some students argue that these differences are not so significant as they appear before members of the races have an opportunity to become familiar with each other. The prospect of interracial living must also be regarded as a contribution to the pride and dignity of nonwhites. None of these benefits is readily capable of quantification, but taken as a whole they suggest that, all else being equal, government policy in housing should be directed not only to seeing that discrimination against nonwhites because of their race does not exist, but that positive steps toward assuring housing integration are taken.

One of the more relevant arguments against the quantification of targeted minority-group and white shares in the labor force—that it contributes to inefficiency in the workplace—cannot be made with respect to apartment house occupancy controls. The qualification of tenants in an apartment house is a relatively simple matter, as compared with the

determination of a prospective employee's ability to perform the duties of the position applied for. An income large enough to cover the rental costs at the time of application, while leaving enough spendable income to cover normal household expenses, is the major tenant requirement. Usually it is assumed that families can spend, without discomfort, about one-fourth of their income for rent. It is not clear whether that means pretax or aftertax income. And sometimes it is challenged.

For example, I was called in 1970 as an expert witness to testify in Federal court on the question whether or not it was true that the dedication of no more of one-fourth of one's income to rent is customarily used as a measure of a prospective tenant's fiscal acceptability. In that case, the complainants were arguing that the owner of an apartment house complex in New York City discriminated against families on welfare by not admitting them to the project unless, as I remember it, their total grant from the human resources administration was four times the amount of their prospective rent. The complainants argued that so long as the total income was equal to the rent, it was none of the owner's business to know by how much it exceeded that standard. If the tenant chooses to eat nothing at all, that is his choice, and should not be the lessor's concern in judging his qualifications to rent the apartment. To the best of my recollection, the court developed a compromise formula that continued effectively to exclude tenants whose income did not exceed their presumptive rent by a considerable margin. Judging qualifications for a job in the face of numerical goals or quotas is a more intricate process.

In the case of two applicants for a job, one a member of the specially protected minorities and the other a white majoritarian, the application of a racial goal to the decision of which applicant to hire has a superficially benign aspect. The decision seems to favor the minority candidate, even if his or her qualifications are less convincing than those of the white person. It is easy to forget that the decision to favor the minority candidate is, in effect, a decision to reject the other applicant, even if more qualified, simply because he or she happens to be a member of the wrong ethnic group. In the case of picking a tenant from two qualified tenants, that reality is somewhat harder to avoid.

It is surely better for society not only that apartment houses are open to occupancy by members of all ethnic, religious, or racial groups who are economically qualified (and who can pass moderate screening as to credit-worthiness), but also that the actual tenancy be comprised of members of such groups in rough proportion to their presence in the local government's population. The question of how to achieve this goal with governmental help must next be settled. The Starrett City method—to take in as many white families as needed to keep the white population stable, and then to admit blacks and other minorities to fill the remaining apartments—was surely the only reasonable way to achieve the integration goal as just defined. There have, in other cases, been different solutions.

In Chicago, for example, the Lake Meadows and Prairie Shores developments, started by Fredin and Kramer in 1953, were apartment house developments on vacant land, similar, in that sense, to the Starrett City development. It was, therefore, possible to erect an apartment house complex intended for nonwhite occupancy, which in Chicago at that time meant black people. The project, having been remarkably well designed and favorably priced, filled rapidly with the population for which it had been intended. According to the developer, however, it proved to be so attractive that white families soon began to place their names on its waiting list in considerable numbers. The result was a racially integrated project without any Herculean or restrictive efforts on the part of the developers. They gave occupants a particularly good value, architecturally and as to site planning, at a good price.

That course was obviously not open to the sponsors of Starrett Housing because of the nature of the surrounding improvements and the political pressures—fostered, no doubt, by both racial stereotyping and solid economic fears—that local homeowners were quick to exert. Certainly, where a pattern of integration can be established in a development originally filled with minority-group families, government's role may be minimal. In projects it has financed, government may wish to exert some control over the waiting list for future occupancy, assuring that the list is open fairly to all who apply, listing them in precise order of their application. The list should be purged, at stated intervals, of those who have located themselves permanently elsewhere. The presence of applicants who are no longer seriously waiting for vacancies would discourage new, realistic candidates from applying. Occupants of the project who may not wish to encourage new applicants to add their names to the

waiting list—perhaps because they may look with fear at a change in the racial composition of the project—may fill the waiting list with the names of people who are not truly interested in it.

It is worth remarking that the waiting list question has from time to time been a significant barrier to racial integration in New York's middle-income housing programs. Incidentally, it is only in such government-subsidized programs that government supervision of the waiting lists for future occupancy is practical as a general rule. There may, however, be cases in which nonsubsidized, privately owned housing may be the subject of a finding of racial discrimination that is barred under local statutes. Such a finding is usually based on the experience of a minority or a mixed couple in seeking an apartment in the target building. If, after an advertisement of a vacancy, such a couple is told that there is no longer any vacancy, the disappointed applicants may then discover that a white couple visiting the building shortly afterwards is offered an apartment. If a finding of discrimination is made on such evidence, part of the settlement may include the establishment of a tenants' waiting list, and the relevant government agency may establish rules to assure that the list is not "stuffed" with names, real or fictitious, of applicants from the "right" ethnic group. Incidentally, the resistance to integration may not come from whites alone. There is often resistance from the minority side to the arrival in a black neighborhood of white families who may wish to buy houses, cooperative apartments, or sometimes even merely to rent in an attractive building traditionally black (that word—"traditionally"—is itself rather shaky because the black neighborhood may well have been white before a generation of whites found its houses too expensive to be a single family's sole house, and yet been unwilling to preside over the division of the houses into small apartments or single rooms with shared bathroom facilities).

The waiting list question is far more complicated than it appears to be. One of the major objectives of a housing program is to create a community with cohesiveness and stability, especially when the house in question is cooperatively owned, and there is no institutional link, such as membership on the part of many occupants in the same union. Incidentally, even if a project is sponsored by a local union, and its original occupants are affiliated with it, the degree of concentration of such members in the population diminishes over the years. To maintain their communal ties, a waiting list of prospective tenants who are friends of the present tenants or even related to them, directly or collaterally, may be very helpful. But, to the extent that it is helpful in strengthening community ties, it may also tend to block the entrance of minority-group families into the building.

As commissioner of the Department of Development of the City of New York in the early 1970s, I had to deal with the problem presented by a major middle-income development built under union sponsorship and financed by the city government. To the best of our knowledge, this development had neither a single black occupant in its 1,200 apartments nor one black family on its waiting list. Any new additions to its waiting list, added on the bottom, would have had to wait many years for an apartment. Some advisors urged that the whole waiting list be replaced by a new list that would begin with a number (no one would be specific as to how large the number was to be) of black families who would have precedence over the white families, some of whom had been on the list for years but still sought admission. I found this unacceptable, as it involved the deliberate selection of tenants by their race and, consequently, the deferral of others who had been waiting simply because of their race. We had no evidence that any specific black families had been excluded deliberately. I suggested that we order the cooperative corporation to advertise that the waiting list was being opened to new applicants who would have an equal chance to be inserted at the top of the existing list. The advertisements, I suggested, would be placed in newspapers and magazines circulated primarily among members of the specially protected minority groups, or on radio stations broadcasting primarily to minority audiences. After a stipulated period of time, the responses to these advertisements would be reviewed for qualification as tenants, and whatever number survived would be put into a fishbowl with an equal number of applicants drawn in order from the top of the existing waiting list. A new top of the list would be established by the order in which the applicants would be drawn from the bowl.

Unfortunately, I left the post of commissioner before the system was tried, and am unable to report on what happened. My suggestion was intended to put minority families in the project promptly while keeping out of government hands the unwelcome and, to my own taste, generally inappropriate duty

of refusing access to an apartment on the grounds that an applicant, otherwise qualified, has a face of the wrong color.

One of the reasons why this issue comes up in such acute form—perhaps I exaggerate by that term; I will return to it in a few paragraphs—is that the government's power to effectuate integration is actually very limited. Prointegration activity falls under the general category of what might be called positive law. A positive law does not forbid someone to do something. It is an injunction relatively easy to enforce. It is rather the kind of law that requires someone to do something that is much harder, indeed impossible to enforce. A government can prevent a murderer from committing a new offense by incarceration or, if it is so minded, by killing him; it can keep a building owner from discriminating by race or color in choosing his tenants by taking the building away from him. But as long as he is in control of the building, neither fines nor imprisonment can force him to rent to a tenant we choose for him. A determined noncombatant who refuses to fight as a soldier cannot be forced to do so, though he can be jailed; nor can anyone make a recalcitrant family move into a building occupied also by people with whom its members do not wish to live. We can, of course, punish the noncombatant when he, without good reasons that we recognize, refuses to take a step forward and repeat the military oath, and we can jigger the rewards and lighten the distasteful aspects of living with a member of the group to which the recalcitrant family objects. But that is a very different thing from being able to force compliance.

Clearly, the most comfortable route to integration in housing is by purely voluntary compliance in which the residents in the integrated housing move in together, not because its attractiveness is emphasized. They move in, not despite the integrated nature of the project, but because of it. The comfort of this route may be the direct result of the lack of speed. Several pioneering developers with a deep and laudable dedication to the idea of solving social problems with housing innovation—one of them being Morris Milgram, the founder of M–Reit, a real estate investment trust that confined its activities to racially integrated projects—have produced such housing. Yet, as has often been the case in efforts to mix social objectives with good business, the achievements, measured by the number of units produced and occupied and remaining stable, have not been gratifying.

The trouble here is basic. In primitive societies, community is inevitable; in more complex societies, people seek it. Without reviewing the disintegrating force of an industrialized economy in destroying the chain of economic relationships that strengthened interpersonal relationships in a preindustrial village, it is easy to see that common race and ethnicity have become a bonding force in the modern world. To overcome the resistance to the introduction of members of an unfamiliar racial or ethnic group into a neighborhood or apartment complex whose major force for unity has been just the opposite—its racial and ethnic homogeneity—is not easy. It can be facilitated if the new members and the older ones share a different, but strong basis of common interest. These can include age, marital status, and membership in a union, provided always that the union is in fact dedicated to interracial harmony. Common interests can also include dedication to hobbies or sports, provided these, too, draw their participants across racial barriers. In any case, however, the mating game, in which the adolescent children of the householders are the players, while the parents seek to be accepted as coaches or managers, complicates the matter. Many Americans have evinced a desire for racial or ethnic integration with their neighbors until the children approach the age of marriage.

Nonetheless, there is reason to believe that the barriers to transethnic marriages are far less formidable than they were in American cities a mere 50 years ago; speed, as already noted, is not one of the characteristic features of social response to racial or ethnic change. Intermarriages between Irish-Americans and Italian-Americans are common; intermarriage between Jews and non-Jews has been sufficiently frequent to disturb some Jews who worry about the prospective loss of numbers and those who do not recognize that frequently the non-Jewish spouse is committed to raising children in the Jewish community. The movement will certainly be slower in the case of interracial rather than merely interethnic liaisons, but there is movement nevertheless. But it remains a sufficiently fearsome event to many people on both sides of the color line to slow down and discourage interracial housing.

Analytically, we have indicated that the power of government to abet racial integration in a housing project is limited to taking steps to augment its attractiveness and to reduce its unwelcome features to families of the several races that may be involved

in a specific project. There have been suggestions for more forceful methods to accelerate interracial occupancy. During the 1960s, for example, a major New York tenants' group allowed one of its officials to suggest that all vacant apartments in New York City be registered with the appropriate branch of city government immediately, and that all future vacancies be registered as they occurred. The government would then assign families searching for apartments to one of these vacancies. The decision would be based in part on the degree of need of the applicants, and in part on the government's opinion as to which assignment would accomplish the most in achieving racial integration in the city.

The suggestion got nowhere. One need not search far for the reasons in a society with a free press and free election of public officials. The right to live where one wishes, subject only to economic facts, seems to most Americans implicit in their status. Its denial to many groups of Americans on the basis of their race and ethnicity seems to them a major deprivation. In fact, it is that very denial that makes it possible to assume that, for example, nonwhites today, and non-Christians in the not very distant past, and non-Nordics, in a slightly more distant past, and non-Protestants before them, would be willing and anxious to accept housing because it had so often been denied to them on noneconomic grounds. In the case of Starrett City, the desire of blacks for apartments at prices they could afford was the assumed premise of the program for integrating the project. The unusual amenities offered in the project, originally with the idea of bringing in white families, would simply be an added blessing for the nonwhites. The assumption, proven in practice, was that the nonwhites would be so grateful for the possibility of moving from wherever they had been living that they would accept, without resentment, the limits on their numbers in the project. Protest by the National Association for the Advancement of Colored People over the limitations on black occupancy did not arise until years after the project had been filled.

The slowness to protest the racial issue and the acceptance of a limit on black occupancy in return for a promise to be placed on the waiting list for future projects do not conceal the reality behind the nonwhite quota in Starrett City. The quota was the crucial amenity offered to whites. The initial television commercials advertising the project showed only white families in the swimming pool, although later commercials showed the pool with black families using it too. But the quota system in effect played on the greater need of black families for housing by getting them to accept a limitation based on color. Although the motives of the Starrett City people were unimpeachable, for they were intended to make politically acceptable a project that would otherwise not have been built at all, the fundamental reality was that the project management was telling some black occupants that, despite all other characteristics, they could not be admitted to the project because their skin color was wrong.

Even though that refusal of an apartment to a black applicant on the basis of race produces movement towards integration, such invidious discrimination remains the very evil that the civil rights movement has attempted to change. In rejecting the use of such a racial basis for choosing tenants, believers in nondiscrimination argue that the advocates of racial quotas in the pursuit of integration are no different from those who supported the doctrine of separate but equal. Advocates of a limit on black admission to housing projects assume that racial characteristics are more important than all other indices of human worth. They have, in effect, looked black people in the eye and said that their race precludes their presence in a housing project, all other characteristics being irrelevant. To this accusation, the answer that no black was finally denied admission to Starrett City is hardly persuasive because at the same time that the blacks were being denied entry, white people were being admitted. The argument that the discrimination against blacks is done in a righteous cause, because it is intended to prepare the way for a fuller, not a diminished, role for blacks in American society through the development of integrated housing, also falls short of being convincing. The same argument was used by the more persuasive of the antiabolitionists. They, too, were arguing for what they conceived to be a better world; they were protecting black slaves, who were undereducated, accustomed to dependency, and totally ignorant of the methods of a commercial society, from being released without help into the wage slavery and anonymity of industrialism.

Despite the merit in the arguments for a limit on black occupancy to produce integration, the fundamental trouble with them is that both would permit the unqualified general use of an unacceptable social device—discrimination on the basis of color—pro-

vided only that those who would employ it conceive that they were using it in the pursuit of supreme social value. Proponents of the quota limit argue that they are being realistic—while opponents are not. Proponents say that the achievement of racially integrated housing, without which true black progress in American life would be impossible, cannot otherwise be achieved soon. In a real-world social order, in which time is limited for achieving social objectives that are of great importance to some segment of the population (and that do not violate constitutional principles), it is possible to argue conscientiously that important principles can be overlooked if the weight of necessity is sufficient. Thus, some who advocate government assistance to assure black economic, educational, and social advancement argue that, despite their own insistence that color blindness is an essential principle of American government, it should be put aside, from time to time, when weighty objectives could not quickly be achieved by the policy of color blindness. Their argument continues, if those principles are not quickly achieved, they would not be achieved at all.

This respectable argument, applied to housing occupancy, would rest its claim on the proposition that integrated housing, not simply nondiscriminatory housing, is essential to black progress in the three areas listed. I might add that, as a personal matter, I cannot accept this argument for integration by limits on black occupancy. I cannot pull the switch. As a housing official, I found it impossible to adopt policies that required me to accept or refuse admission to a housing project by reason of the applicant's race or ethnicity. For me, the argument ended there. But I accept the fact that others, of at least equal seriousness in dealing with the elimination of racism in public and private affairs, were not so inhibited. For them it is necessary to examine whether the distinction between nondiscriminatory housing and integrated housing is weighty enough to justify the application of racial factors in excluding some applicants.

Faced with this choice, I would have to argue that, in my view, the distinction between nondiscriminatory housing and racially integrated housing is not so material as to justify the substitution of the second for the first by applying entrance criteria that would limit nonwhite tenants to a specific numerical quota. To the argument that without such quotas there could be no guarantee that any nonwhites would be admitted as residents, I would have to admit that such an outcome is indeed possible. It is also possible, though I would imagine it to be less likely, that in housing intended to be integrated, and so made more attractive to whites by a numerical limit on black residents, the black limit might be set so high in relation to the lack of attractiveness of other features of the development that whites would refuse to live in it. Or it might be so low that blacks would be repelled by it. There are no guarantees.

Assuming, *arguendo,* that the amenities and the restrictions on nonwhite occupancy are so artfully arranged that white families apply and are accepted while the nonwhite quota is filled with the relegation of the surplus applicants on the waiting list, what have we really achieved? In the specific case of Starrett City, we achieved political approval for the housing project construction; nearly 6,000 units of good housing have been completed. We have also turned unused land, with some inherent defects, into a good site; provided a background for the organization of a large number of community organizations; and provided a local school population with an approximate 50 percent nonwhite level of enrollment, a percentage that has been reached because the reproduction rate of the nonwhite population is higher than the whites' rate.

The total occupancy remains stable, but testimony by the project's expert witness, architect, and social scientist Oscar Newman makes clear that stability requires the continuing existence of the admissions quota system that limits nonwhite occupancy. We have not, in short, established that an integrated housing project in the section of New York City where Starrett City is located will, without continuing controls, perpetuate its racially mixed character.

That such a pattern of stable racial mixture is not self-perpetuating would not be in the least extraordinary if we did not force ourselves to forget that the natural form of settlement in American cities reflects ethnicity and religious differences in much the same way that it reflects race. New Yorkers frequently describe theirs as a city of neighborhoods, by which they mean many different things, but one of the clearest is their meaning that while the city as a whole is cosmopolitan, made up of the gross of many different ethnic strains, the neighborhoods, with few exceptions, are likely to be homogeneous. Any old-time New Yorker brought up in the more crowded parts of the city will be happy to regale modern listeners with stories of the bitter fights over "turf" between his ethnic group and its rivals.

As black Americans gain economic and political strength, it is only to be expected that many of them will wish to provide for themselves and their children neighborhoods that will express their own culture, living habits, and tastes in food, clothing, furniture, and entertainment. Obviously, they will not choose to remain in the slum neighborhoods in which they began their New York experience, just as the Irish no longer live in Hell's Kitchen in great numbers (its name has been changed, no doubt to protect the innocent), nor Germans in Yorkville, nor Jews on the lower east side or in east Harlem. When these groups moved to better neighborhoods with improvements in their economic condition, they replicated the ethnic homogeneity of their old neighborhoods.

The same is true of New York's blacks, many of whom left Harlem for St. Alban's and other suburban sections, and President Street and its environs in Brooklyn and other middle-class urban locations. Some of each of these groups do want to live in integrated communities. There are many of these in a city as large as New York. But as previously noted, those that remain integrated over the years are able to do so because their residents choose it to be that way. What most people want is choice.

These remarks, though centered about New York City because the issue of racial controls in Starrett City arose there, apply equally well to other metropolitan centers with diverse ethnic and racial populations.

A second reason for doubting that the achievement of housing integration by itself justifies the discrimination against specific tenant applicants on racial grounds is that nothing in the quota system directly alleviates the most difficult problem faced by minority groups—namely, the blacks and the Hispanics—in their effort to exercise housing choice. That is the lack of sufficient income to make the exercise of choice possible. As a practical matter, the greatest housing problem faced by these minorities today, given the laws in support of open housing, is difficulty in paying the rent. Many black families who would like to live in Starrett City but cannot are not excluded on racial grounds per se; they do not show up as statistics. They are excluded by their limited income.

It is certainly far beyond the scope of this paper to suggest ways in which income for blacks and Hispanics can be improved, but it has to be noted that the resistance to nonwhite movement into a white middle-class area is as much a matter of economics as of race. If the surrounding white community were convinced that the black and Hispanic families who moved into Starrett City were of the same or similar economic status, their opposition would not be so great. Indeed, we might speculate that a policy of restricting nonwhite occupancy serves to reinforce the impression that blacks are economically inferior. Certainly, the imposition of a quota on nonwhites may also make some of the more impressionable among them feel that they are stigmatized, an impression that has long ago been implanted in any case by all too many aspects of American race relations. What makes the kind of stigmatization that takes place in Starrett City all the more galling, however, is that it is imposed by the United States Government and its sovereign State, New York, in the name of doing something to enable black people to live with whites as near neighbors.

Recognition of this fact has probably played a part in the apparent wavering of the National Association for the Advancement of Colored People (NAACP), or, more correctly, its New York chapter, in its traditional support of government help in creating an integrated project by limiting black occupancy to assure a substantial white presence. There is no wavering in the association's support of governmental intervention to assure a nondiscriminatory policy on the intake of tenants, specifically, black tenants. Perhaps the intervention of the NAACP in the Starrett City matter, in an effort to stop the integration program, was motivated by uncertainty and confusion over what steps within the reach of the association will actually be of help to nonwhites in the United States. Even if a sense of disappointment over the lag in the advancement of the more depressed and disorganized part of the black population has produced second thoughts over the past agenda, the new rejection of the integrationist goal in housing may reflect a new emphasis on forcing blacks to feel pride in their own company and accomplishments.

Certainly, such a go-it-alone policy has become characteristic of some current black political action. In that sector of human activity, going it alone was only one phase of a far more complex process by which newly arrived or enfranchised groups asserted a claim to political power. Members of the group tended to vote for a candidate of their own ethnicity, no matter which party label he bore; but they

also recognized that as members of a minority, they could not make general progress until they had proven their ability to form coalitions with other groups, and would support *their* candidates in return for making common cause. Thus, going it alone without coalition building is a dangerous maneuver for a minority. Going it alone in housing may make a similar appeal to group consciousness, but it does not raise a similar risk. It is far more in the urban tradition of non-Anglo-Saxon groups to live separately, to unite behind a local candidate of their own group, and to submerge racial identity on behalf of a candidate not of their group, who promises to take their interests seriously. To place housing segregation ahead of political integration reverses the traditional pattern by which new groups asserted power.

Yet, even as one considers the precedent, it is obvious that no ethnic group is homogeneous, nor is the black group. There are blacks who prefer to live in a racially integrated neighborhood because they feel, among other sentiments, that the progress that may be expected of their children will require them to grow accustomed to and to succeed in mastering the ways of life of the majority white society. One of the promises of a diverse, self-governing society whose economy is based on a free market, or one as free as possible, is that choices will be available. It is hard to imagine that integrated housing will be available for any substantial number of aspirants *within a reasonable span of years,* unless government is prepared to take the step of limiting black occupancy, favoring white prospective tenants, and holding apartments vacant until applicants for the units match the deficit numbers in the prescribed racial formula for integration.

These measures, so patently contrary to the nonascriptive traditions of American democracy, should be specifically and frankly authorized by law, but only when applied to a small fraction of the government-assisted housing units coming on the market. The purpose is to give those minority-group members willing to accept an overt limitation on their number an opportunity, freely chosen, to live in racially integrated housing. The policy should state frankly that it means the presence of majorities and minorities in the same building under conditions such that neither group shall occupy less than 35 percent of the total number of apartments. (It is obvious the formulation of the preceding sentence has tortured the terms "minorities" and "majorities" totally out of shape, because, by definition, the minorities in the general population might actually constitute a majority in a particular project.) The plan for establishing such a program would have to be approved by the appropriate government authorities following public hearings. The fight to keep apartments vacant for integrationist purposes should be limited to a specific number of years, probably not exceeding 7, stipulated in advance. The theory is that after that period of time, if the desirability of integration does not meet a market test by the establishment of an interracial waiting list that would continue a salutary, stable mix, the whole integrationist program would have demonstrated its unacceptability to the population.

Obviously, no one can be sure that such a program would meet legal challenges to its constitutionality under Federal or State charters.

Certainly, given the present stringency of the housing market in some parts of the country, the prospect of having to wait for a new apartment until the balance of tenancy made further nonwhite entrants acceptable would be daunting. It is precisely in such areas that black inhabitants would be least likely to move out. It could also be argued that in such areas the pressure on blacks to find housing without considering its racial mixture would increase the black demand for an expansion of nonwhite occupancy limits. On the other hand, it is in just such housing-shy communities that white families would be most likely to opt for staying in a project in which they are living. Even if the percentage of black occupancy rises above the predicted norm, the physical value of a home to white families is likely to outweigh the discomfort or embarrassment of living in a development with a big and growing black population.

In the communities where, as is now often the case, there is a surplus of housing, with many vacancies and severe pressure on owners to cover expenses, the willingness of management to resist filling vacancies with whoever applies will be irresistible. In this type of community, in which ample housing choices are available, especially to white families, the tolerance of those in an integrated project for a black population that exceeds the promised number is likely to be quite low. As white families move for frankly racial reasons, the pressure on other white residents to do likewise becomes irresistible. All but the least mobile white families move out. Somewhere on a graph it would be

possible to pick a set of coordinates at which the rate of white departures picks up significantly and to call that point the "tipping point." It seems clear from the previous discussion that the location of the tipping point is determined by many factors other than racial feelings and the sense of identity. The condition of the real estate market in a specific area will be crucial, as will the character of the development whose integration is threatened. As pointed out, the willingness of white families, in more than token numbers, to live in the same buildings with blacks depends on the balance between attractions and disadvantages in which for most whites, the presence of blacks will be construed as a disadvantage, but probably not for most a crucial disadvantage.

Thus, in a well-located project, the advantage-disadvantage balance is likely to permit black occupancy to reach a high percentage of the total before it becomes impossible to find a new white family to replace each white family that moves out. In a poorly designed, and most important, a poorly managed development, the tipping point, as defined, will likely occur at a much lower level of black occupancy.

It should also be understood that occupancy characteristics are far more subtle and distinctive than this simple division of color would suggest. I have attended innumerable public hearings in New York City at which site approval for publicly assisted housing developments was discussed. There has been at least one occasion on which black speakers objected strongly to the construction of a specific low-rent public housing project. White families living in the same neighborhood supported the proposed project, which would be expected to be occupied in large part by black families.

On a simple racial basis, this behavior would be impossible either to predict or to explain. But it makes perfect sense when other details are sketched in. The white families, in this case, were living in a large, union-sponsored cooperative project. Many of the occupants of the cooperative, being of modest income, hoped that the public housing would provide nearby homes for their elderly parents. The blacks, on the other hand, were of fairly comfortable middle-class, home-owning status, and most of those who testified against the public housing (they were supported in their opposition by the State branch of the NAACP) were fearful that the construction of low-rent housing in their neighborhood would diminish the value of their homes. Speakers expressed the opinion that if they were white instead of black, no one would dare suggest building a low-rent public housing project near them. Ironically, this testimony was offered at the same time that the New York City administration was trying to build a high-rise, low-rent public housing development in Forest Hills, only 8 miles or so from the site to which the black speakers were objecting. (The NAACP favored the Forest Hills development, along with many other groups interested in interracial housing and in an end to housing segregation.)

I have also heard a famous leader of a black civil rights group testify at a public hearing in New York City in opposition to a change in the zoning map. The change would have facilitated the construction of a high-rise apartment house across a boulevard from a garden apartment development in which the black leader had been living for 8 years. He opposed the change in words that could have been picked up phrase by phrase from speeches made in communities across the land, attacking governmental plans to bring people of a different type into a happy homogeneous area. The black speaker, of course, was referring to a homogeneity based on cultural and economic characteristics; the objectors that one is more likely to hear from in suburban communities are usually, though not always, thinking of a homogeneity based on skin color or, perhaps, religion.

My purpose in raising this issue is not to embarrass middle-class black people. On the contrary, no group in American life needs and can benefit from support from the outside quite so much as the black middle class. My purpose is, rather, to emphasize how complex is the problem of widening the concept of residential community as Americans now frame it. At the same time, I think these bits of evidence point out that the achievements of a few, or even of many, Starrett Cities would seem to me to have minimal consequences for making integrated racial communities a natural form of American settlement.

I do believe that until they—racially integrated communities—are achieved naturally, because people accept those of a different race unthinkingly as a part of the same community, such communities will be neither stable nor numerous. And in order to achieve them, we are exposing our posterity to the terrible risk of authorizing government to exclude residents on the basis of race per se, if it assumes that

the purpose of such invidious discrimination is socially beneficial.

For the purpose of offering a free choice to some or, more properly, a few black families, I would counsel acquiescing in this risk on an experimental, temporary, and frankly explained basis. But I myself set somewhat higher standards for what I would be willing to regard as an integrated community; it must be freely chosen or it becomes meaningless. And it will not be freely chosen unless government understands how important to the society as a whole educated free choice in housing accommodations must be. Free choice will not be achieved in housing unless the economy is sufficiently productive to make the choice a reality. It will not be achieved when the government itself threatens it by programs in other activities—employment, government service—dominated by heightened color consciousness and invidious discrimination of an allegedly benign character. It will surely not be achieved by tinkering with test results to minimize the benefits of self-discipline and intellectual effort, but by redoubling the investment now being made in rendering education important to its youthful constituency.

To the extent that occupancy controls establish the principle that integrated occupancy can only be achieved by restricting the freedom of choice in housing for one group or another, they will achieve whatever short term goals they do achieve only at the cost of making black-white cohabitation seem ever more strange and less welcome.

Racial Occupancy Controls and Integration Maintenance: A Constitutional and Statutory Analysis

By Rodney A. Smolla*

Introduction

Integration maintenance plans have been around for some time and may be increasing in popularity in some quarters. In the last 3 years, several important test cases have reached the lower courts. Three provocative examples are *Arthur* v. *Starrett City Associates,*[1] *Williamsburg Fair Housing Committee* v. *New York City Housing Authority,*[2] and *Burney* v. *Housing Authority of the County of Beaver.*[3] The allegations in the *Starrett City* case are that the defendants are operating a housing complex in Brooklyn, New York, with approximately 17,000 tenants, pursuant to a racial quota limiting the percentage of apartments rented to minority-group members to 30 percent. The *Williamsburg* case involved a housing project operated on a quota allocating 75 percent of the apartments to whites, 20 percent to Hispanics, and 5 percent to blacks. The *Burney* litigation involved a more fluid quota system utilized by the Housing Authority of Beaver County. With regard to each housing project run by the authority, if the percentage of black-occupied units in a project was greater than the percentage of black-occupied units in all of the housing authority's units, then the project was labeled as having a "black racial imbalance" and whites had priority for apartments in it. Conversely, if the percentage of black-occupied units in the project was less than the percentage of black-occupied units in the total number of authority projects, the project was labeled as having a "white racial imbalance." In all three cases the plaintiffs were *minority-group* organizations and individuals who claimed that these "ceiling quotas" discriminated against them on the basis of race or ethnic heritage. In all three cases the defendants attempted to justify the "integration maintenance" quotas on the grounds that they were necessary to prevent "tipping" and "preserve integration." The two primary legal challenges to integration maintenance involve the equal protection clause of the 14th amendment and the Fair Housing Act, Title VIII of the Civil Rights Act of 1968.[4]

Constitutional Analysis

Purposeful Intent

The first constitutional line of defense for integration maintenance is that such plans, because they are enacted from benign and altruistic motives, are free

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[1] 89 F.R.D. 542 (E.D.N.Y. 1981) (*see also,* United States v. Starrett City Associates, 605 F. Supp. 262 (E.D.N.Y. 1985).

[2] 493 F. Supp. 1225 (S.D.N.Y. 1980).

[3] 551 F. Supp. 746 (1982).

[4] 42 U.S.C. §§3601-3609.

of any "discriminatory intent" and are, therefore, completely immune from equal protection attack. It is, of course, quite accurate that under the Supreme Court's holdings in cases such as *Washington* v. *Davis,*[5] *Arlington Heights* v. *Metropolitan Housing Development Corp.,*[6] and *Personnel Administrator of Massachusetts* v. *Feeny,*[7] discriminatory intent must be proved to establish an equal protection violation. "Purposeful discrimination," the Court has held, "is the 'condition that offends the Constitution'." Because the "central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct on the basis of race," there can be no constitutional violation in the absence of purposeful intent to discriminate. But the attempt to characterize integration maintenance plans as immune from equal protection attack for lack of discriminatory intent completely misconstrues what the Supreme Court means by "purposeful" or "intentional" discrimination, by confusing "intent" with "motive."

In all of the Supreme Court decisions that have elaborated on the intent requirement, the statute or regulation at issue has been *facially neutral.* In contrast to the public housing dispute in *Arlington Heights,* or the job exam dispute in *Washington* v. *Davis,* for example, both of which involved challenges to classifications facially unrelated to race, the integration maintenance plans all involve a purposeful, acknowledged use of racial criteria. In *Washington* v. *Seattle School District No. 1,*[8] the Court clearly distinguished between facially neutral and racially explicit governmental activity, saying that "when facially neutral [action] is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the [action] in some sense was designed to accord disparate treatment on the basis of racial considerations." So too, in *University of California Regents* v. *Bakke,*[9] which involved the allegedly "benign" but nonetheless explicit use of race, the Court again emphasized that "this is not a situation in which the classification is on its face *racially neutral,* but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate." And in *Feeny,* the Court held that "a racial classification, *regardless of purported motivation,* is presumptively invalid and can be upheld only upon an extraordinary justification." In sum, integration maintenance plans quite clearly *do* involve purposeful discrimination within the meaning of that requirement as used by the Supreme Court.

Selecting the Proper Equal Protection Test

The second line of defense for integration maintenance is the claim that even if such plans are subject to constitutional scrutiny, the level of that scrutiny should be something lower than the stringent "strict scrutiny" standard that normally applies when racial classifications are at issue. The lower courts that have dealt with this contention have *unanimously* rejected it; all have applied strict scrutiny. These courts have been in the unenviable position of trying to make sense of the confusing Supreme Court holdings in *Bakke* and *Fullilove* v. *Klutznick.*[10] The lower courts have, nonetheless, done an excellent job of reaching the most plausible explanation of *Bakke* and *Fullilove* in the context of integration maintenance: Faced with an integration maintenance case, the Supreme Court today would surely invoke strict scrutiny. The Supreme Court held in *Bakke* and *Fullilove* that some forms of governmental race-conscious activity are permissible under the equal protection clause. The Justices produced 11 separate opinions in the two cases. The Burger Court, understandably, is as divided as American society, as divided as the Republican and Democratic parties, on precisely how to address the government's "ameliorative" use of race. Despite the multiplicity of opinions in the two cases, however, the messages in the opinions *for the limited purpose of analyzing integration maintenance* are reasonably clear and uniform.

A definitive majority exists on the Court in support of three positions: (1) some use of race in governmental programs is permissible, but its use is limited to programs that are "remedial"; (2) the term remedial refers only to programs that *enhance* minority opportunity in response to the lingering effects of past racial discrimination; and (3) even remedial race-conscious programs are illegal if they are not well tailored to effectuate their remedial purposes. If the opinions in *Bakke* and *Fullilove* are reduced to their lowest common denominator, even

[5] 426 U.S. 229 (1976).
[6] 429 U.S. 252 (1977).
[7] 442 U.S. 256 (1979).
[8] 458 U.S. 457 (1982).
[9] 438 U.S. 265 (1978).
[10] 448 U.S. 448 (1980).

those Justices who are the most lenient in approving the remedial use of race would absolutely prohibit race-conscious programs that reinforce racial stereotypes, promote racial separatism, or ask minorities to bear the brunt of the social cost of a "benign" program.

For the present, the Court has rejected the position originally articulated by the first Justice Harlan in his dissent in *Plessy* v. *Ferguson,* that "[o]ur Constitution is colorblind." In *Bakke,* the petitioner, Alan Bakke, challenged the validity of a special admissions program for minority students at the medical school of the University of California at Davis. Four members of the Court, Justices Brennan, White, Marshall, and Blackmun, voted to uphold the special admissions program, stating that the "government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. . . ." Justice Powell, who cast the critical swing vote in *Bakke,* agreed with these Justices that government may in some circumstances use race as a selective criterion. He held, however, that the particular race-conscious program used by the Davis medical school was constitutionally impermissible because it tended to pursue racial preference for its own sake, rather than for valid educational reasons. The remaining four Justices never reached the constitutional issue, holding that the Davis program violated Title VI of the Civil Rights Act of 1964, which they construed to be colorblind. Thus, the peculiar judicial compromise in *Bakke* approved in principle of the government's use of race as a selective criterion, but struck down the particular racially selective program before the Court.

The cloud of ambiguity over the constitutional status of affirmative action that existed after *Bakke* was to some degree lifted by the Supreme Court's decision in *Fullilove,* in which the Court for the first time placed an unequivocal stamp of approval on a race-conscious governmental activity. Seven Justices in the case agreed that the government could engage in race-conscious activity in some circumstances, and six Justices approved the specific race-conscious program that was at issue. *Fullilove* involved the validity of the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977, a congressional spending program that required, absent an administrative waiver, that 10 percent of the Federal funds granted under the program for public works projects be used to procure services or supplies from businesses owned and controlled by members of statutorily defined minority groups. Chief Justice Burger, who was joined by Justices White and Powell, announced the judgment of the Court and flatly rejected the contention that "in the remedial context the Congress must act in a wholly colorblind fashion." Justices Marshall, Brennan, and Blackmun adhered to their position in *Bakke* and approved of the government's use of race to "provide benefits to minorities for the purpose of remedying the present effects of past racial classification." Justice Stevens, though finding the MBE provision unconstitutional, refrained from embracing a colorblind standard. Only two members of the *Fullilove* Court, Justices Stewart and Rehnquist, held that the Constitution is colorblind—that it countenances absolutely no use of race-conscious activity by the government.

Every Justice who reached the constitutional issue in both *Bakke* and *Fullilove* refused to accept at face value the government's assertion that the program did, in fact, remedy the present effects of past discrimination, and instead attempted to penetrate beneath labels to ensure that the particular program did, in fact, effectuate genuinely remedial objectives. A program that does not, in fact, enhance the opportunities of minorities will not survive the scrutiny of the Court under any of the tests discussed below.

The Court's consensus is not undercut by the division among the Justices regarding the exact standard of review. Justice Powell stands alone in his clear adherence to the "strict scrutiny" test as traditionally articulated: The government's racial classifications are invalid unless they are made in pursuit of "compelling" governmental objectives and are "narrowly tailored" to achieve those objectives. Three Justices, Brennan, Marshall, and Blackmun, have adopted a two-tier analysis. They apply the strict scrutiny test to racial classifications that are "invidious," but apply a more relaxed "intermediate" standard of review when they perceive the race-conscious activity at issue as remedial or benign. Under their intermediate test, the government's objectives need be merely "important," rather than "compelling," and need be only "substantially related," rather than "narrowly tailored," to the accomplishment of the objectives.

Chief Justice Burger and Justices White and Stevens apparently have abandoned precise articula-

tions of the standard of review. Chief Justice Burger's opinion in *Fullilove* expressly eschewed the adoption of any of the competing "formulas of analysis," and Justices White and Stevens apparently agree with the Chief Justice that the formulas are not of much assistance in deciding cases. Nevertheless, those three Justices do apply a test that is identical to the second prong of the strict scrutiny test: They require that a program be narrowly tailored to the effectuation of its goal. The Chief Justice and Justice White deviate sharply from the conventional strict scrutiny formula, however, in refusing to test the importance of the government's goal. They ask only whether the government has the power under the Constitution to adopt the objective.

Justices Brennan, Marshall, and Blackmun have been the most permissive Justices in approving race-conscious activity by the government. Even those three Justices have, however, repeatedly emphasized the difference between genuinely remedial programs and programs that are enacted in a good-faith belief that they are benign, but because of their motives, assumptions, or effects are rendered impermissible. In *Bakke,* Justice Brennan stated that the Davis medical school's plan did not "contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." His opinion also stated that a plan is not benign merely because the legislature so believes: "'[T]he mere recitation of a benign, compensatory purpose is not an automatic shield'," and "the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping" is not always clear. Articulating a concern critical to the integration maintenance debate, the opinion indicated that state programs ostensibly designed to ameliorate the effects of past discrimination risk creating stigma, "since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."

In addition to distinguishing truly remedial programs from those that stigmatize, Justice Marshall in *Fullilove* differentiated programs that disadvantage whites relative to blacks from programs that disadvantage blacks relative to whites. Whites, unlike blacks, are "'not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'." The three Justices seemed aware of the problems arising from remedial programs that whites design, and emphatically adhered to the principle that "any statute must be stricken that. . .singles out those least well represented in the political process to bear the brunt of a benign program."

It would seriously distort the *Bakke* and *Fullilove* decisions to interpret them as authorizing in broad terms the government's good-faith use of race. To the contrary, both decisions evince a general hostility toward racial classifications, but exempt programs that convincingly demonstrate a sound connection to remedying the effects of past discrimination. Since the *Bakke* and *Fullilove* decisions, the lower courts, consistent with this narrow interpretation, have uniformly held that programs using racially restrictive quotas must satisfy Justice Powell's rigorous strict scrutiny test to survive constitutional challenge.

Applying Strict Scrutiny

The third line of constitutional defense for integration maintenance is that even if the strict scrutiny standard does, in fact, apply to such programs, the interests served by integration maintenance are sufficiently compelling, and the means employed sufficiently well tailored, to survive even the rigorous strict scrutiny test. This level of the constitutional argument is the most problematic, for it involves a number of complex constitutional considerations, and it implicates a deep philosophical split within American culture.

Are the Ends Compelling?

The first step in the application of the strict scrutiny test is the determination of whether the governmental interest in promoting integration maintenance is "compelling." Defenders of integration maintenance argue that, *of course,* the governmental interest at stake is compelling because the interest is the preservation of integration. This is not, obviously, an insubstantial argument—no one can deny that in American society today the achievement and maintenance of integration are compelling values; it seems almost racist to assume otherwise. But the matter is not that simple, for it depends upon what one *means* by the goal of "integration." "Integration" may mean breaking down racial barri-

ers to freedom of choice in housing; in short, it may mean the elimination of discrimination. Every American of good will hates racism and endorses the elimination of racial discrimination. Every American of good will would agree that the goal of "integration," defined in this sense, is compelling. "Integration" may have a second meaning, however, and with regard to its second meaning, Americans of good will may reasonably differ. To some, "integration" means more than the elimination of discrimination; it means the *achievement of results.* Applying this second meaning, to achieve the result of racial mixing and racial balance, one must at times use unpalatable means. In the context of integration maintenance, "integration" has a *third* meaning: To achieve "ideal" results, one may even go so far as to penalize members of the racial group that suffered from discrimination in the first place.

To understand fully the governmental objectives underlying integration maintenance, the immediate purpose of altering the racial mix by limiting black entry should be placed in the philosophical and jurisprudential context from which that purpose is derived. Integration maintenance reflects at least two classic strains of American legal and social thought. The first, utilitarianism, is the belief that restrictions on individual freedom are permissible when necessary to achieve the greatest good for the greatest number of people. The second, the universalist ethic, is an assimilative ideal that holds that a country's public policy should achieve "balanced" or "proportional" racial and ethnic representation in all aspects of the Nation's culture.

Utilitarian thought is not new in the context of racial policy. In *Parent Association* v. *Ambach,*[11] the U.S. Court of Appeals for the Second Circuit was faced with a program that limited black enrollment in certain public schools by quotas designed to deter white flight from those schools, a plan analogous to integration maintenance:

> The constitutional issue thus posed is not unfamiliar in a democratic society. The greatest good for the greatest number is a concept deeply embedded in our history. It is ironic that it comes full circle in a case involving minority groups where the issue may be viewed as a conflict, not necessarily between the claims of whites and those of non-whites, but between the competing rights of non-whites themselves. May an individual non-white student be made to suffer exclusion in a community effort to prevent resegregation of the system?

The court in *Ambach* answered its rhetorical question in the affirmative and in doing so explicitly subordinated the idea that individuals should not be treated differently on the basis of race to the idea that racially disparate treatment is permissible if it is done for the "greater good"—to avoid white flight and preserve a stable racial mix.

The "greater good" as defined in *Ambach* evokes a strain of American legal thought, of which integration maintenance is a part, that assumes that a "balanced dispersal" of blacks throughout all segments of society is desirable for its own sake. Professor Mark Yudof describes this intellectual tradition as the "universalist ethic":

> The cornerstone of the liberal, progressive thinking is what might be called a universalist ethic, the basic premise of which is that a stable, just society, without violence, alienation, and social discord, must be an integrated society. Segregation of the races in public institutions, employment, and housing will inevitably lead to conflict and the destruction of democratic values and institutions. In short, the goal is a shared culture in which all segments of the population participate.[12]

Proponents of integration maintenance, drawing on these values, argue that their result-oriented view of "integration" is clearly compelling. To buttress this position, a connection is sometimes drawn between integration maintenance and affirmative action. Integration maintenance proponents, in fact, like to treat their plans as simply one form of affirmative action. For those who are against affirmative action, of course, this linkage will lead to an immediate rejection of integration maintenance. But proponents of integration maintenance are willing to throw away those "votes" in return for enlisting the allegiance of those who favor affirmative action. Since Federal courts have approved the affirmative action goal in a number of cases as "compelling," this strategy would seem very wise, since the "votes" of Federal judges are often of immediate concern. The equation, thus, goes something like this: Integration maintenance is affirmative action; if you're with us on affirmative action, you're with us on integration maintenance.

This equation, however, is also too simplistic—it just ain't necessarily so, either in practice or in theory. That something is wrong with the equation ought to be evident immediately as a matter of

[11] 598 F.2d 705 (2d Cir. 1979).
[12] Yudof, "Equal Educational Opportunity and the Courts," 51 Tex. L. Rev. 411, 457 (1973).

realistic practical politics. Black civil rights groups (of course, there are exceptions) often favor the concept of affirmative action, yet they often (again, there are exceptions) oppose integration maintenance. To many blacks, the goals of integration maintenance are quite apparently not identical to affirmative action. Integration maintenance does not depend on the consent of blacks, individually or as a group. The governing bodies of predominantly white communities impose integration maintenance in order to prevent the community from becoming predominantly black. Blacks do not participate significantly in the political processes that produce integration maintenance plans. The utilitarian thesis is inappropriate for integration maintenance because in all cases the group asked to bear the burden is predetermined and membership is inescapable. The majority, defining the "greater good" in its own terms, dictates the burdens to be borne by the few. Integration maintenance is simply not on the same moral footing as other race-conscious programs that claim an ameliorative purpose.

A primary function of the 14th amendment is to remove racial issues from the transitory whims of majoritarian politics. If the meaning of the equal protection clause as it has evolved from *Plessy* v. *Ferguson* through *Brown* v. *Board of Education, Bakke,* and *Fullilove* is that minority rights may not be sacrificed even if the entrenched majority perceives that sacrifice to be for the greater good, and if the clause's limitations on government activity are, like many of the core limitations of the Constitution, designed to insulate minorities without political power from the machinations of the political process, then the integration maintenance rationale fails, because it supplies a utilitarian answer to an essentially nonutilitarian question. Although it is perfectly permissible for individuals of any race to believe as a matter of personal ideology that communities with black populations of approximately 30 percent enjoy an "ideal" racial mix, does the Constitution permit the government to embrace such racial distribution preferences? The constitutional issue thus posed is not whether the governmental decisionmaker has added his sums correctly in computing the greater good, but whether the color of skin is a legitimate predicate for the assignment of plùses and minuses.

Integration maintenance is, in this sense, an affront to emerging black expressions of power, dignity, enterprise, and self-reliance. The conflict between assimilation and resurgence of ethnic identity has been particularly strong for American blacks. Since the 1960s, individual blacks frequently have chosen to emphasize their group identity as a means of achieving greater political and economic power. Increased black ethnic identity as a political phenomenon repeats a familiar American pattern. Particularly in the Nation's older cities, it has never been thought wrong or unusual for persons to emphasize their own ethnicity to gain political or social advantage. Similarly, although discrimination against blacks undoubtedly accounts for much of their concentration and collective isolation in urban areas, it is impossible to eliminate choice of ethnic association as a reason for the concentration. In short, Americans often choose to group themselves on an ethnic basis because they perceive that identification as economically, politically, or culturally advantageous.

Integration maintenance seeks to prevent concentrations of blacks. If the integration maintenance concept is projected to its logical conclusion, blacks would be diffused evenly across the metropolitan landscape. With that geographic dispersal, black political power would be diluted, and the strength of the black economic, political, religious, and cultural institutions that facilitate cohesive group identity and consciousness would be diminished.

The lexicon of integration maintenance reveals the concept's inherent cultural condescension: Concentrations of blacks are almost always called ghettos. The condescension is not pernicious but unintentional; it arises from a tendency to assume that the ghetto pattern of existence is the natural mode of living for urban blacks. This perception is reinforced when the black suburb is merely a physical extension of a truly urban ghetto, even though sociologists classify a substantial percentage of the black population in the United States as middle class. It is racial stereotyping to assume that a middle-class community may be labeled a "ghetto" because over half of its residents are blacks.

It may be assumed that no rational person seeks out dilapidated housing, poor neighborhood schools, high crime, and substandard police and fire protection. It may not be assumed, however, that a rational person does not want to live in a black neighborhood. Government must not equate the two. Individual blacks with the means to move to the suburbs may or may not wish to live in neighborhoods in which there has been substantial black entry. Unfortunately, no individual black can be sure that his

entry into a white neighborhood, when combined with the entry of other blacks, will not cause an exodus of whites. Surely, however, individual blacks deserve the freedom to make decisions of affiliation. Integration maintenance presumes that restrictions on choices for blacks are permissible because otherwise whites will exercise their own choices and move away. Black political and cultural cohesiveness and majority status is the practical, and arguably deliberate, consequence of the balance that is struck.

Although the Constitution is not colorblind, *Bakke, Fullilove,* and the equal protection cases that preceded them appear to reject the proposition that government may pursue an "ideal" level of racial balance as an end in itself. The Supreme Court has allowed government to use race as a tool only to achieve educational or economic objectives that the Court believes are directly linked to overcoming past discrimination against minority groups. Each time the Court has approved the government's limited use of race, it has emphasized its belief that a logical link exists between the racial policies of the government program and the objective of remedying the effects of prior racial prejudice. In those cases the Court has also found that the government program uses race as a tool to eliminate the effects of prior prejudice in a manner devoid of stigmatizing racial stereotypes and without adverse effects on members of any racial minority. The Court has never approved the utilitarian notion that race may be used to circumscribe minority rights in the interest of the "greater good."

In *Swann* v. *Charlotte-Mecklenburg Board of Education,*[13] Chief Justice Burger, writing for a unanimous Court, stated that school boards could voluntarily adopt prescribed ratios of black students to white students for each school within a system, even in the absence of a constitutional violation. Chief Justice Burger noted, however, that the Court would not approve the notion that there is a "substantive constitutional right" to "any particular degree of racial balance or mixing. . . ." He acknowledged, however, the power of a school board faced with a history of segregation to use its awareness of the racial imbalance as a starting point for voluntarily dismantling a dual school system.

Similarly, Justice Powell in *Bakke* approved of the government's pursuit of pluralism in education, writing that "the attainment of a diverse student body. . .clearly is a constitutionally permissible goal for an institution of higher education." Powell proceeded, however, to focus on the distinction between educational pluralism and racial balance for its own sake. That distinction is the crucial point in his opinion and thus in the judgment of the *Bakke* Court. Powell stated that the Davis medical school's pursuit of ethnic pluralism was permissible only as "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. . . ." By contrast, ethnic pluralism pursued for its own sake is neither a compelling state interest nor a constitutionally permissible goal: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

Describing race as one in a wide range of factors that should be considered in the interest of academic pluralism—a factor incident to developing a student body capable of enjoying a robust exchange of ideas and perspectives—Powell rejected the argument that the permissible educational pursuit of diversity requires reserving a specified number of spaces for a given racial group. On the contrary, Powell argued that a specific racial quota hinders the attainment of true diversity.

Nothing in the majority coalition in *Fullilove* modifies the *Bakke* holding that the government's pursuit of racial diversity for its own sake is constitutionally proscribed. Although the six Justices who voted to uphold the minority business enterprise provision differed in their characterizations of the congressional purpose as "compelling," "substantial," or merely "legitimate," they uniformly agreed on the congressional purpose. They characterized the MBE program as a strictly remedial measure, aimed at the elimination of barriers to minority-firm access to public contracting opportunities. The Court concluded that Congress' aim was to achieve *equality of opportunity only,* through race-conscious means tailored to eliminate the lingering effects of past discrimination that continued to make opportunity unequal.

Justice Powell's concurring opinion in *Fullilove* emphatically reaffirmed the position that racial preference per se "can never constitute a compelling state interest." After concluding that the MBE

[13] 402 U.S. 1 (1971).

program permissibly addressed the interest of ameliorating the effects of past discrimination, Powell emphasized that he continued to adhere to the position that racial classifications cannot "be imposed simply to serve transient social or political goals, however worthy they may be."

Are the Means Narrowly Tailored?

Even if it were conceded that the ends behind integration maintenance are compelling, the strict scrutiny test requires that the means chosen to achieve those ends be precisely and narrowly tailored to achieve their effectuation. It is on this second prong of the strict scrutiny test that integration maintenance most clearly falters. Integration maintenance fails the "means" side of the strict scrutiny test for at least two reasons: First, it severely infringes the right of black *individuals* to exercise freedom of choice in housing, a freedom that is a necessary corollary to the right to travel. Second, it predicates governmental policy on avoiding white flight and accommodating white prejudice.

The premise that government has a right to intervene in the geographic distribution of the population cannot be reconciled with the right to travel, a right that has long been part of the Nation's culture and that has recently been elevated to constitutional status. American history is largely a history of migrations. Long before the Supreme Court recognized the freedom to travel as a constitutional right, Americans assumed that citizenship carried with it the privilege to move about the country unfettered by restrictive governmental regulation.

Article four of the Articles of Confederation explicitly guaranteed the right to travel from State to State, but neither the Constitution nor any subsequent amendment mentions this right. Nevertheless, as early as 1823 judicial pronouncements recognized the right to travel as implicit in the constitutional structure. In 1849 Chief Justice Taney wrote in dissent in the *Passenger Cases:*[14]

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

During this century the right to travel has emerged as a fundamental constitutional right. In *United States* v. *Guest,*[15] Justice Stewart observed that "freedom to travel throughout the United States had long been recognized as a basic right under the Constitution," and in *Shapiro* v. *Thompson,*[16] the Supreme Court stated "that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement."

Prior to the Civil War, of course, blacks who were held as slaves did not enjoy the right to travel. In *Dred Scott* v. *Sandford,*[17] Justice Taney, who had declared in ringing terms the fundamental nature of the right to travel, wrote for the Supreme Court that the slave Dred Scott did not obtain emancipation for himself or his family by traveling from the slave State of Missouri to the free State of Illinois. Blacks, wrote Taney, "had for more than a century before [the Declaration of Independence and the adoption of the Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had not rights which the white man was bound to respect." Free blacks from Northern States also were subject to travel restrictions prior to the Civil War. For example, several slaveholding States adopted legislation to preclude the entry of free blacks in order to deter slave uprisings.

In light of this unfortunate legacy, it is difficult to defend any government program that inhibits the free exercise of the right of blacks to travel, even if the action discourages black entry obliquely rather than directly. A black does not have the same right to travel as a white if an ordinance prohibits the sale of property on a certain block to blacks because blacks constitute 30 percent of the residents. Although the black may still be permitted to purchase in nearby villages, his right to travel is abrogated because the essence of the freedom to travel is choice.

In housing, the right to travel unshackled by racial restrictions is coupled with the traditional notion of Anglo-American law that every parcel of property

[14] 48 U.S. (7 How.) 282 (1849).

[15] 383 U.S. 745 (1966).

[16] 394 U.S. 618 (1969).

[17] 60 U.S. (19 How.) 393 (1856).

is unique. Specific enforcement of a land sale contract is permitted because the law assumes that no other piece of real estate is an adequate substitute for the real estate described in the contract. Any restriction on the right to live where one wishes is a substantial one.

The second reason that integration maintenance fails the "means" test is the flaw in the utilitarian position that integration is justified by the "greater good" of avoiding white flight. Theoretically benign political calculations of the greater good based on race have an unfortunate history in America. In 1917, long before *Brown* v. *Board of Education,* the Supreme Court in *Buchanan* v. *Warley,*[18] struck down a municipal ordinance enacted by the city of Louisville, Kentucky. The ordinance was strikingly similar to a modern integration maintenance plan, making it unlawful:

> for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

The city openly declared its motives for adopting the ordinance, which were probably generally regarded as benign in 1917: "to promote the public peace by preventing racial conflicts;. . .to maintain racial purity; [to prevent] the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow. . . ." The ordinance stated that its objective was "to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace. . . ." Indeed, the ordinance was adopted for many of the same motives as was the statute in *Plessy* v. *Ferguson,* which required separate passenger cars for black and white riders on trains. The majority in *Plessy* had characterized the "separate but equal" statute as "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." Although the Supreme Court accepted Louisville's assertion that the ordinance was desirable in promoting public peace and preventing racial conflicts, the Court struck down the ordinance, holding that such aims "cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

Modern integration maintenance plans can be distinguished in *motive,* but *not in purpose* from the Louisville ordinance struck down in *Buchanan.* Although current plans facially resemble the Louisville ordinance, the representatives of communities or housing projects who adopt such plans today do so not out of racial animus. Nevertheless, integration maintenance plans rest on an uneasy juxtaposition of conflicting motives. They arise in suburbs and projects containing white families whose individual tipping points converge to form a community tipping point—the point at which the community's collective racial prejudices and fears cause white evacuation. The means chosen by the governing body to prevent evacuation is simply to engage in official race discrimination, even if that body is itself motivated only by racial tolerance.

The question can be illustrated by hypothesizing two suburbs that enact identical integration maintenance plans. One suburb is a long-established town on the outskirts of Boston that still makes all its major governmental decisions in town meetings. The second suburb employs a modern representative form of government such as a city council. The first community convenes a meeting to discuss the "problem" of incipient black entry into the town. After a large number of residents say they will leave if black entry exceeds 25 percent, the town adopts an integration maintenance ordinance, with two-thirds of the town's residents voting to approve it. The ordinance requires brokers to discourage black entry once such entry exceeds 25 percent of the population.

If we were to poll the residents of the town to discover their motives for approving the plan, the social science evidence indicates that there would probably be a wide variety of responses. Some residents were probably motivated purely by racial animus—some white families are unwilling to live on the same block with a black family even if by all objective indicia there is no danger that the entry of one black family will have any effect whatsoever on the safety or prosperity of the neighborhood. As expressed in *Trinity Episcopal School Corp.* v. *Rodney,*[19] "[i]n large measure, the tipping point is subjective and prejudicial reaction of whites to

[18] 245 U.S. 60 (1957).

[19] 347 F. Supp. 1044 (S.D.N.Y. 1974).

minority group encroachment." Those residents motivated by such separatist notions would be echoing the rationale advanced by Louisville to defend its ordinance in 1917, but in language less offensive to the contemporary ear.

Although blind prejudice would motivate some of the residents, the sociological data indicate that most residents would probably explain their action in less emotional terms, professing to be relatively free from racial prejudice against blacks. Instead, they would explain their vote as motivated by fear of the imminent deterioration of their neighborhood if black entry is not controlled. The residents in this category would fear a decline in property values, an increase in crime and vandalism, and an erosion of the quality of neighborhood schools and essential government services.

The ordinance enacted by such a town meeting would be plainly unconstitutional even though actual racial animosity may have accounted for only a small percentage of the votes. The myriad cultural and economic forces present at the town meeting were distilled into an overtly racial solution. It is irrelevant that in functioning as social planners, the town's citizenry may arguably have acted "in good faith"; it is enough that they chose racial means to attack perceived social and economic problems.

A series of Supreme Court decisions has held that mere community opposition cannot repress the imperatives of the equal protection clause. In *Brown II,* the decision implementing the school desegregation cases of 1954, the Court declared that "the vitality of [the] constitutional principles [set forth in *Brown I*] cannot be allowed to yield simply because of disagreement with them." In *Monroe* v. *Board of Commissioners,*[20] the Court reaffirmed this mandate by striking down a "free-transfer" plan used to desegregate the public schools in Jackson, Tennessee, because the principal effect of the plan was to retain racially identifiable schools rather than to dismantle the dual school system. Rejecting the school authorities' argument that "without the transfer option it is apprehended that white students will flee the school altogether," the Court ordered the school board to achieve a nonracial, nondiscriminatory system and to ignore the prospect of community opposition. Several years later, in *United States* v. *Scotland Neck Board of Education,*[21] the Court invalidated the establishment of a new school district even though the school officials argued that the new district was necessary to avoid the exit of white students from the system into private schools. The Court declared that white flight is not a justification for failing to uproot a racially discriminatory school system.

Integration Maintenance and the Fair Housing Act of 1968

Analysis of integration maintenance under the Fair Housing Act of 1968 is important for two reasons. First, the Fair Housing Act reaches private activity because it is enacted pursuant to the 13th amendment. Thus, a "benign quota" imposed by a privately owned apartment complex receiving no governmental aid of any kind would still come within the Fair Housing Act's coverage, even though it would be beyond the coverage of the 14th amendment for lack of "state action." Secondly, for both purely private and governmental housing activity, the Fair Housing Act creates a lower standard of proof than exists in a 14th amendment case.

The Elements of a Statutory Violation

In enacting the Civil Rights Act of 1866, which is currently embodied in section 1982 of the United States Code, Congress declared in apparently unequivocal language that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." In the 1968 watershed decision, *Jones* v. *Alfred H. Mayer Co.,*[22] the Supreme Court held that section 1982 prohibits *"all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities."

Two months before the *Jones* decision, Congress had enacted the Fair Housing Act, embodied on Title VIII of the Civil Rights Act of 1968. In its opening section the statute declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The operative provisions of Title VIII are contained in section 3604, which defines and makes unlawful five separate types of racially discriminatory activity. Subsections (a) and

[20] 391 U.S. 450 (1968).

[21] 407 U.S. 484 (1972).

[22] 392 U.S. 409 (1968).

(b) of section 3604 provide that it is unlawful to deny "a dwelling to any person because of race, color, religion, sex, or national origin" or "to discriminate in terms,. . .or in provision of services or facilities" associated with the sale or rental of real estate.

The operative provisions of section 1982 and Title VIII flatly prohibit consideration of race in the sale and rental of housing in the United States. Construed broadly by the lower courts to effectuate its purposes, Title VIII, like Title VII of the Civil Rights Act of 1964, proscribes activity with discriminatory effects, even if the defendant had no subjective intent to discriminate. A violation of Title VIII can thus "be proved without establishing a malevolent or unlawful intent. . . .[and] allegedly benign motivation. . .cannot provide a defense."[23] In *Zuch* v. *Hussey,*[24] a groundbreaking decision, the district court held that section 3604(a) prohibits exerting any effort "to steer or channel a prospective buyer into or away from an area because of race."

Integration maintenance plans, thus, have tougher sledding against an alleged Title VIII violation than against an alleged equal protection clause violation, for in order to establish a prima facie case, the plaintiff need show only that the action complained of had a racially discriminatory effect; he is not required to show that the defendant acted with racially discriminatory motivation.[25]

Once the plaintiff has established a prima facie case, the prevailing view is that the burden then shifts to the defendant to establish a justification for acts resulting in discriminatory effects. The justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact. If the defendant fails to rebut the prima facie case, a violation is proved. If the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available.

Integration Maintenance and the "Affirmative" Enforcement of the Act

Some courts and commentators have suggested that differential treatment according to race in the housing market does not violate Title VIII if such treatment is undertaken pursuant to the mandate of an integration maintenance statute. The rationale is that because integration maintenance plans seek to preserve racial balance, they further the goal of the statute.

To support this view, some litigants have cited a different provision of the Fair Housing Act, which provides that "[t]he Secretary of Housing and Urban Development shall. . .administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[26] It has been argued that pursuant to section 3608(d), there is an obligation to act affirmatively to promote integration, and that integration maintenance plans are sometimes necessary to comply with that obligation. Supporters of integration maintenance generally rely on *Otero* v. *New York City Housing Authority*[27] as support for this interpretation of the dictates of Title VIII.

The language used by Congress in these various provisions has created confusion as to the nature and extent of HUD's duty under Title VIII. If HUD's duty is limited to enforcing nondiscrimination in housing, the administration of integration maintenance quotas would not be authorized. If HUD is required to act "affirmatively" to promote and maintain integration in housing, racial occupancy controls could conceivably (depending on one's definition of "affirmatively") be permissible in certain circumstances.

The legislative history of Title VIII does not very clearly resolve the question of the statutory validity of integration maintenance quotas. The most realistic and honest interpretation of that history indicates that Congress probably never even considered the question of HUD administration of such quotas. There was virtually no legislative debate regarding the affirmative duties placed on the Secretary of HUD under section 3608(d)(5). What the legislative history does reveal is that the primary congressional intention in passing the legislation was to break up

[23] United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978).
[24] 394 F. Supp. 1028 (E.D. Mich. 1975).
[25] See, e.g., Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287–90 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978); Smith v. Anchor Building Corp., 536 F.2d 231, 233 (8th Cir. 1976); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979).
[26] 42 U.S.C. §3608(d).
[27] 484 F.2d 1122 (2d Cir. 1973).

residential concentrations of minorities and to foster integrated living patterns.[28] Congress also intended to promote *freedom of choice* in housing and to prevent humiliation resulting from racially discriminatory housing practices.[29]

The legislative history further shows that, at the time that Title VIII was enacted, Congress believed that strict adherence to the antidiscrimination provisions of the act would promote the policy of antisegregation; abolition of racially discriminatory housing practices ultimately would result in residential integration. In other words, Congress perceived antisegregation and antidiscrimination to be complementary.

In *Otero,* the court declared that the affirmative obligation under section 808(e)(5) of the Fair Housing Act[30] to promote residential integration outweighed the duty under that statute to prevent discrimination. The serious flaw in the *Otero* reasoning is that it reads far too much into the word "affirmative." Given Congress' heavy emphasis on the antidiscrimination principles of the act, the far more natural reading of Congress' intention in using the word "affirmative" is that Congress wanted the implementation of the act to be *aggressive.* Congress wanted HUD to do more than sit back and wait for notice of violations. Congress wanted HUD to advise, cajole, advertise—to do, in short, what was necessary to deliver the message that the national policy was now strongly against race discrimination. "Affirmative" was not meant to be taken in the sense of *restrictive quotas,* but in the sense of "affirmative marketing," the energetic effort to break down racial barriers, not create new ones.

Integration Maintenance and the "Standing" Cases

The second argument made by proponents of integration maintenance to support their view that such plans are permitted by the Fair Housing Act comes from certain language in three Supreme Court decisions involving standing to sue under Title VIII. The Supreme Court has decided three cases that take an expansive view of litigant standing under the Fair Housing Act. Those three decisions, *Trafficante* v. *Metropolitan Life Insurance Co.,*[31] *Gladstone, Realtors* v. *Village of Bellwood,*[32] and *Havens Realty Corp.* v. *Coleman,*[33] contain statements that might be regarded as supporting the use of ceiling quotas. In the *Trafficante* case, a black tenant and a white tenant of a San Francisco apartment complex that housed 8,200 residents brought suit against the owner of the complex, claiming that the owner discriminated against nonwhites by making it known that they would not be welcome at the complex, manipulating waiting lists for apartments, delaying the processing of nonwhite applications, and using differential acceptance standards. Their complaint alleged that they had "lost the benefits of living in an integrated community," that they had missed "business and professional advantages which would have accrued if they had lived with members of minority groups," and that they had suffered "embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto'." There were conceivably two obstacles to finding standing in *Trafficante.* First, one of the complainants was white, yet all discrimination was directed against nonwhites. Second, both the white and black plaintiffs already had apartments in the complex and were, thus, not the immediate victims of discriminatory refusals to rent. In an opinion by Justice Douglas, the Supreme Court, nonetheless, found that both plaintiffs had standing. The alleged "injury," Justice Douglas wrote, was the "loss of important benefits from interracial associations." This injury was encompassed by the Fair Housing Act, Douglas stated, because "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community'." Douglas also cited the statement by Senator Walter Mondale that the purpose of the act was to achieve "truly integrated and balanced living patterns." Douglas concluded that the Court could "give vitality to [the Fair Housing Act] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute."

[28] *See* 114 Cong. Rec. 4322 (1968) (remarks of Sen. Mondale) (one result of Fair Housing Act would be that "rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns").

[29] *See id.* at 5643 (remarks of Sen. Mondale) (Title VIII gives blacks freedom to move where they will and "removes the opportunity to insult and discriminate against a fellow American because of his color").

[30] 42 U.S.C. §3068(d)(5).

[31] 409 U.S. 205 (1972).

[32] 441 U.S. 91 (1979).

[33] 445 U.S. 363 (1982).

Trafficante was followed by *Gladstone, Realtors* v. *Village of Bellwood.* The plaintiffs in *Gladstone* were the village of Bellwood, Illinois, a suburb of Chicago, a black resident of Bellwood, four white residents of Bellwood, and a black resident of the adjoining suburb of Maywood, Illinois. The plaintiffs claimed that two real estate brokerage firms in the area were engaging in racial steering. Blacks, the complaints alleged, were shown homes for sale in an integrated section of Bellwood and were steered away from homes in predominantly white areas. Prospective white buyers, on the other hand, were guided away from the integrated area of Bellwood. All of the individual plaintiffs in the litigation were not, in fact, seeking to purchase homes in Bellwood, but were rather acting as "testers," confederates posing as home buyers to determine if prospective black and white buyers were treated differentially by the real estate agencies. In the Supreme Court, the defendant real estate brokers argued that neither the village of Bellwood nor any of the individual plaintiffs had standing to sue. The Supreme Court held that the village and the four white residents living in the impacted area all had standing.

In discussing the standing of the village of Bellwood, Justice Powell, writing for the Court, used language that certainly does at first blush seem to support the concept of integration maintenance. The Court noted that the "adverse consequences attendant upon a 'changing' neighborhood can be profound." In using the peculiar word "changing," and placing it in quotation marks, Powell appeared to be endorsing the notion that a municipality may treat the "changing" of its population from white to black as "adverse." This interpretation is buttressed by Powell's further observation that if steering practices significantly reduce the total numbers of buyers in the Bellwood housing market, real estate prices may be deflected downward. "This phenomenon would be exacerbated," Powell wrote, *"if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents."* Such a reduction in property values diminishes the tax base, and leads to "[o]ther harms flowing from the realities of a racially segregated community." Powell stated that there "can be no question about the importance to a community of 'promoting stable, racially integrated housing'." If the defendant agencies have begun "to rob Bellwood of its racial balance and stability," the village has standing to challenge the legality of their conduct.

With regard to the four white Bellwood residents, the Court noted that they had claimed injury in that "the transformation of their neighborhood from an integrated to a predominately Negro community is depriving them of 'the social and professional benefits of living in an integrated society'." The Court found these allegations of injury sufficiently "distinct and palpable" to confer standing. The injuries could be social and professional, and also economic. The "most obvious source" of economic injury "would be an absolute or relative diminution in value of the individual respondent's homes." Finding these allegations of injury sufficient, the Court did not reach the question of "tester standing" in *Gladstone,* and the Court did not find that the two black plaintiffs, neither of whom resided in the "target" areas of Bellwood, had sufficient allegations of individualized harm to permit them standing.

The issue of "tester standing" was finally reached in the third of the Supreme Court standing cases, *Havens Realty Corp.* v. *Coleman.* The *Havens* litigation was commenced by three individuals, two black and one white, and a public interest group, Housing Opportunities Made Equal (HOME). The defendant, *Havens Realty,* owned and operated two apartment complexes in Henrico County, Virginia, a suburb of Richmond. One of the black plaintiffs alleged that, in attempting to rent an apartment, he was falsely told by Havens that none was available. The other two individual plaintiffs were testers; the white tester plaintiff was told that apartments were available for rental, while at the same time the black tester plaintiff was told that there were no vacancies. The complaint identified the plaintiff HOME as a nonprofit organization, with a multiracial membership of about 600, devoted to the purpose of making "equal opportunity in housing a reality in the Richmond Metropolitan Area." HOME's activities included the operation of a housing counseling service and the investigation and referral of complaints involving housing discrimination. Echoing the complaints in *Trafficante* and *Gladstone,* the tester plaintiffs in *Havens* alleged that they had been deprived of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." For its part, HOME alleged that the steering practices of Havens had "frustrated" the organization's counseling and referral services, with a consequent drain on resources.

As it had in *Trafficante* and *Gladstone,* the Court in *Havens* took an extremely liberal view of standing under the Fair Housing Act. In a unanimous opinion by Justice Brennan, the Court reemphasized that, in enacting the Fair Housing Act, Congress intended to extend standing to the full limits of Article III. On the question of tester standing, Justice Brennan wrote that the combination of section 804(d) of the Fair Housing Act and section 812(a) of the act made it unlawful merely *to represent* that a dwelling is not available because of race, color, religion, sex, or national origin. The act, in short, created a legally enforceable right to truthful information about available housing. This meant that the *black* tester did have standing because she was allegedly lied to, in violation of her statutory right to truthful information, but that the *white* tester did not have standing because he was told that apartments were available, which was the truth.

Justice Brennan then turned to the concept of "neighborhood standing" that had previously been developed in *Trafficante* and *Gladstone,* and that is the most significant for purposes of the integration maintenance debate. Once again, the Supreme Court reaffirmed that standing existed to contest the social, professional, and economic losses that arose from racial steering practices. On the issue of HOME's standing, the Court said that the alleged impairment of HOME's ability to provide counseling and referral services was sufficient injury, in fact, to supply standing.

In combination, these three standing cases create the illusion that the Supreme Court would look quite charitably at integration maintenance. All three emphasize the benefits that flow from interracial associations. *Gladstone* seems to go even further, emphasizing the legitimate claim of a municipality itself in maintaining racial stability. More than any other case ever decided by the Supreme Court, in fact, a facial reading of the language in *Gladstone* does seem to support integration maintenance. The language seems to acknowledge the importance and legitimacy of preventing a neighborhood from precipitously "changing."

The apparent support for integration maintenance in the standing cases, however, is superficial only; on closer examination, that support dissolves. The first flaw in treating the standing cases as supporting integration maintenance is that the facts of all three cases involved housing practices designed to keep blacks *out* of a particular market. In all three cases, the people actually primarily harmed by acts of discrimination were blacks. The apartment owner in *Trafficante* tried to avoid renting to blacks; the brokers in *Gladstone* would not show blacks homes in the "pure white" neighborhoods; in *Havens,* it was the black apartment seeker and the black tester who were lied to. From a realistic perspective, the standing cases involve the enlistment of whites, municipalities, and public interest groups in the battle to eliminate discrimination against minorities. Whites were given standing, it is true, but *not* for the purpose of *limiting* black entry into neighborhoods or apartment complexes, but for the purpose of *assisting* that entry. The Supreme Court, in effect, took an expansive view of standing in *Trafficante, Gladstone,* and *Havens* in order to broaden the army of combatants in the pursuit of the primary goal of the Fair Housing Act, elimination of discrimination against minority-group members.

When recast in light of the factual realities in *Trafficante, Gladstone,* and *Havens,* the message of the standing cases is, thus, actually antithetical to integration maintenance. Justice Powell, for example, wrote in *Gladstone* that the white residents had standing because they lived in a neighborhood "whose racial composition allegedly [was] being manipulated. . . ." Surely, it is an inversion of both the logical and moral principles of the standing cases to maintain that because *Trafficante, Gladstone,* and *Havens* permit whites who *favor* black entry to sue to strike down barriers to entry, municipalities that fear the exit of whites who *disfavor* black entry can enact new barriers to black entry, thereby avoiding an exodus of prejudiced or fearful whites. The legal interest recognized in *Gladstone, Trafficante,* and *Havens* is the interest all citizens in a community share in living in neighborhoods that are not racially skewed because of discrimination; it is not the interest in living in a community no more than 30 percent black.

The second flaw in attempting to garner support for integration maintenance from the standing cases is that it puts interpretations on the words of the authoring Justices that we know *from other cases* those Justices could never have intended. The *Trafficante* opinion, for example, was written by Justice Douglas. His statement about the "benefits from interracial associations" could be interpreted to endorse implicitly the principle of penalizing blacks to serve the "higher" goal of preserving interracial associations, or it could have the more simple

meaning that whites have an interest in opening doors to blacks so that they are not cut off from interracial contact. We know from one of Justice Douglas' most famous opinions, *DeFunis* v. *Odegaard,*[34] that he *must* have intended the second interpretation. In *DeFunis,* Douglas wrote that he viewed the affirmative action admissions program at the University of Washington law school as unconstitutional. The Washington quota system, Douglas wrote, impermissibly required one to "determine which groups are to receive such favorable treatment and which are to be excluded, [and] the proportions of the class to be allocated to each." Douglas took an aggressive colorblind position in evaluating the Washington plan. "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it," he wrote, "then constitutional guarantees acquire an accordionlike quality." To read Douglas' *Trafficante* opinion as endorsing integration maintenance is, thus, to ascribe to Douglas views that he quite clearly found repugnant.

Similarly, to attribute to the author of the *Gladstone* decision a position sympathetic to the philosophical underpinnings of integration maintenance is to affiliate that author with a view completely hostile to the most famous judicial opinion of his life. Given Justice Powell's statements in *Bakke* that racial balancing *for its own sake* is always unconstitutional, and that racially explicit legislation is not entitled to greater judicial deference because it is characterized as benign, his opinion in *Gladstone* cannot be read as an endorsement of benign governmental steering. Justice Powell's jurisprudence in dealing with race cases during his tenure on the Court could not be more antithetical to the philosophical moorings of integration maintenance. One need only recall statements such as those of Justice Powell in the Seattle school district case, that "the Court has never held that racial balance itself is a constitutional requirement," or his conclusions in *Bakke* that it "is the individual who is entitled to judicial protection against classifications based on his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group," or Powell's statement that "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups" to realize the extreme improbability that Powell could have intended to encourage the integration maintenance philosophy in *Gladstone.*

Finally, to read into the opinion of Justice Brennan in *Havens* an implicit endorsement of integration maintenance is to ignore his statement in *Bakke* that the Davis medical school plan did "not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." The simple unanimity of the Court in the standing cases, if nothing else, ought to make it clear that no support for integration maintenance can reasonably be garnered from them. In *Bakke* and *Fullilove,* the Court was dramatically divided, and surely, when the Supreme Court does one day hear an integration maintenance case, some division, at least as to analysis (if not result), is very likely. We know with certainty, for example, that Justice Rehnquist, applying his colorblind standard, would find any integration maintenance plan reprehensible. Yet, *Havens* was a unanimous opinion, an opinion in which Justice Rehnquist obviously had no difficulty joining, a state of affairs that would be unthinkable if Rehnquist or anyone else on the Court thought that the philosophical thrust of the opinion was to promote racial quotas and racial steering.

Conclusion

Without for a moment intending to impugn the good faith of the advocates of integration maintenance, the concept is morally and legally wrong. The very minority groups that have so long been victims of discrimination in housing in the United States should not be asked to suffer new, "officially approved" race discrimination merely because white prejudice in some neighborhoods may lead to white flight. The essence of the matter is well captured by a recent Sixth Circuit decision involving the standing of a black resident of Cleveland Heights, Ohio, to challenge that community's integration maintenance policies:

> That the City's alleged policy denies equal treatment is obvious. It creates a favored class based solely on race. Because a race-conscious policy favoring prospective white residents was applied throughout the City, Smith was personally denied equal treatment within that City. White residents of Cleveland Heights were not forced to

[34] 416 U.S. 113 (1973).

shoulder the burden of belonging to a race disfavored for purposes of their City's housing policies; Smith was required personally and directly to bear this burden. No badge of disrespect follows white residents as they follow their daily routines. The City tells Smith it does not want his friends and relatives, even his children, to enter as homeowners. It says, as he perceives it, "we will tolerate you but want no more like you." White residents do not have to live with that official inscription on the courthouse door. For Smith that inscription written into law over the door of his town is an injury. His sense of community is deeply offended because the doorway to his town is an extension, in a symbolic way, of his own doorway.[35]

[35] Smith v. City of Cleveland Heights, No. 84–3099 (6th Cir., slip. op. May 3, 1985).

Fair Housing: The Conflict Between Integration and Nondiscrimination

By Oscar Newman*

Introduction

Title VIII legislators had as their goal the removal of discriminative barriers that kept black families locked in their ghettos. They anticipated that:

- absent these restrictive covenants (some of them government imposed), blacks would be able to compete equally with whites for housing;
- integration would follow as a direct consequence of nondiscrimination;
- the restrictive and incapacitating ghettos would dissolve;
- blacks would not only find new housing, but new educational, employment, and social opportunities; and
- the races would enjoy the benefits of mutual association.

However, the implementation of Title VIII proved problematic. Blacks were not able to avail themselves of the advantages of Title VIII in an evenly dispersed pattern throughout the fabric of white society. Instead, they concentrated their moves on those areas most open to them: residential communities whose prices they could afford (and that were often located immediately adjacent to black ghettos); and assisted housing that provided rent subsidies (which covered costs above 25 percent of a family's income). The sought-after integration proved short lived. Pent-up black demand overwhelmed the communities most open to them. Whites, who had more housing options available, moved away. A pattern of resegregation followed. Other white communities found ways to resist black influx, including use of the "Mrs. Murphy" exemption to Title VIII. The feared-for consequences materialized: The ghettos expanded; integration remained elusive; the stable, integrated community became the anomaly.

Communities and housing agencies wedded to the concept of integration found themselves on the defensive. The regulations that were promulgated by Title VIII had no specific stipulations requiring the creation and maintenance of integrated communities, only those that ensured nondiscrimination.

Many integrated communities and housing agencies threatened by these changes argued in court that integration was an equal, if not greater, intent of Title VIII. They claimed that the requirement to integrate does not appear in the regulations, because the legislators expected integration to follow from nondiscrimination.

Strangely, the ensuing court decisions that tried to resolve the conflict between integration and nondiscrimination often did so in an isolated framework: absent a sense of history, in apparent ignorance of the prevailing socioeconomic differences between blacks and whites, unconcerned about the geograph-

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ical patterns of residential occupancy or the history of neighborhood change. It is as if the very reasons that prompted the passage of Title VIII were no longer of consequence. The courts found either for integration or for nondiscrimination, responding to the nuance of local circumstance. And regardless of which way they found, they qualified their findings with caveats. The substantive issues were not addressed, the unforeseen conflict between integration and nondiscrimination not resolved. Many of the court remedies, if implemented to the letter, would have produced greater inequities than the court hoped to redress. Not surprisingly, implementation did not always follow court rulings closely.

Many of the difficulties arising from these court decisions are those that plagued the legislative history of Title VIII itself: The full extent of the issues was never considered, the problems likely to ensue not recognized, the potential conflicts not resolved. That is the situation we now find ourselves in. Short of advocating a full legislative review, it might be useful to explore some of these issues and determine whether a compromise can be found that will address the concerns of both sides in the conflict.

In this paper, I will attempt to provide sufficient overview to allow the reader to consider and weight the issues himself. I begin with a brief presentation of the socioeconomic and demographic background necessary to understand the problem. Ancillary to this, I review the social science literature on tipping: the racial turnover of communities. Following that, I provide a brief review of the legislative history of Title VIII along with excerpts from the sentiments expressed by key legislators. The key decisions of the courts in attempting to reconcile the conflict between integration and nondiscrimination are then presented. From this, I look at the ensuing regulations and their interpretation and implementation by the U.S. Department of Housing and Urban Development (HUD). And finally, I conclude with a compromise that I hope addresses the two intents of Title VIII and the concerns of all parties.

The Socioeconomic and Demographic Context

Nowhere in the legislative history of Title VIII is there an open and detailed discussion of the socioeconomic differences between blacks and whites in American society. Absent any direct personal experience, a reader of that history would come away with the conclusion that black Americans form a racially different but otherwise socioeconomically equal segment of our society; and that the only factor keeping blacks imprisoned in their ghettos was pervasive white prejudice, discrimination, and exclusion. The inability of blacks to compete economically is not considered, the variation in black versus white family structure not discussed. The behavioral differences between black and white individuals stemming from their different socioeconomic circumstances is not considered in terms of how it might affect realization of the sought-after integration.

It is easy to understand why the socioeconomic differences between the races was not pursued by our legislators, nor the implications of these differences upon their program considered. The task is not a pleasant one. A frank presentation of the issues adds fuel to the arguments of racists. Such discussions also further burden those members of our society who are already weighted down by past inequities. But not to present and discuss the significance of these differences is not to appreciate their consequences in the implementation of Title VIII and only serves to postpone the resolution of the question still further. Here, then, are the demographic and socioeconomic realties, to be used only as tools with which to provide an implementable justice.

Demographics

According to the 1980 U.S. census, blacks form 11.7 percent of the U.S. population. Of blacks living in metropolitan areas, 83 percent live in the inner cores of our older cities. By contrast, only 42 percent of whites do.

Some 12 years after the passage of Title VIII, segregation remains the pervasive norm. Karl Taeuber of the University of Wisconsin undertook a survey of 28 cities with a black population of 100,000 or more (together housing 9.7 million blacks or a third of the Nation's total). Using a segregation index where 100 represents total segregation (that is, every city block is either 100 percent or zero percent black) and zero represents total integration (that is, every city block has the same ratio of blacks in it as in the total city), Taeuber found that the Nation's 1980 segregation index is 81, down only 6 points from 1970, which was identical to the decline in the previous decade before passage of Title VIII. At this rate, reasons Taeuber, it will take 50 years just to

achieve an index of 50, that is, to produce a situation where 50 percent of city blocks have blacks living in them at the same ratio as their presence in the overall city.

It has long been recognized that the residents of segregated minority communities receive inferior municipal services—they may not even have paved streets or street lighting. For instance, in *Hawkins* v. *Town of Shaw,*[1] black residents proved that the town provided a lower level of services to black neighborhoods. Some 97 percent of all the residents living in homes fronting on unpaved streets were black. No high-power mercury vapor lights had been installed in black areas. Ninety-nine percent of white residents were served by the town's sewer system, but only about 80 percent of the black population had sewer service. Water drainage systems were provided in the white areas, but black areas had either inadequate drainage ditches or, on some streets, no drainage system at all.

Such glaring disparities of services are rare in most large municipalities, but they exist nonetheless. The Bureau of the Census and the Department of Housing and Urban Development together perform an annual housing survey of housing and neighborhood conditions in large cities. The following pages compare black and nonblack evaluations of neighborhood conditions and services within New York City.

Opinion of Neighborhood Conditions

These data indicate that although black households are, overall, only slightly more subject to undesirable neighborhood conditions (89.1 versus 86.3 percent), in certain categories the disparity is fairly significant, including: abandoned buildings (38.5 versus 14.2 percent); rundown housing (33.1 versus 14.1 percent); poor street lighting (18.4 versus 11.0 percent); crime (52.4 versus 43.5 percent); and litter (43.9 versus 29.2 percent).

Opinion of Neighborhood

Forty percent of the black households reported one or more inadequate services compared with 31.1 percent of nonblacks.

Only 32.6 percent of the black households rated their neighborhood as "good" or "excellent." The comparable figure for nonblacks was 59.6 percent. Also, 18.6 percent of the blacks gave an overall opinion of "poor" against just 8.2 percent for nonblacks.

General Abandonment

When communities become both low income and black, it is often a prelude to gradual abandonment. In our institute's examination of change in the residential neighborhoods surrounding Starrett City, we found that those communities that had become more than 50 percent black were also experiencing a serious loss in total population. Thus, east New York, which was 70 percent black in 1970, lost 33,000 people (or 36 percent of its population) by 1980. And Brownsville, which was 72 percent black in 1970, lost 35.5 percent of its population (or 25,000 people) by 1980.

Family Structure

The black family itself, although experiencing some economic advances, has also seen some setbacks. At the height of the civil rights movement in 1965, a quarter of black families were headed by women. Today, 20 years later, virtually half (or 47 percent) of black families have female heads of household, and 55 percent of black babies are born to unmarried mothers. A study conducted in 1983 by the Center for the Study of Social Policy, a nonpartisan research group, showed that in all races, families headed by women were twice as likely as two-parent families to be poor. Half of all families headed by black women have incomes below the poverty line. More than one in four blacks was born to a teenage mother in 1979 (according to figures compiled by the Children's Defense Fund, a child advocacy group based in Washington, D.C.). The comparable figure for whites was one in seven.

Income

The average income for all black families with children is 56 percent the average for whites. Black families with two working partners do better, earning 84 percent of the income of white families with two working parents; but, as noted above, half of black families are headed by a female.

Education

In 1978, 52.4 percent of blacks had completed less than the 12th grade, in comparison to 32.1 percent of whites. Although no national statistics are available,

[1] 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc,* 461 F.2d 1171 (5th Cir. 1972).

most school boards show blacks as performing far below whites in math and reading scores. This makes white parents (as well as black) hesitate about sending their children to schools where black children predominate, even if the educational provisions in black and white schools are equal.

Employment

Among black teenagers, the official unemployment rate hovers around 50 percent; but according to Sar A. Levitan, an employment analyst, only one-sixth of them have jobs because so many have dropped out of, or never joined, the labor force.

Crime

The Federal Bureau of Investigation's uniform crime reports for 1980 show that, although blacks form only 11.7 percent of the U.S. population, they account for 24.5 percent of those arrested for all offenses and 44.1 percent of those arrested for violent crimes. They also account for 47.9 percent of the U.S. population arrested for murder, 47.7 percent of those arrested for forcible rape, and 57.7 percent of those arrested for robbery. Blacks also formed 29.9 percent of all those arrested for property crimes, 29.1 percent of those arrested for burglary, 30.5 percent of those arrested for larceny theft, and 29.4 percent of those arrested for motor vehicle theft (grand larceny auto).

Factors Affecting Crime and Instability

Our institute's research into the factors affecting crime and instability in federally assisted housing developments found that two social factors proved the strongest determinants of decline: the percentage of one-parent families on welfare and the ratio of teenagers to adults. The black families living in these developments proved to be highly represented in both these categories and so were, in themselves, strong predictors of crime and instability.

Residential crime is an important indicator of the attitudes and behavior of residents and of the malaise a development is suffering. This is because most residential crime is committed by teenage residents in the vicinity of their homes.

Skips and Evictions from Rental Apartments

In a comparison of all-black housing developments administered by the New York State Division of Housing and Community Renewal in New York City with an integrated development that was 2 to 1 white to minority, our institute found that the all-black developments suffered twice as many skips and evictions and two to three times as many dispossessions.

Property Values

Although there is an initial increase in residential property values as blacks move into a predominantly white neighborhood (blacks, because of deprivation, will pay more for a property than whites who have more choices available), as the neighborhood becomes increasingly black, property values either decline or do not keep pace with the overall increase in property values.

The resale value of assisted housing developments is said to decline proportionally with the increase in percentage black occupancy.

The Intent of Title VIII

The legislative history of Title VIII of the Civil Rights Act of 1968 (also known as the Fair Housing Act) is complicated and protracted. It spans such nationally traumatic events as the urban riots of 1967 and the assassination of Dr. Martin Luther King, Jr. The original bill, H.R.2516, was not directed at fair housing. It was introduced in the House of Representatives by Emanuel Celler on Jan. 17, 1967, and provided new penalties for violence against, or intimidation of, persons seeking to exercise their civil rights. The bill, with amendments, was passed by the House on August 16, 1967, but contained no provision relating to fair housing.

Contemporaneously, the Senate Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency began holding hearings on several related bills, including S.1358, a fair housing bill introduced by Senator Walter Mondale. (It should be noted that this bill varied in significant respects from the one that was eventually passed.) The bill provided for an extension in three phases (over a 1-year period) of the housing stock to be covered under the act: first, all federally assisted housing, then all multifamily housing, and finally, all single-family residences.[2]

The enforcement provisions differed also from what was eventually passed: responsibility for administration and enforcement was to rest with the

[2] S.1358, 90th Cong., 1st Sess., §3 (1967).

Secretary for Housing and Urban Development, who had the authority to issue complaints, hold hearings, and issue appropriate orders. The Attorney General could also enforce the law by initiating suits in Federal courts to eliminate patterns or practices of housing discrimination.[3]

The subcommittee heard testimony on August 21, 22, and 23 from almost 50 witnesses. No official action was taken to report out the bill.

Meanwhile, H.R.2516 was sent to the Senate Judiciary Committee, which reported it to the Senate floor on November 2, 1967. It still contained no fair housing provisions. Debate on the bill continued through the rest of the year with no action taken.

As the new session began in January 1968 and debate continued, Mondale realized that there would be only one civil rights bill on the Senate floor during the session. After an amendment designed to weaken the bill failed, Mondale introduced his fair housing amendment, which was essentially S.1358 with the addition of a "Mrs. Murphy" exemption, cutting from the intended coverage 5.5 million owner-occupied dwellings containing four or fewer units.[4]

Southern Senators invoked a filibuster, and debate continued through February. Two attempts at cloture failed. Finally, Senator Everett Dirksen worked out a substitute fair housing amendment that the supporters of the original title were able to support. The Dirksen amendment reduced the enforcement power of the Secretary of HUD, and removed from the coverage of the act all single-family dwellings sold by an owner-occupant without the use of a real estate broker. However, even the Dirksen version failed to command enough votes to end filibuster. Only after the publication of the Kerner Commission report on civil disorders (March 1968) and the attendant publicity, was Senate sentiment sufficiently altered to produce a cloture vote.

The civil rights bill was passed by the Senate in substantially the same form on March 11, 1968.

The bill that the Senate returned to the House bore little resemblance to the original H.R.2516. It did not go to the Judiciary Committee for new study, but straight to the House Rules Committee. On April 9, the Committee sent it to the floor of the House under a rule that limited debate to 1 hour and permitted no amendments. The House voted to accept the Senate amendment and passed the bill. President Johnson signed the bill into law on April 11, 1968.

Historically, a fair housing title was never officially on the agenda of either the House or the Senate Judiciary Committee. There was, thus, no committee report that dealt with fair housing. The only legislative history we have of the act is the floor debates in Congress and the Banking and Currency Subcommittee hearings. The transcripts of the subcommittee hearings are 500 pages long, and the Senate hearings take up over 1,000 pages of the *Congressional Record.* Three areas of intent are expressed in the Senate hearings. Each is cited below, followed by a sampling of the sentiments expressed:

Intent 1: That an end be put to discrimination in housing.

The Act would gradually prohibit discrimination on account of race, color, religion or national origin in the sale or rental of housing.

The Act would also prohibit "blockbusting," discrimination in the financing of housing, discrimination in provision of services or admission to membership by real estate organizations, and interference with or threats against persons enjoying or attempting to enjoy any of the rights which the Act grants or protects.[5]

If you maintain that denial, of what I think is a right, of people to live where they want to move and move freely as Americans, I think it's one of the demeaning and insulting, enraging aspects which have been responsible for our riots, and is responsible for a weakness in America we ought to overcome.[6]

Intent 2: That racially integrated living replace segregated living and the debilitating effects of segregation on black families and American society in general.

Discrimination in housing forces its victims to live in segregated areas, or "ghettoes" and the benefits of government are less available in ghettoes. The ghetto child is more likely to go to an inferior school. His parents are more likely to lack adequate public transportation facilities to commute to and from places of work, and so will miss employment opportunities. Local building and housing laws are not, or cannot be, effectively enforced in ghettoes. Federal subsidies for private housing bypass the ghetto and flow instead to the suburbs. Freeways are typically routed through ghettoes, because land there is cheaper and their inhabitants less able to organize politi-

[3] S.1358, 90th Cong., 1st Sess., §§11, 12, 13, 14 (1967).

[4] 115 Cong. Rec. S.1876 (daily ed. Feb. 28, 1968).

[5] Sen. Mondale, 114 Cong. Rec. 2272 (1968).

[6] Sen. Proxmire, *id.* at 349.

cally to oppose them. Most significantly of all, law enforcement is least effective in the ghetto, although it is there that it is needed most. The slum inhabitant must take for granted that he and his children live in continual danger of physical attack.

There are many, many integrated living areas in this country. The experience in them has been far more enriching and fulfilling than one might initially believe. Therefore, one wonders whether the understanding which this nation needs, and the people's need of each other, can be accomplished unless we decide we will live together and not separately.[7]

Intent 3: That as a consequence of the proposed Fair Housing Act, black families will not "resegregate" integrated areas or spread the ghetto.

There will not be a great influx of all the Negroes in the ghettoes into the suburbs—in fact, the laws of supply and demand will take care of who moves into what house in which neighborhood. There will, however, be the knowledge by Negroes that they are free—if they have the money and the desire—to move where they will; and there will be the knowledge by whites that the rapid, block by block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns.[8]

Senator Proxmire explained why integration must be a legitimate goal of the proposed act:

For instance, we had an area in Milwaukee, one of the few areas incidentally, which was integrated, which is integrated, and there are about 40 percent Negro families and 60 percent white families living there. They are living very well there. The Negroes there are very anxious to prevent the area from becoming a solidly Negro area.

When a Negro family sells to a white family, they are very pleased because this helps maintain the balance. When it works the other way they are displeased, not because they don't want another Negro family in but because they know what happens in a community which becomes segregated and becomes identified as just a Negro community.[9]

Given the limited nature of housing programs then in effect, none of the Senators was able to anticipate that the antidiscrimination intent would come into severe conflict with the other goal of the act, the replacement of segregated communities with integrated ones. But the new government housing programs that intended to mix income groups by supplementing rents (221d3, sec. 8, etc.) opened up middle-income housing to large sections of the black community. If the nondiscrimination provision became the governing principle of the Fair Housing Act, integrated communities would prove difficult to maintain.

Tipping: The Racial Turnover of Communities

Social science researchers have given "tipping" a variety of meanings. A current, acceptable definition is: the percentage of minority occupancy at which racial transition becomes inevitable. A more historical description of tipping is provided by Goering: "The tipping point is a threshold after which there is an acceleration in the rate of white out-movement from a neighborhood."[10] This latter definition emphasizes the point where white flight occurs, while the former suggests a more subtle process of transition. The former view is supported by the work of Eleanor Wolf and Charles Lebeaux[11] and Frederic Pryor,[12] who observed in their studies of racial transition that racial change could occur without a mass white exodus.

Supporters of both models have devoted considerable effort to the task of quantifying that tipping threshold and have produced a wide range of results. According to Goering, the tipping point is usually between 25 or 30 percent.[13] Ackerman places the range from 30 to 50 percent black,[14] Navasky at 30 to 60 percent.[15] Yinger has suggested that "the existing evidence implies that under most, but not all, circumstances, stable integration of a neighborhood requires that blacks remain less than about 10 percent of the neighborhood's population."[16] Rapkin suggests that under certain circumstances, tipping may occur as the result of just one black family entering a neighborhood.[17]

[7] Mondale, *id.* at 2273–76.
[8] Mondale, *id.* at 3422.
[9] Proxmire, *id.* at 348.
[10] John M. Goering, "Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence," *AIP Journal,* January 1978, pp. 68–78 (hereafter cited as "Neighborhood Tipping").
[11] E.P. Wolf and C.N. Lebeaux, "Class and Race in the Changing City." In L.F. Schorore, ed., *Social Science and the City,* New York, Praeger, 1967.
[12] F.L. Pryor, "An Empirical Note on the Tipping Point," *Land Economics,* November 1971, pp. 413–17.
[13] "Neighborhood Tipping," p. 68.
[14] B.L. Ackerman, "Integration for Subsidized Housing and the Question of Racial Occupancy Controls," Stan. L. Rev. (January 1974), pp. 245–309.
[15] V.S. Navasky, "The Benevolent Housing Quota," How. L. J. (1960), pp. 6, 30, 46–47, 53.
[16] J. Yinger, *Possibility of Achieving Racial Integration,* p. 12.
[17] C. Rapkin, and W.G. Grigsby, *The Demand for Housing in Racially Mixed Neighborhoods,* Berkeley: University of California Press, 1960.

Some authors occasionally use the terms "black" and "minority" interchangeably. "Minority" should be used to include blacks, Hispanics, Orientals, American Indians, and others. Regarding tipping, it is the percentage black that has proven the issue. Orientals do not evoke the same response, nor do American Indians. Among Hispanics, it is the percentage of black Hispanics that contributes to tipping.

In a 1975 Detroit survey of white and black attitudes toward various suburbs, Farley, et al., distinguished between a preference point, a leaving point, and an entering point.[18] Respondents were shown maps with black- and white-occupied houses at varying degrees of integration. They were then asked: if they would feel uncomfortable in such a neighborhood, if they would attempt to move away from such a neighborhood, and if they would be willing to move into such a neighborhood. The results show that, at each level of integration, the percentage of whites *unwilling to move into* that neighborhood was significantly higher than those who indicated they would *move out.* Also, blacks expressed significantly higher willingness to live with whites at various levels of integration than did whites with blacks. Figure 1, prepared by our institute from Farley's data, plots white and black willingness to live in integrated neighborhoods at varying levels of black occupancy and shows at what level the combined effect of white and black attitudes is most likely to produce stable integration (i.e., 22 percent black).

White and Black Willingness to Live in Integrated Housing

The curve that plots white willingness to live among blacks is a continually declining one, with 75 percent of whites willing to live in communities that are 5 percent black and only 30 percent of whites willing to live in communities that are 35 percent black. Only 18 percent of whites will live in communities that are 50-50 black-white.

By contrast, the curve that plots black willingness to live among whites produces a plateau that shows that virtually all blacks would be willing to live in communities that range anywhere from 25 percent to 75 percent white. Of equal importance, it shows that as many as 60 percent of blacks would be willing to live in communities that were 90 percent white.

The evidence presented by Farley on black versus white attitudes towards integration raises a disturbing question: Given equal access to housing by both racial groups and a greater black willingness to live among whites at various levels of integration, how can any neighborhood hope to maintain integration over the long run? If black and white willingness were equal, then in order to maintain integration in a development at a given ratio, the racial composition of the replacement population would have to equal exactly the development's racial ratios. But if black willingness is higher than white, blacks will exert a disproportionally higher demand. To compensate for this, whites would have to be represented in the marketplace at a disproportionally higher percentage than they are intended to be represented in the integrated development. This is in a situation where the market is allowed to act of its own accord, that is to say, without management's use of race-conscious occupancy controls.

Our institute developed a formula from Farley's data that revealed that if it were desired to maintain a development at, say, an 80–20 white-minority mix but *without the use of occupancy controls,* whites would have to form 88.4 percent of the market population.[19] This formula considers only the difference between white and black demand based on both races' willingness to live in integrated communities at various levels of black occupancy. It does not consider greater black demand resulting from housing deprivation, nor does it consider the phenomenon of blacks rushing to avail themselves of any quality housing market that is shown to be open to them. Both of these additional phenomena would exert pressures that would require a still higher white presence in the marketplace than 88.4 percent.

Charting the Tipping Phenomenon

To learn of the likely tipping point at Starrett City, our institute examined the change in racial composition of four neighboring housing developments occupied by similar income groups.

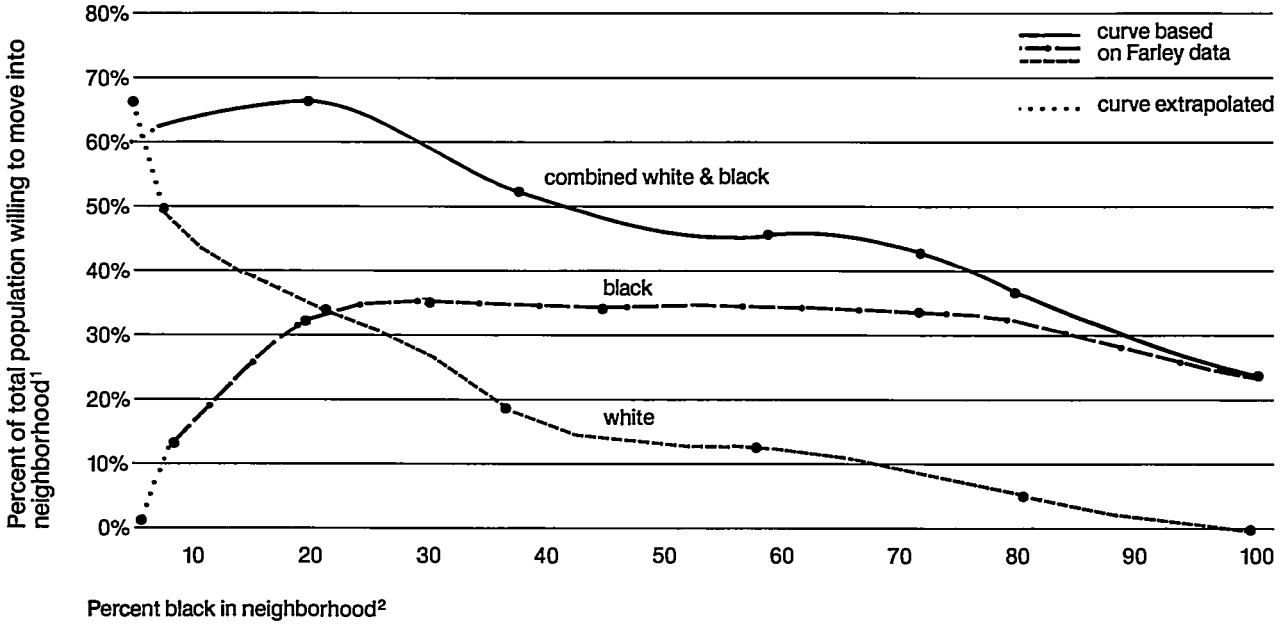
Figure 2 dramatically illustrates the tipping point phenomenon. Prior to early 1968 (Title VIII was passed in April 1968), the black population in these

[18] Reynolds Farley, et al., "Chocolate City, Vanilla Suburbs. Will the Trend Toward Racially Separate Communities Continue?" *Social Science Research,* 7, 4, 1978, pp. 319–44.

[19] O. Newman, *Integration Equals Intervention, the Use of Occupancy Controls at Starrett City,* New York, Institute for Community Design Analysis, 1983, pp. 44–47.

FIGURE 1

White and Black Willingness to Live in Neighborhood by Percent Black



[1]Assumes a total population that is ⅔ white, ⅓ black. Data for black population were calculated by multiplying Farley's data x ⅓. Data for white = Farley's data x ⅔. Total population = Σ black + white subpopulations.

[2]Based on our assumption of a total population which is one third black, the willingness curve for the combined population peaks at 20 percent black. The curve then decreases sharply between 20 and 40 percent black, leveling off as white responses become insignificant. The downward curve for neighborhoods 70 percent or more black reflects black antipathy for such communities.

Source: ICDA estimates based on data from Farley et al., "Chocolate City Vanilla Suburbs . . ." *Social Science Research* 7, (4) 319-44 (1978).

developments stood between 12 and 16 percent. In mid-1968 the New York City Housing Authority removed its race-conscious occupancy controls over public housing projects in this area. The black population of these projects began to climb precipitously. By January 1977, the three public housing projects had become between 70 percent and 83 percent black.

There was, of course, the possibility that the tipping of these developments was prompted by an overall neighborhood change, rather than a change in the authority's policies and/or the internal composition of the projects themselves. Our examination of the 1970 census reveals that the immediate neighborhood surrounding the projects was 86.1 percent white when the projects began to tip. This figure includes the population of the public housing projects. Without the projects, the surrounding neighborhood was about 90 percent white, hardly a figure that would have led the projects to tip.

By January 1980, the four housing developments were between 82 percent and 97 percent black. But the 1980 census reveals that the surrounding neighborhood (including the developments, but excluding Starrett City) was 61.9 percent white. It is clear, therefore, that the increase in black population in the neighborhood was precipitated by the increase in black population in the projects.

Tipping in the Higher Income Development

The effect of the rapid increase in black population in the three public housing projects on the neighboring moderate-income development (Fairfield Towers) is of interest and is also revealed in figure 2. Fairfield Towers, which in 1966 was 10 percent black when the three public housing projects were between 12 percent and 16 percent black, lagged by 2 to 3 years in its own steep climb to becoming an all-black project.

But although Fairfield Towers started later, once it began tipping in January 1972, at 17 percent black, it did so more rapidly. It became 90 percent black in 5 short years—from 1972 to 1977. This suggests that moderate-income white populations, having more income and, therefore, more choice than white public housing residents, will flee a project that is tipping more rapidly.

The Remaining 20 Percent White Population

There is also a lot to be learned about the 20 percent white population that remained in the public housing projects. When these projects were 80 percent white, the percentage of white elderly families averaged 20 percent. But when these projects were 50 percent white, the percentage of white elderly families ranged from 45 percent to 65 percent. They were also of lower income, with a 43 percent spread between themselves and the income of the black residents. When interviewed at random today, the remaining white elderly stated that they had no other option open to them but to stay where they were.

If all this suggests that residential integration is a precarious commodity, consider the work of Duncan and Duncan,[20] who found that no community in Chicago was able to maintain integration (which they defined as 25-75 black-white) between 1940 and 1950. Based on this study, Morton Grodzins concluded that "without controls there has been a total failure to achieve interracial communities."[21]

Factors in Neighborhood Selection

According to Bradburn, Sudman, and Gockel,[22] white and black buyers in integrated neighborhoods and white buyers in segregated neighborhoods describe similar criteria in selecting their new homes. The most frequently cited advantages were: convenience to work, the size of the dwelling, specific features other than size, and financial considerations.

Wolf and Lebeaux indicate that buyers are also concerned with the quality and cost of public services, *especially education* and, in some areas, the level of crime. These same concerns have been reported by residents in private interracial developments by the Potomac Institute[23] and by Grier and Grier in their 1960 study.[24]

From the point of view of blacks, high-quality services and low crime rates are more likely to be found in integrated neighborhoods. In an opinion

[20] Otis D. Duncan, and Beverly Duncan, The *Negro Population of Chicago,* Chicago: University of Chicago Press, 1957.

[21] Morton Grodzins, "Metropolitan Segregation," *Scientific American,* October 1957, pp. 33–41.

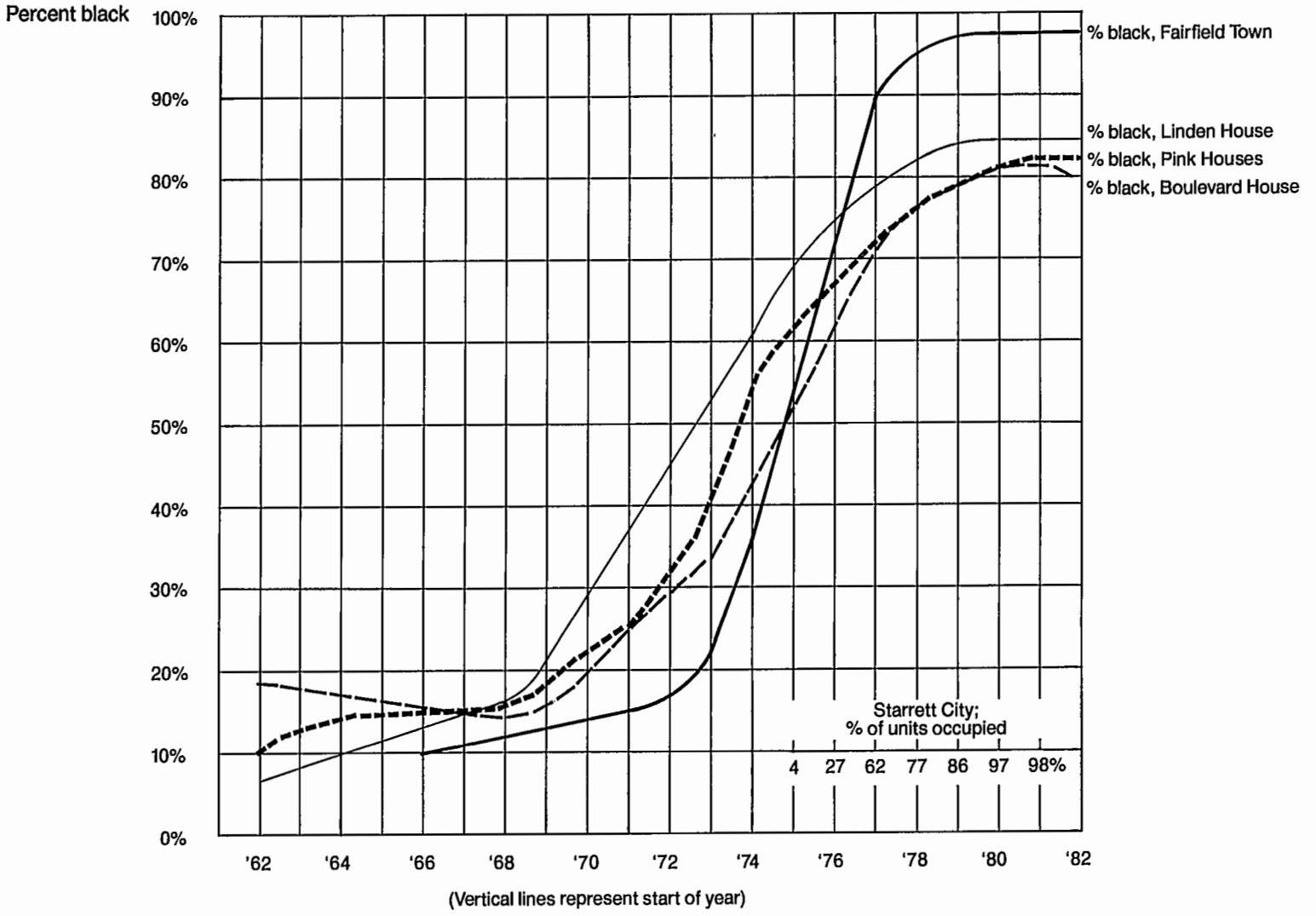
[22] N.M. Bradburn, S. Sudman, and G.L. Gockel, *Racial Integration in American Neighborhoods,* Chicago, National Opinion Research Center, 1970.

[23] *Housing Guide to Equal Opportunity, Affirmative Practices for Integrated Housing,* Washington, D.C., Potomac Institute, 1968 (hereafter cited as *Housing Guide).*

[24] E. Grier and G. Grier, *Privately Developed Interracial Housing: An Analysis of Experience,* Berkeley: University of California Press, 1960.

FIGURE 2

Increase in Percent Black Occupied Units in Housing Developments Bordering Starrett City



poll taken in 1968 by the Survey Research Center, blacks who preferred integrated neighborhoods gave the following reasons: races learn to get along better, less crime, quieter, and better services. It seems that if the quality of the dwelling units, the public services, and the overall condition of neighborhood are reasonably high and are maintained at that level, the chances of a community remaining stable and integrated are greatly improved. Grier and Grier, J.T. Little, et al.,[25] Lillen, and the Potomac Institute make similar recommendations. These recommendations apply to privately developed housing just as they do to subsidized housing.

Several writers have suggested that successful, stable racial integration can better be realized in rental housing and in owner-occupied housing that is managed by a central agency (i.e., a cooperative or condominium) than in privately owned and separately managed housing. In rental and collective housing, because of the size of the operation, the managers are not as vulnerable to real estate pressures (i.e., blockbusting) and community changes as are individual homeowners. The collective managers are also in a position to implement policy that can contribute significantly to stability and integration. They can facilitate entry by different racial groups in desired proportions by screening applicants or by directing advertising or promotion to recruit different groups. The managers are thus able to assure prospective residents that the minority population will not exceed a certain figure.

Schnare and McRae have developed a model that attempts to explain tipping in terms of economic factors.[26] That model suggests that white interest in a racially mixed community is inversely proportional to both the percentage of minorities and to the cost of housing in that community. This model shows that tipping will occur when blacks are willing to pay more for housing than the maximum amount whites are willing to pay. This condition is likely to occur frequently in neighborhoods of transition because of strong black need and equally strong white preference for living in segregated white communities.

One economic factor of particular concern to white homeowners is the value of their homes. For most Americans, their home is their largest personal investment. As a result, white move-outs will increase when they perceive a future increase in minority population that may lead to a decline in property value. This can become a self-fulfilling prophecy on the part of whites, in that their very flight precipitates the phenomenon they most dread. The process highlights the significant impact of future expectations on racial transition. J.T. Little, et al., and Farley have documented the importance of residents' expectations regarding the possibility that their properties will decrease in value with in-migration of low-income, nonwhite families. Bradburn, et al., and Rapkin and Grigsby also stress the importance of the current residents' expectations. As alluded to earlier, there are mitigating factors that can serve to increase white participation in integrated housing. These include: location, neighborhood conditions and services, and various economic factors. One might add to these: *white perception of the future racial composition of a neighborhood.*

An overwhelming conclusion from the social science literature on tipping is that the perceived future racial composition does have an important impact on a renter's decision to move in. This suggests that any housing or community management policy that can guarantee a consistent racial mix will likely have a significant impact on the ability of that development or community to continue to attract white residents, thereby increasing the tipping point while still promoting racial stability.[27] If the area is sufficiently large, its racial stability can also promote stability within the surrounding neighborhood. Should that area tip however, it is very likely that the surrounding community would also tip.[28]

[25] J.T. Little, et al., *The Contemporary Neighborhood Succession Process,* report by the Institute for Urban and Regional Studies, St. Louis, Washington University, 1975.

[26] Ann B. Schnare and C.D. MacRae, *A Model of Neighborhood Change,* Contract report no. 225–4, Washington, D.C., The Urban Institute, 1975.

[27] Focus group sessions with "majority" parties who considered Starrett City as a place to live and then withdrew, and with current "majority" residents, conducted in 1977, found: "Those who were really in the market seemed to have been discouraged by fears about the ability of Starrett to reach and maintain a fully rented status and thus sustain its racial balance goals" (p. 2). "Tenants generally found the quality of life at Starrett City very good, they found maintenance and security quite adequate, and they liked their neighbors. Most planned to stay if the community 'stayed the way it is'" (p. 3). *Starrett City Study,* New York, Carol Bernstein Research, 1977.

[28] For an analysis of the impact of a housing project on its surrounding community, see reference to Karl Taeuber in D.R. Mandelker, et al., *Housing and Community Development,* New York, Michie Co., 1981, pp. 589–90.

Summary

The results of my own 20 years of observation of communities throughout the country suggest that the phenomenon that most predicts tipping is whites' unwillingness to replace themselves in an integrated community, thus increasing the rate of black entry. This normally begins to occur at between 15 percent and 20 percent black, although for some white ethnic groups it occurs earlier. There is also some variation in the tipping point due to the income of inhabitants and the location of the community. Generally, the higher the income of inhabitants, the smaller the integrated community; and the more it is located within a highly desired, all-white community, the higher will be the tipping point. For example, the tipping point of a 100-unit public housing project located in a white, moderate-income area adjacent to a black community would be at about 15 to 20 percent black. If the same project were only 10 units in size and located in a middle-income area some distance from the ghetto, 6 of those 10 families could be black and the project would not tip. The reason is that the tone of life in the project would also be determined by the surrounding community, and the four white families would perceive themselves as part of the larger surrounding white community and not as part of the housing project.

To sum up, we can say that tipping is affected by two forces: black demand and white disinterest.

Effects of Black Demand and White Disinterest on Tipping

The factors affecting black demand and white disinterest can be broken down as follows:

Black demand is determined by:

a. The cost of available housing, including:
   —real costs; and
   —available subsidies.
b. The location of available housing, including:
   —number of blacks in inadequate housing in the market area;
   —distance from work; and
   —distance from larger black community.
c. The middle-class ambience of the housing (see factors affecting middle-class ambience under "white disinterest" to follow).

White disinterest is determined by:

a. The absence of a middle-class ambience as determined by:
   —quality teaching and adept students in local schools;
   —well-built and well-maintained housing;
   —low crime rates;
   —quality shopping and institutions; and
   —quality city services.
b. Higher housing costs, in terms of:
   —real costs; and
   —available subsidies.
c. The percentage of blacks in evidence in the community irrespective of their effect on the middle-class ambience.

The above formula assumes that the law operates to give blacks an equal choice in housing. However, experience has shown that there are many more ways for whites to keep housing unavailable to blacks than the law can hope to correct—absent incentives to whites to make housing available to blacks.

As long as blacks remain a lower socioeconomic group, their presence makes the maintenance of a middle-class ambience difficult: in schools, crime rate, project maintenance, shopping, municipal services—both within the development and in the neighborhood outside it.

The school factor is obviously of less importance to whites who do not have school-age children: elderly or career-oriented whites.

Item *c* under "white disinterest" above is intended to represent "white prejudice." It measures the effect of the percentage black independently of the real effect the presence of blacks as a lower socioeconomic group might have on reducing the middle-class ambience. This factor measures the stigma whites feel that greater society puts upon them for living in a heavily black community.

White prejudice is most effectively neutralized by creating positive white experiences with interracial living so as to create a new positive prejudice to replace an old negative one.

Looking at how to minimize the effects of the two major factors affecting tipping, we find that the strength of "black demand" can be minimized if quotas are used to keep black demand constant.

Regarding white disinterest, the effect of lower black socioeconomic status on the ability to maintain a middle-class environment can be lessened by raising blacks' socioeconomic status. Enabling young blacks to grow up in an integrated environment is one of the better ways to accomplish this.

Housing costs (item *b* under "white disinterest" above) suggest that whites can be induced to live in integrated environments through the provision of subsidized housing. The current lack of housing subsidies not only removes this factor, it drives up the cost of housing by removing incentives for builders.

Court Interpretations of Title VIII

Two years after its passage, the courts began to grapple with those statutory affirmative action obligations of Title VIII that extend *beyond* the constitutional requirements of nondiscrimination. In the Third Circuit's decision in *Shannon* v. *HUD,*[29] Judge Gibbons declared that the government in considering sites and types of housing projects must have before it:

> the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.
>
> Possibly before 1964 the administrators of the Federal housing programs could—by concentrating on land use controls, building code enforcement, and physical conditions of buildings—remain blind to the very real effect that racial concentration has had in the development of urban blight. Today, such color blindness is impermissible. Increase or maintenance of racial concentration is *prima facie* likely to lead to urban blight and is, thus, *prima facie* at variance with the national housing policy.[30]

Although the court in *Shannon* recognized that the concentration of blacks led to urban blight and that this was now at variance with national housing policy, the court nevertheless warned that desegregation is not "the only goal of national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto."[31] *Shannon,* therefore, does not provide a substantive interpretation of the full scope of the Title VIII mandate or attempt to reconcile the emerging conflict between nondiscrimination against individuals and the social need to integrate the races.

In *Otero* v. *New York City Housing Authority,*[32] the Second Circuit interpreted the affirmative mandate of Title VIII to mean a duty to promote integrated housing. The case is interesting because in overturning the southern district court's decision,[33] the court of appeals placed a higher priority on the New York City Housing Authority's "constitutional and statutory duty to foster and maintain racial integration"—and so not "tip" the project and, by extension, the surrounding neighborhood—than it did on the authority's obligation under its own regulations: that of giving priority in housing to those misplaced by the very urban renewal that made the public housing project they wanted access to possible.

The appeals court decision is also noteworthy in rejecting the district court's conclusion that Title VIII's mandate to integrate was intended to be primarily for the benefit of minorities:

> We do not view that duty [to] integrate as a "one-way" street limited to introduction of non-white persons into a predominantly white community. The Authority is obligated to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons.[34]

This decision also weighs, for the first time, the constitutional rights of the individual to nondiscrimination against the larger good of society in promoting integration:

> To allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting partners in the trend toward ghettoization of our urban centers. . . .Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettoes and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location.[35]

For further precedent, the Second Circuit cites *Gautreaux* v. *Chicago Housing Authority*[36] that:

> A tenant assignment policy which assigns persons to a particular project because of the concentration of persons of his own race already residing at the project has been prohibited. Not only may such practices be enjoined, but affirmative action to erase the effects of past discrimination and desegregate housing patterns may be ordered.[37]

But the court of appeals also issues a warning in its conclusion:

[29] 436 F.2d 809 (1970).
[30] *Id.* at 820–21.
[31] *Id.* at 822.
[32] 484 F.2d 1122 (1973).
[33] S.D.N.Y., Feb. 8, 1973.
[34] 484 F.2d at 1125.
[35] *Id.* at 1134.
[36] 296 F. Supp. 907 (7th Cir. 1970).
[37] *Id.* at 1133.

The Authority's denial of housing to a family because of its race could, whether or not labeled a "benign" quota, constitute a form of unlawful racial discrimination in violation of the family's constitutional rights. For these reasons the burden on the Authority is a heavy one.[38]

The authority is, in effect, asked to demonstrate that by giving minorities priority, the project and its surrounding neighborhood would tip.

In *Williamsburg Fair Housing Committee* v. *New York City Housing Authority,*[39] the plaintiffs, representing nonwhite persons denied dwellings in five housing developments, brought an action claiming that defendants had instituted and approved policies for the maintenance of racial quotas in the developments. The community is divided between Hispanics and Hassidic Jews, with an additional small percentage of blacks.

The Williamsburg renewal area included six housing developments, four of them belonging to the New York City Housing Authority and two of them to the New York City Department of Housing Preservation and Development. At the time of the consent decree, the five completed housing projects had been race-consciously rented on a floor by floor basis to achieve and maintain integration throughout the development without creating any pockets of minority concentration. Three of the projects were occupied at 75 percent white and 25 percent nonwhite, one was 90 percent white and 10 percent nonwhite, and the last was 60 percent white and 40 percent nonwhite. The sixth project, financed by the New York City Department of Housing Preservation and Development, was not as yet completed. It was to be rented at 35 percent white and 75 percent minority. The nonwhite components in the projects were predominantly Hispanic, with a few percentage points black.

The initial suit was brought by nonwhite persons against the four housing authority projects for discrimination in renting. At the completion of the sixth project, Clemente Plaza, and prior to its occupancy, intervenor defendants-third party plaintiffs in the name of United Jewish Organizations of Williamsburg, sought a temporary restraining order and preliminary injunction against its tenanting in a discriminatory fashion.

The court recognized that there was:

> evidence that the white community in Williamsburg was aware of the projected 75/25 percent [black/white] ratio at Clemente Plaza and [that this ratio] might have disrupted the integrated pattern or the larger community as well.

> The consent decree works to alleviate the fears of the community groups while making each of the developments more racially integrated during the adjustment period.

The consent decree required that nonwhite applicants to four of the five existing projects be given precedence until the projects became between 32 and 35 percent nonwhite. The fifth project that was already 40 percent nonwhite was to so remain. The sixth, and hitherto unrented project, that was to become 25 percent white and 75 percent nonwhite was changed to become 51 percent nonwhite and 49 percent white; its being perceived that this would make it *both* easier to rent to whites *and,* thus, removing it as a potentially destabilizing factor within the entire community.

The district court approved a consent decree between plaintiffs and all of the defendants except for the owner and manager of one of the developments, noting that:

> Paragraph 6,. . .enjoins the consenting parties from discriminating in the rental of dwelling units in the six developments and proscribes the use of quotas of racial or religious criteria in such rentals. At the same time, however, the decree recognizes that, in light of past acts of discrimination, it is necessary to establish "adjustment periods" for each of the projects during which time they will become more integrated. *Once a given project reaches a certain percentage of white to non-white tenants, the adjustment period ends and the underlying principle of nondiscrimination in rentals controls.*[40]

The court concluded that the consent decree substantially embodied the goal of integrated residential housing advocated in *Otero.* With respect to the remaining defendants, the case proceeded to trial on the merits. The opinion of the court, filed July 15, 1980, found that defendants' use of a racial integration maintenance quota violated Title VIII and other statutes. Specifically, the court reiterated the language in *Otero* concerning the high burden of proof to be met by a defendant on the "tipping" issue, and concluded that the burden had not been sustained.[41]

[38] *Id.* at 1136.

[39] 450 F. Supp. 602 (S.D.N.Y. 1978).

[40] *Id.* at 606 (emphasis added).

[41] P.H.E.O.H. para. 15,338 at p. 15,964.

Interim Conclusions

The court decisions reviewed above share a common thread: They all recognize that the obligation to integrate is equal to, if not greater than, the obligation not to discriminate when discrimination and race-conscious occupancy controls come into conflict.

The courts have accepted that there might be a need to discriminate after a certain percentage of minorities have been served in order to achieve and maintain stable integration—that is, in order to avoid tipping. However, the courts have placed a burden on those to whom they have granted the right to employ race-conscious tenant selection criteria by requiring them to demonstrate that tipping would be the inevitable outcome should quotas not be employed. When, as in the case of *Williamsburg Fair Housing Committee,* this has not been clearly demonstrated, the court found for the plaintiffs.

The judicial memorandum approving the *Williamsburg* consent decree is significant in another important respect: The court recognized that Title VIII requires the Secretary of HUD to "proceed to try to eliminate or correct alleged discriminatory housing practice by informal methods of *conference, conciliation,* and *persuasion.*"[42]

The court began by quoting from *Otero* that the goal of the Fair Housing Act is to promote:

> open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.[43]

The judge then stated further that:

> the very nature of this goal makes its achievement improbable if not *impossible through the imposition upon the community of solutions not of the community's own design* and thus quite likely lacking the community's support and confidence. The Court cannot force persons to live in the community; the continued or increased presence of any element of the ethnic makeup of a neighborhood, and thus the success of the Act's goal of supporting integration in the community, will depend largely on the willingness of individuals and groups to live there.[44]

In *Burney* v. *Housing Authority of the County of Beaver,*[45] the court rejected these previous decisions, and *Otero* in particular, and found for the rights of the individual not to be discriminated against over the greater societal good of achieving integration. The court also took exception to the Second Circuit's minimization of the burden being placed upon minority groups in bearing the cost of self-exclusion to achieve integration. But the court in its summation returned to a more balanced and cautious view and concluded that defendants in *Burney* had not demonstrated what they were obligated to: that a nonrace-conscious procedure would have definitely resulted in tipping. The court then outlined what it perceived might have been an acceptable defensive strategy.

On the subject of housing quotas, the *Burney* opinion is the most thoughtful we have to date, and it is worthwhile discussing at length for the issues it raises on the inherent conflicts between nondiscrimination and cost of maintaining integration.

Plaintiffs, minority applicants to the County of Beaver Housing Authority, challenged the consent order between the authority and the Pennsylvania Human Relations Commission. The consent order was designed to desegregate each of the authority's low-income housing projects through the use of a new tenant selection and assignment procedure that gave priority to racial group applicants who were underrepresented in a particular project, the goal being to have each project reflect the racial composition of the authority as a whole—at that time 33 percent minority. The authority kept chronological lists of applicants by race and apartment size requirements. If an applicant refused the unit offered, the name was placed on the bottom of the list. Once a project reached the target balance, a white family moving out was to be replaced by a white family, and a black by a black, the only permissible exception being emergency placement due to fire, flood, relocation due to eminent domain proceedings, etc.

There was disagreement between the authority and the commission as to whether the 33 percent minority was to be fixed (as claimed by the authority) or flexible so as to reflect ensuing changes in black and white demand for housing (as claimed by the commission).

However, the court determined that because an applicant's race was the key factor in his or her

[42] 42 U.S.C. §3610(a) (emphasis added).

[43] 484 F.2d at 1122, 1134.

[44] *"Cf.,* Comment, School Desegregation, 42 Brooklyn L.Rev. 961, 972–73 n.59, 974–75 n.68 (1976) (noting the relation between court imposition of school integration and 'white flight' from cities)." 450 F. Supp. at 606.

[45] 551 F. Supp. 746 (W.D. Pa. 1982).

selection and assignment, the plan was constitutionally and statutorily infirm regardless of whether the target racial balance was a fixed or fluctuating percentage.

The court recognized that the U.S. Constitution is not colorblind in the absolute sense, that is, considering that all racial classifications are per se invalid. Citing *Parent Association of Andrew Jackson High School* v. *Ambach,*[46] the court regarded any state action involving purposeful racial discrimination, however benign, as requiring the most exacting form of review, particularly when the plan burdens or stigmatizes individual members of a minority group—even if the plan benefits other members of the same group.

The court gave cognizance to the authority's argument that, in absence of a quota restricting the percentage of black families permitted to reside in each of its projects, tipping would occur, leading to the complete resegregation of the projects.

The court, citing *Linmark Associates, Inc.* v. *Township of Willingboro,*[47] also acknowledged that the Supreme Court expressly recognized the importance to a community of promoting stable, racially integrated housing because "substantial benefits flow to both whites and blacks from interracial association. . . ." The court, however, felt that "the gains from the use of benign quotas to promote integration were tempered by two types of injuries inflicted upon blacks:"

1. that blacks were denied access to a particular project because of their race,
2. that blacks were stigmatized by the implication of inferiority.

The court added: "Integration maintenance, with its express purpose to limit the percentage of black residents, may be explained *only as a recognition of the reality of white flight, a phenomenon based on white prejudice.*" (Emphasis added.)

The court then drew the distinction between the use of racial quotas in schools versus their use in housing. In schools, "no black person is totally denied access to a government benefit because of race [but] a person who is denied access to a particular vacant housing unit because he is black is not, at that time, offered alternative housing. As long as housing alternatives are not provided, the constitutional personal rights problem is not avoided."

The court's lengthy conclusion lamented both the inadequacy of the defense in meeting its burden of proof and the confusion as to the nature and extent of HUD's duty under Title VIII. Strangely, the court chose to decide the case by finding the authority's failure to meet its burden of proof on tipping sufficient, in and of itself, to establish a violation of plaintiffs' rights under the equal protection clause of the 14th amendment. It then asked:

> Is HUD's duty limited to enforcing nondiscrimination in housing. . .or is HUD required to *act affirmatively* to promote integration in housing, in which case racial occupancy controls could be permissible in certain circumstances?. . . .The results of our examination. . .leave undecided until another day the issue of whether section 3608(d)(5) of Title VIII authorizes the use of integration maintenance quotas by HUD, and through HUD, by a local housing authority.[48]

A close examination of the evidence and arguments presented by the court reveals some unresolved problems that appear to contradict some of its conclusions. For instance:

1. In the court's presentation of the change in the racial composition of housing projects following upon the 1978 consent decree between the authority and the commission, the court recognized that "significant changes have occurred"[49] but failed to see that, although the predominantly white projects had increased their percentage of black residents from 200 to 300 percent, the predominantly black projects only achieved a 10 percent reduction in black population. Whites, clearly, were not moving into black projects at the rate that blacks were moving into white projects. If this were a consequence of whites rejecting moving into all-black projects for a substantive reason, those whites would have to move to the bottom of the waiting list and find themselves without access to housing for reason of their race. In fact, the consent decree's methodology for distributing public housing units is likely to have the effect of turning all of the city of Beaver's public housing into black housing. If the population of the county of Beaver that qualifies for assisted housing is more white than it is black (as is the case in most smaller cities), whites' exclusion from public housing is a form of racial discrimination. Given that whites are a majority in that

[46] 598 F.2d 705, 717 (2nd Cir. 1979).
[47] 431 U.S. 89, 94, 95, (1977).
[48] 551 F. Supp. at 769.
[49] *Id.* at 753.

town, this is likely to have the ultimate effect of curtailing both sites and funds for the public housing program itself and, ultimately, for its black inheritors.

2. The latter concern requires satisfaction of the question: Are whites rejecting a move into predominantly black housing for substantive reasons or only for reasons of racial prejudice? The court claimed it found: "Integration maintenance, with its express purpose to limit the percentage of black residents, may be explained *only* as a recognition of the reality of white flight, a phenomenon based on white prejudice."[50] But the court did not present evidence or cite precedence for this conclusion. If it turned out that white unwillingness to live in projects that are more than 30 percent minority is based on legitimate concerns about the quality of schools, high crime rates, maintenance problems, and poor shopping and community facilities, the issue is no longer one of racial prejudice. Since the judge, in his argument, moved directly from concluding that "white prejudice [is] at the basis of quotas" to "racial quotas deny blacks access to particular projects solely because of their race and stigmatize them," the very underpinnings of the court's decision may be in question.

3. The court differentiated between quotas that limit access to schools and quotas that limit access to housing "because no one is ever denied education on the basis of race."[51] This is, of course, because our society has made attendance in school to a certain age mandatory and provided schools in sufficient numbers accordingly. The provision of housing, however, is not a universally available government benefit. This does not mean it cannot be. What would the court attitude be if the percentage of blacks living in public housing proved greater than the percentage of blacks versus whites qualifying for public housing citywide? It often is. The court may also have been in error for not comparing the quality of the education received as a criterion along with its universal availability. In the same measure, the court should have given consideration to quality in housing.

The court concluded that future defendants of integration, to be successful, must demonstrate that their housing quota is "precisely tailored to achieving the integration objective. . . .When the percentage of black residents is *kept below the tipping point,* the quota imposes unnecessary costs on black entrants, serving the insidious purpose of exclusion more than the benign purpose of integration."[52]

Starrett City

Starrett City, a 5,880-unit housing development on 153 acres in southeast Brooklyn (east New York), is the largest subsidized project in the country. Originally conceived of as a co-op (1967), it was disbanded by its developers when increased costs and interest rates put it beyond the intended market. The project was assumed by the Starrett organization but as a rental. In order to receive tax-exempt status from the city and a section 236 commitment from HUD to pay interest on $307 million New York State HFA bonds, the project needed the city's Board of Estimate Approval.

There was opposition to a rental project of this size and in this area by the two neighboring, predominantly white communities: Canarsie and lower east New York. It is the Starrett organization's claim that its commitment to rent and maintain the proposed project at 70–30 white-minority was essential to appeasing community opposition and receiving board of estimate approval.

From the initial renting, applicants to the project were predominantly black. Working from the experience of other housing developers in the neighborhood, Starrett City determined that to meet its integration target, it was necessary to rent first the apartments designated for white families (should the minority apartments be rented first, the project would look as if it were totally minority occupied and whites would resist renting).

Two major mortgage increases were required to allow Starrett City to rent to whites first. These covered the costs of a much longer rent-up period and a reverse construction procedure (where the buildings most distant from the existing east New York community were constructed first and rented first).

Both the New York State Commission of the Division of Housing and Community Renewal (DHCR) and HUD knew of these goals and stratagems and approved the requested mortgage increases. HUD approved Starrett City's affirmative

[50] *Id.* at 758.

[51] *Id.* at 759–60.

[52] *Id.* at 767.

housing marketing plan in June of 1975, and Starrett City continued to file racial occupancy reports with HUD until the project achieved 90 percent occupancy in mid-1979.

On December 5, 1979, a suit[53] was filed by black tenants alleging that: Starrett City kept two waiting lists from which it rented units chronologically, one for whites and one for minorities; that the waiting list for minorities was much longer than that for whites; that minorities had to wait much longer for apartments; and that Starrett City was openly employing race-conscious occupancy controls (or quotas) to keep the percentage mix by units at 65 percent white to 35 percent minority (with the percentage black at 20 percent).

The suit was filed against Starrett City and OHCR. Starrett City asked that HUD be made a party to the suit. HUD refused, and Starrett City filed for dismissal for failure to join an indispensable party. HUD, through the U.S. Attorney General's office (Eastern District), refused again, saying: It does not approve of quotas; that quotas are not essential to achieving integration; and that it (HUD) is not an essential party to the suit.

Starrett City, in its defense, claimed that, given that the project was for occupancy by low-income families and located adjacent to a large, low-income minority area, the project would "tip" without the use of race-conscious occupancy controls. Furthermore, Starrett City claimed that by making public its use of occupancy controls, it could raise the normal tipping point in that area because it reassured tenants of its commitment to maintaining the existing levels of integration. This removed the uncertainty about the project's future and reduced the risk of white flight.

After 4½ years of pretrial discovery, the case was settled on April 30, 1984. The settlement called for Starrett City to increase minority access by 3 percent over a 5-year period. The settlement allowed Starrett City to continue to use controlled tenant selection based on race in order to maintain integration. The New York State DHCR, the other defendant in the suit, was required to maintain an open-access housing program and increase minority occupancy to a minimum of 20 percent over a 15-year period for those of its supervised projects under 20 percent, once the DHCR has made the determination as to why these projects are under 20 percent. Both Starrett City and DHCR were to increase minority occupancy in a way that was consistent with achieving and maintaining integration.

On June 28, 1984, the Civil Rights Division of the U.S. Department of Justice filed two actions: (1) an *amicus curiae* brief objecting to the paragraph of the decree that allows Starrett City to continue to maintain occupancy controls based on race; and (2) a complaint for "discrimination in housing," accusing Starrett City of "pursuing a policy and practice of discriminating against persons on the basis of race, color, and national origin."

At a July 17, 1984, hearing, all parties to the settlement spoke to its achievement, including the NAACP, the Open Housing Center, the DHCR, and Starrett City. The Justice Department suit was categorized as politically motivated (its being an election year), and the question was asked of Justice: Where was the government all those years when it explicitly stated that it did not want to get involved and implied that it would live by any agreement reached?

On April 2, 1985, the settlement was approved by the court with minor modifications.

The Justice Department suit was still pending as of November 1985.

Finally, keeping the *Williamsburg* court's caveat in mind—that, "The court cannot force persons to live in the community."—I made some random inquiries into the degree to which the decisions in the court cases reviewed above have been implemented. I learned that some defendants found themselves unable to carry out the court order in full, while others could not even carry them out in part. To quote one housing official: "Fifty percent black and fifty percent white is fifty percent black and fifty percent vacant."

Ensuing Regulations

Title 24 of the Code of Federal Regulations contains the regulations promulgated by HUD. Under Title VI of the Civil Rights Act of 1964[54] and Title VIII of the Civil Rights Act of 1968,[55] HUD has a duty to administer its programs in a manner that furthers the policies of nondiscrimination and of integration. The following regulations, some governing HUD programs in general and some applica-

[53] Arthur v. Starrett City Assoc., 79 Civ. 3096 (ERN), stipulation of settlement and consent decree, Apr. 30, 1984.

[54] 42 U.S.C. §200 *et seq.*

[55] 42 U.S.C. §36011 *et seq.*

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ble to specific programs only, are intended to promote fair housing for minorities.

Affirmative Fair Housing Marketing (AFHM) Regulations

AFHM regulations[56] were specifically promulgated under the authority of Executive Order 11063 (an early and relatively limited precursor to the Fair Housing Act) and Title VIII. They apply to all Federal Housing Administration (FHA) housing programs, and they are intended to "achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, or national origin."[57] It is to be remembered that before these regulations came into effect, the FHA frequently required restrictive racial covenants in urban areas of likely racial transition prior to providing mortgage guarantees to applicants.

Requirements under this part also include the adoption of an affirmative program to attract tenants of all minority and majority groups to the project during the initial rental period. Each developer who is participating in a Federal housing program is also required to submit an affirmative fair housing marketing plan indicating compliance with all the requirements of the regulation.[58]

Even though the developer must submit goals in terms of percentages of minority and majority tenants, HUD has since denied that the AFHM regulations require a developer to adhere to these goals.

Nondiscrimination Provisions

Part 1, 24 C.F.R. 1.1 *et seq.*, contain the general nondiscrimination provisions of Title 24. Its purpose is to effectuate the provisions of Title VI. These regulations contain a list of specific discriminatory actions as well as procedures for compliance review. Prohibited actions include both the denial of housing to a person on the basis of race and the subjection of a person to segregation.[59] These regulations are not helpful in resolving any conflict between nondiscrimination and integration.

Section 200.300 also contains general and, thus, generally unhelpful proscriptions against discrimination in housing.

Site Selection Regulations

In *Shannon* v. *HUD*,[60] the court declared that it was no longer possible for HUD to remain blind to the "very real effect that racial concentration has had in the development of urban blights. . .colorblindness is. . .thus at variance with national housing policy."[61] The *Shannon* decision helped promulgate a new set of HUD regulations governing site selection criteria.[62] These regulations set forth criteria to help HUD evaluate applications for funding housing projects in order to assess the impact of a proposed project on the racial composition of the community.

The objectives of this section are: "To provide minority families with opportunities for housing in a wide range of locations [and t]o open up unsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." The regulations contain a form that must be filled out by HUD employees in evaluating each project. The form contains a section for evaluating minority housing opportunities at the proposed project. These project selection criteria establish a ranking system to evaluate the projects. The regulations give *priority* to projects that provide for geographic dispersal and *prohibit* projects in minority-concentrated areas or in racially mixed areas where the projects would cause a significant increase in the proportion of minority to majority residents, unless: (1) an overriding need for housing exists in the area; (2) sufficient and comparable housing opportunities for minorities exist outside the area; or (3) the project is located in an urban renewal area.

Proposed Regulations Governing Site and Tenant Selection

In 1977, HUD proposed new regulations that would have provided more specific uniform criteria for evaluating proposed development sites with the aim of ensuring that housing opportunities for lower income and minority households were available in a wide range of locations.[63]

The proposed regulations stated that before HUD would approve a proposed site, it would determine: (1) whether the site was in an area of minority concentration; (2) whether the site was in a racially

[56] 24 C.F.R. §200.600 *et seq.*
[57] 24 C.F.R. §200.610.
[58] 24 C.F.R. §200.625.
[59] 24 C.F.R. §1.4.
[60] 436 F.2nd 809 (1970).
[61] *Id.* at 820–21.
[62] 24 C.F.R. §100.700 *et seq.*
[63] Federal Register, vol. 42, no. 15, Jan. 24, 1977.

mixed area; or (3) whether the site was in an area of undue concentration of federally assisted housing. An "area of minority concentration" was defined as either an area containing more than 40 percent minority residents or an area where minority residents were "a significantly greater proportion of the residents of the area than the proportion of minority residents of the locality as a whole." A racially mixed area was defined as one where minority residents were a "significant" percentage but *less than 40 percent* of all residents of the area.

Under the proposed regulations, a site would have been unacceptable if a project would have caused the percentage of minorities in a racially mixed area to rise to over 40 percent or if it would have caused a "significant and disproportionate" concentration of minority students in a public school, thus distorting a voluntary or court-imposed school system plan to assure equality of educational opportunity. A site in an area of minority concentration would have been approved only under the following circumstances:

1. Sufficient and comparable opportunities for assisted housing were available outside areas of minority concentration;
2. There were no sites available, or that could be made available, within the jurisdiction of the local government unit that were not areas of minority concentration; or
3. The site was an integral part of an overall local strategy for the preservation of revitalization of the immediate neighborhood.

The new regulations were never finalized because of the criticisms they engendered. The criticisms were not directed so much at the inequity of the suggested 40–60 racial mixes in their various contexts, but rather at the limiting prospects of providing housing for blacks given the requirement of searching outside the ghetto and its immediate environs. Others complained that the regulations *weren't strong enough* to bring about dispersal, and that they would allow local governments to continue to locate assisted housing in low-income or minority areas. There was sharp criticism of the provision allowing assisted housing in proscribed areas if no feasible alternative sites were available *within the jurisdiction of the local government involved*—self-limiting site selection to the same political jurisdiction being perceived by the NAACP as "practically emasculating" the entire proposed regulation.[64]

The 40 percent limit on minority population was criticized by some as arbitrary and too rigid. There were several suggestions that the proportion in a specific location should be compared with the percentage in the entire area to determine if the concentration were too high. "In some areas," said the Boston area HUD office, "a percentage far less than 40 percent may in fact represent an undue concentration of assisted housing."[65]

Section 3608(d)(5) of HUD regulations promulgated under Title VIII provides that: "The Secretary of Housing and Urban Development shall administer the programs and activities relating to housing and urban development in a *manner affirmatively* to further the policies of this subchapter." (Emphasis added.)

In the "notes of decisions" that follow the above regulation, the *Otero* case is cited, as follows, under the heading, "Integration of Public Housing":

> Fact that primary intention of this chapter was to benefit minority groups does not mean that the affirmative duty to integrate public housing should not be given effect where it would deprive such groups of available and desirable housing.

HUD Views on Integration Versus Nondiscrimination

There appears to be a serious conflict within HUD itself (as well as within many State and local housing agencies) as to how best to resolve the conflict between the nondiscrimination intent of Title VIII and the intent to have integrated communities replace segregated ghettos. The conflict within the agency itself is the consequence of the separate concerns of various divisions. No government agency operates with a single goal nor speaks with one mind. Nor are its purposes necessarily consistent from administration to administration. Those divisions of HUD (and of State and local agencies) that bear the responsibility for the financial viability and managerial stability of the projects they subsidize normally insist that the integration goals (usually 70 percent white and 30 percent minority) be met in the original lease up of apartments and be so maintained over the life of the project. But those divisions of government housing agencies concerned with equal opportunity recognize only the nondiscri-

[64] Housing and Development Report, Apr. 4, 1977, p. 1002.

[65] Ibid.

mination intent in the Fair Housing Act and insist that no individual be passed over on the basis of race in order to achieve an affirmative marketing goal.

In a period of great housing need and minimal government housing programs (such as we are now experiencing), the Equal Opportunity Division of HUD will usually prove the more vocal and persistent in carrying the agency's banner—just because there is no other way for government to provide additional housing to minority groups (which are also often those in greatest need).

HUD Explores the Courts' Likely Acceptance of Quotas

In January 1981, in the final days of the Carter administration, Jane McGrew, HUD's General Counsel, prepared an 18-page memorandum to Lawrence Simons, the Assistant Secretary for Housing and Federal Commissioner, exploring the likelihood that integration quotas in assisted housing would meet a court test. Her conclusion is favorable, although she does define the specific contexts where such an approval would likely be granted:

1. a demonstration of the need for a quota versus affirmative marketing procedures to achieve and maintain integration;
2. the demands of previous court rulings on the burden a quota would place on minorities;[66]
3. the duration and the extent of the quota be limited;[67]
4. the need for administrative agencies to justify their actions on the basis of a complete administrative record.[68]

The lawfulness of racial quotas used to achieve or maintain integration in assisted housing has not been determined by any court. Whether they are upheld outside of a remedial context will probably depend on whether the integration goal of Title VIII is held to be a compelling state interest, and on whether the quota in question is determined to be reasonable under the circumstances. The impact of housing on school integration, employment opportunities, access to social services and racial harmony, and the high degree of significance attached to housing integration by the Supreme Court in several other contexts suggest that integration in housing would be deemed a compelling state interest.

[66] See Justice Brennan's comments in the *Bakke* case, 438 U.S. at 361–621, and Gautreaux v. Chicago Hous. Auth., in *cert. denied* 402 U.S. 922, (1971).

[67] See the majority in *Weber,* 443 U.S. at 207, n.7, and Chief Justice Berger's opinion in *Fullilove, 1*00 S.Ct. at 2780.

[68] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

Other Indications of HUD's Commitment to Integration

In addition to the regulations and sentiments cited above, the following additional HUD actions indicate a commitment to integration:

- In *Schmidt* v. *Boston Housing Authority,*[69] HUD had approved a race-conscious tenant assignment plan much like *Young,* below, and the one adopted by the County of Beaver Housing Authority and overturned by the court in the *Burney* case (discussed earlier in this paper under the heading "Interim Conclusions").
- HUD has been undertaking what it calls "Title VIII reviews of housing authorities" nationwide to put an end to the practice, in many authorities, of keeping individual housing projects segregated by race. HUD has then prompted minority tenants to sue the authority to obtain relief. In the case of *Young* v. *Housing Authority of Clarksville,*[70] the court approved a plan requiring the transfer of enough tenants by race within 20 days "to ensure that the racial make-up of each site is within five percent of fifty percent white and fifty percent black. . .the present racial composition of the entire HAC tenant population. . .any tenants not desiring to transfer shall be evicted."[71]
- In approving sites for its section 8 new construction project, HUD has systematically shown a preference for sites located an appreciable distance from existing minority ghettos. It has then required that developers undertake an effective affirmative marketing plan to ensure that minority tenants would be able to avail themselves of housing in these projects.
- HUD has approved race-conscious affirmative fair housing marketing plans that spell out the desired mix of tenants by race in new projects (normally about 70–30, white-black). Some developers have claimed that the framing of such affirmative marketing plans with a commitment to achieve such a mix is often a HUD precondition for approving housing sites that are located within the vicinity of minority concentrations. Such requirements, however, are rarely found in writing.

[69] 505 F. Supp. 988 (D. Mass. 1981).

[70] U.S. Dis. Court, E.D. Texas, Paris Division, No. P–82–37–CA, Oct. 11, 1983.

[71] *Id.* at 7.

- HUD has also approved of rental practices (at additional costs to HUD) directed at reaching the aforementioned affirmative marketing goals, including: leasing to white tenants, first, while keeping black tenants waiting, and the keeping of apartments off the market for long periods while attempting to attract white tenants. HUD has justified these actions and the granting of financial waivers accordingly, as necessitated by the goal of achieving a "well-planned and racially integrated 'city' within a city, acting as an anchor providing stability for surrounding area."[72]

The Equal Opportunity Division of HUD has taken exception to any interpretation of affirmative fair housing marketing plans as racial quotas or even as goals that require extraordinary actions in order to be achieved:

> Determinations of compliance with the provisions of an Affirmative Fair Marketing Plan are made on the basis of whether good faith efforts to fulfill the provisions of the plan and comply with the regulations have been made and *not* whether implementation of the plan has resulted in the achievement of the anticipated results stated.[73]

The current consensus that appears to be emanating from HUD (in practice, but not in writing) is that HUD will not criticize or intervene in any integration maintenance effort that desires to keep projects at a 50–50, black-white mix. The choice of the 50–50 mix is unclear; it need not reflect: the mix of existing tenants in the authority at large; the mix of families in the authority's market area who qualify for public housing; the mix of existing tenants in the authority at large; the mix of families in the authority's market area who qualify for public housing; any experience on tipping or the location of the particular development. There may just be a perception at HUD that a 50–50 distribution of units between the races is inherently just and truly integrated. It is not at all clear what the various courts will do when they find that the 50–50 rulings they have stipulated cannot be achieved. Whites have refused to move into predominantly black projects and remain there over time. All-white projects that were turned 50–50 as a consequence of court decisions are losing their white residents. The housing authorities are faced with three choices: keeping units ,that have been abandoned by whites vacant until other whites can be found to take them, renting the vacant units to blacks and so turning all their projects all black, or disobeying the court ruling. If whites sued for being deprived of access to public housing, what argument could they offer that would not label them as racist?

In the area of integrated residential neighborhoods composed of privately owned and rented housing, HUD has adopted the view that any affirmative marketing procedure just short of the use of racial quotas is acceptable. Thus, talking prospective black homeowners out of buying or renting in the community is acceptable; finding them housing elsewhere is acceptable; giving them or their landlord a financial reward from them to look elsewhere is acceptable; an all-out effort to attract whites instead of blacks is acceptable. Anything just short of absolutely turning the black family away on the basis of race will meet HUD approval. There is apparently no perception on the part of HUD that these acceptable practices may be just as racist and stigmatizing. Nor is there any perception at HUD that the only measure of the *success* of these alternatives to quotas is the exclusion of blacks above a certain preconceived number—a goal no different from the use of quotas. Why else employ these alternative stratagems if they will not be successful?

From all the above, it is clear that HUD has been unable to reconcile a role for itself within the twin mandates of Title VIII. Any rational, implementable policy that addresses the two intents of Title VIII would be of great benefit to HUD, to the millions of tenants who live in assisted housing across our Nation, to residential communities undergoing transition that would like to maintain their integrated status, and to those racially exclusive communities that would like to open themselves to integration but are concerned about not being able to control the process so as to ensure the continued maintenance of their existing quality of life.

From its policy statements and actions over the years, it may be concluded that HUD is firmly committed to *both* nondiscrimination and integration. When the two intents come into conflict in court, HUD has most often tried to sidestep the issue, reflecting the internal conflicts within the agency itself. These days, any affirmative marketing procedure that maintains integration will be accepted by HUD, short of the turning away of an individual to fulfill a quota.

[72] Letter from Lawrence Simons, HUD Asst. Secy. for Housing, Jan. 14, 1981, on Starrett City.

[73] Letter from Mr. Stroude, Director of Equal Opportunity Division, HUD, New York Area Office, 1976.

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Maintaining Racial Integration

In 1968 the Potomac Institute, a not-for-profit corporation devoted to the study and advocacy of subsidized housing and integration, undertook a survey of 154 integrated neighborhoods throughout the country.[74] Its purpose was to learn how integration was maintained. The survey found that stable integration was only made possible through the use of occupancy controls—whether forthrightly or surreptitiously. Furthermore, it concluded that the decision to employ occupancy controls was essential in providing the incentive to integrate to go along with the restraints of fair housing regulations.

Following in the footsteps of the Potomac study, our institute undertook a survey of some of the largest housing developers and managers throughout the Nation who were known to have a commitment to the construction and maintenance of integrated housing. From them we learned that:

- Middle- to low-income housing that is predominantly occupied by minorities has more problems and is more difficult to manage;
- Integrated housing does not occur by accident; it has to be created by intent and be sustained with a continuing commitment;
- The use of race-conscious occupancy controls (quotas) are far more effective than affirmative marketing in maintaining integration;
- Those housing managers who claimed to be successfully maintaining integration with the use of affirmative marketing alone were found, in effect, to be using the techniques of occupancy controls, but either not admitting to them publicly or not admitting it to themselves;
- Successful, stably integrated housing developments served as models that encourage other managers and developers to try the same thing and that could open new sites for housing and encourage the funding of new housing programs;
- Society's legal acceptance of racial occupancy controls was seen by developers and managers as an incentive to the creation and maintenance of integrated housing and neighborhoods;
- To maintain stable integration, the upper ceiling on *all minorities in a development* was said to be about 40 percent, the upper limits on *blacks* about 20 percent. But most developers felt more comfortable with ceilings of 30 percent and 15 percent, respectively;
- If housing management felt obliged to push the ceiling to the upper limits of 40 percent and 20 percent, this required the mandatory adoption of a *publicly stated occupancy control limit*—a limit that should never be exceeded if the credibility of management was to be maintained;
- Managers thought that Title VIII was being applied counterproductively when it served to turn existing integrated housing into segregated, minority-occupied housing;
- Some thought that affirmative marketing, as a tool genuinely different from occupancy controls, could be used effectively in some circumstances.

From the findings of this survey, we developed criteria for when and where to use occupancy controls or affirmative marketing as mechanisms to maintain integration:

- Affirmative marketing can be used effectively to maintain integration in sites distant from existing minority concentrations, for populations other than families with children, and for higher income groups.
- Occupancy controls, however, are mandatory in communities bordering on existing minority concentrations, for middle- to moderate-income families with children, for developments with a significant percentage of welfare families, and for large, high-rise projects occupied primarily by families with children.

Conclusions and Recommendations

Because of strong black demand for housing and because of white unwillingness to share communities with blacks at more than 20 percent black, housing developments and communities that have been unable to use racial occupancy controls have found themselves becoming predominantly black. The Nation's assisted-housing program for families with children has effectively become a black housing program. Because blacks form only 11.7 percent of the population of the country, this imbalance in users has had unforeseen consequences in governments' allocation of funds for subsidized housing. Communities that say no to assisted housing are not only concerned with the fair distribution of government assistance to a variety of beneficiaries, they are concerned with the effects that subsidized housing projects that become all black have on the stability of surrounding communities.

[74] *Housing Guide.*

An example of the erosion of public support for assisted housing when it becomes increasingly black is provided by New York City and State (see figure 3). As the percentage of blacks in the New York City Housing Authority's subsidized projects increased from 15 percent in 1949 to 31 percent in 1955, so the percentage of voters who voted *no* to housing bond referendums increased to ensure their defeat. After 1959 when the percentage black had reached 40 percent, no housing bond referendum was ever again approved in the State. Although the upstate New York no vote was always high, it is the virtual doubling of the New York City no vote (from 10.6 percent in 1947 to 19.4 percent in 1965) that produced these defeats. This explanation for the correlation between increase in percentage black and percentage no votes is confirmed by New York City Housing Authority management and New York State's housing commissioners at work at the time of these defeats.

There are two sets of implications of concern here: The first involves the setting up of policies and programs that can result in the unfair distribution of government assistance to its citizens; the second involves the creation of housing programs that effectively serve a single racial group. Should a government be elected that has little support from that racial group, funds for that program will be curtailed. Today, we have few housing programs left. However, it is likely that at some time in the future we will again allocate funds for assisted housing. But given the history of past assisted housing, it will be perceived as a housing program for blacks. This will severely limit the sites that will be made available for housing as well as the funding for it. We may also suddenly find ourselves confronted with the fact that we are a Nation with apartheid housing and all the implications that follow from that.

Given the choice between no new housing for minorities and a reasonably high ceiling of the percentage of minorities in an integrated community, the choice seems obvious. According to our institute's survey of housing developers, the models provided by the successful maintenance of stable, integrated developments breed other opportunity: More sites become available in adjacent white communities; other developers perceive the advantages and stability of such investments; legislators perceive the utility of housing programs that serve whites simultaneously with blacks and create models of integration aspired to in the passage of Title VIII.

Currently, blacks form just under 12 percent of the Nation's population. Given that racially integrated communities have been successfully maintained at 20 percent black, an even distribution of integrated housing would, thus, more than accommodate black demand. There are other reasons that speak to the benefits of the even distribution of integrated housing: Yinger,[75] Downs,[76] and Abrams[77] all make the point that an essential ingredient in the creation of stably integrated housing developments is the parallel and ubiquitous creation of like communities throughout the urban area: This removes the option of white flight to an all-white community.

The difficulty arises in the case of central cities where black populations form as much as 50 percent of the population. No housing policy that is limited to the environs of such a single government entity could achieve much. The opening up of the surrounding suburbs to blacks on a controlled basis could, however, address this problem. The higher cost of suburban housing may be a factor to be considered, but the use of subsidies to supplement rentals and purchases in the private sector has proven more cost effective in providing desirable housing to low- and moderate-income groups than the construction of new assisted housing.

HUD's former General Counsel, Jane McGrew, and the court in *Burney* share similar views in the arguments needed to get court acceptance of the use of quotas. In her policy paper (Jan. 16, 1981, p. 12) she argued that:

> Even if it were decided that the goal of integration constitutes a compelling state interest, it would be necessary to find that the particular housing quota in question is reasonable under the circumstances, and that no less onerous means would accomplish the result.

Earlier in this paper, in my discussion of tipping, I said that in higher income communities and in subsidized housing located in suburban areas distant

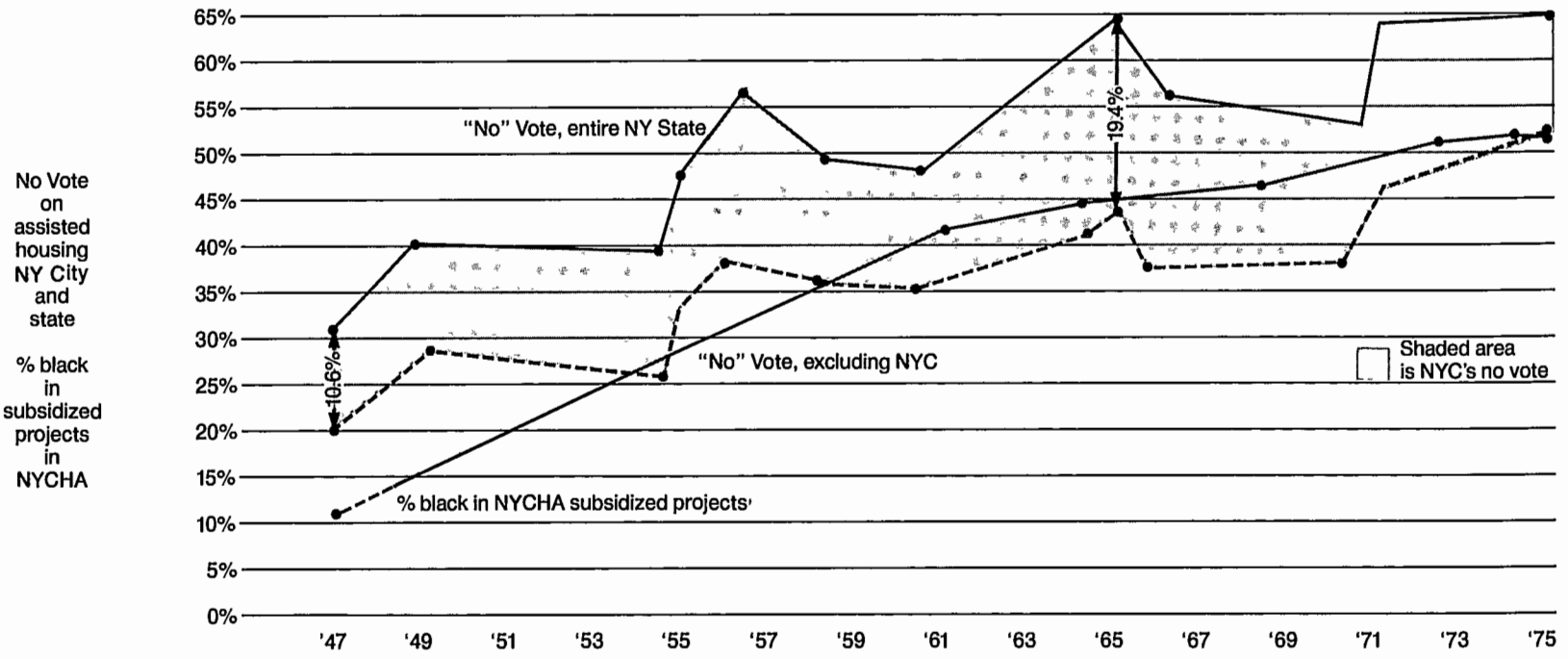
[75] J. Yinger, "On the Possibility of Achieving Racial Integration through Subsidized Housing," *Urban Planning Policy Analysis and Administration, Policy Note P80-2,* Cambridge, Mass., John F. Kennedy School of Government, Harvard University, 1980, p. 11.

[76] A. Downs, *Opening Up the Suburbs,* New Haven: Yale University Press, 1973.

[77] C. Abrams, *Race Bias in Housing,* New York, American Civil Liberties Union, 1974.

FIGURE 3

Increase in New York City's and New York State's "No" Vote for Housing Assistance Programs with the Increase of Percent Black in NYCHA Subsidized Projects



Year	Program	Funds Requested
1947:	Low rent	$135 million loans; $4 million subsidies
1949:	Low rent	$300 million loans; $12 million subsidies
1954:	Low rent	$200 million loans
1955:	Low rent	$9 million subsidies
1956:	Ltd. profit	$100 million loans
1958:	Low rent	$ 75 million loans; $5 million subsidies
1960:	Low rent	$5 million subsidies

Year	Program	Funds Requested
1964:	Low rent	$165 million loans; $7.5 million subsidies
1965:	Low rent	$200 million loans; $9 million subsidies
1966:	Amend. III	Debt full 2 percent rather than assessed value
1970:	Proposition I	Increase of $20 million in max. State subsidy
1971:	Amend. I	Community Development Article
1975:	Proposition I	$250 million for 1 percent mortgage loans for elderly

from minority concentrations, quotas to limit black demand might not be needed. However, there is no doubt that the maintenance of integration in assisted housing close to black concentrations requires the use of race-conscious occupancy controls. Although the range in percentage black before tipping occurs is small, the precise tipping point can be difficult to predict. Since the goal is to limit black occupancy only to the degree necessary to maintain integration instead of using an "arbitrary" percentage ceiling on blacks, one can adopt a policy of allowing the percentage of blacks to float and be determined solely by the degree that whites continue to remain interested in the project, the measures of whites' continued interest being:

- whites' continuing to apply to, and to move into the project;
- whites' (particularly families with children) not moving out of the project before their lease is up;
- white tenants' continued renewal of their leases; and
- whites' continued use of the project's schools.

After setting an initial "safe" figure on the percentage black, the percentage could be allowed to increase slowly by ½ to 1 percent a year while continued measurement determined white response. If any of the above measures indicated white disaffection, the percentage increase would be allowed to increase again under continued monitoring, until there was satisfaction that a workable percentage had been reached. Five years down the road, an attempt could be made to increase the percentage again. *All this could be done publicly.*

The percentage of minorities will thus be determined empirically; that is, by the *very* requirements needed to maintain integration. The limit on percentage black is, thus, no longer an arbitrary action, but a flexible, changing means for maintaining integration—one that is in keeping *both* with HUD's affirmative marketing mandate and its integration goals.

Although this is not a fixed quota, an important resulting benefit of fixed quotas—the increase in the tipping point—would be enjoyed by the program. Whites' fears about the uncertain future of the project would be allayed, since the continued influx of whites is an essential requirement in determining the percentage mix.

Counsel McGrew's second requirement is that the quota not stigmatize the minority group nor that the group be made to bear the brunt of the quota:

A quota would be more supportable if it were shown that alternative assisted housing opportunities were available elsewhere in the community for minorities.

Once the percentage of minorities in the development had attained its representative share of the market, it could no longer be convincingly argued that minorities are being either *stigmatized* or *deprived* of their fair share of society-created opportunity.

The question then becomes: What if the level of white interest requires the project to maintain a percentage of blacks below their proportional representation in the market area?

A remedial measure could then be put in place to assist those blacks deprived of a particular project in finding housing elsewhere—preferably in a like, integrated setting. To facilitate this, the project (if it were large enough) or, preferably, a municipal housing agency could set up a "home finding service." Its purpose would be to aid that differential percentage of minority applicants between the empirically defined limit and the percentage in the market area to find other housing. The service would seek to find apartments for applicants everywhere in the greater metropolitan area.

With the initiation of these two programs, the harm to minorities will be made minimal: If they are being deprived, it is at a percentage close to their representation in the market area; and then, they are only being deprived from enjoying the benefits of a site-specific environment. These deprivations would then be counterbalanced by the extraordinary effort being made to find unsuccessful applicants housing elsewhere, by seeking to open up new opportunities for integration elsewhere, and by the continued maintenance of an integrated environment. This activity is, thus, actively engaged in redressing its own (and a national) problem, and the court is, thus, likely to be sympathetic.

Counsel McGrew's third requirement is that a limit be put on the duration of the quota. This is already addressed in the provisions made for the quota to be flexible; that is, to allow it to increase over time in response to white and black acclimatization and other factors, including black socioeconomic development.

Some social scientists have argued that residents in desegregated projects hold more favorable atti-

tudes toward members of another racial group than do tenants in the segregated projects.[78] Most studies support the contact hypothesis that racial tolerance increases with equal-status interracial contact. For example, Hamilton and Bishop found that [white suburbanites become more tolerant of a black neighbor over time even without significant interaction with that neighbor. The authors speculate that this response occurs because the whites' worst fears are not fulfilled. Although it is not tested, this speculation offers some hope that subsidized housing will come to be accepted over time—provided that they do not confirm whites' worst fears].[79]

Following from these findings, it has been argued that, as contacts between races erode whites' fears and as other races become further accustomed to integrated living, the quota—itself an expedient measure for use in the transitional stage—can become increasingly more flexible until, eventually, it becomes expendable.[80]

But the advantage of integrated living goes much beyond the improvement of white tolerances; its real significance lies in opening avenues of upward mobility to blacks and, by facilitating supportive contacts, lessening black fears about their presence in the white world and their uncertainties about being able to compete equally.

A still ongoing 15-year study of black students educated in predominantly white suburban schools has found that these students are more likely than those educated in predominantly black city schools to attend largely white colleges, to live and work in racially mixed communities, and to have white friends.

The unpublished report, by the Center for Social Organization of Schools at Johns Hopkins University and the Rand Corporation, is the first thorough, long term study of the broad effects of school desegregation. It traces the educational, economic, and social development of 661 black pupils who were in Project Concern, an experiment begun in Hartford in 1966. Of those in the project, 318 were sent to predominantly white schools in the Hartford suburbs and 343 remained in predominantly black city schools.

The study found that those who had attended one of the schools in the integration plan overwhelmingly gravitated toward racially mixed settings as adults, while blacks who had remained at segregated schools generally projected a less receptive and sometimes hostile attitude toward living and working in racially mixed settings:

> Evidence suggests that the test scores of minority students rise after desegregation. But this outcome is not the real test of the value of desegregating the schools. The real test is whether desegregation enables minorities to join other Americans in becoming well-educated, economically successful, and socially well-adjusted adults.

> The daily coexistence with whites showed the black students they could both compete and socialize with their white schoolmates.

The analysis drew the following six conclusions about those who attended racially mixed schools as contrasted with those who did not:

- They were more likely to graduate from high school;
- They were more likely to attend predominantly white colleges and complete more years of college;
- They perceived less discrimination in college and in other areas of adult life;
- They were involved in fewer incidents with the police and got into fewer fights as adults;
- They have closer and more frequent social contact with whites as adults, are more likely to live in desegregated neighborhoods, and have more friends in college; and
- Women in the group were less likely to have a child before they were 18 years old.

Given that blacks form a lower socioeconomic group within American society, the legal enforcement of nondiscrimination alone will only open up that minimal amount of housing for them that they can afford, and such a demand will turn those communities all black. If black efforts are concentrated on gaining access to remaining assisted housing, that housing will become all black in turn, given that very little assisted housing is being built today. With such consequences, very little assisted housing is likely to be built in the future. Thus, by exercising

[78] M. Deutsch and M.E. Collins, *Interracial Housing: A Psychological Evaluation of a Social Experiment,* Minneapolis: University of Minnesota Press.

[79] David L. Hamilton and George D. Bishop, 1976, "Attitudinal and Behavioral Effects of Initial Integration of White Suburban Neighborhoods," *Journal of Social Issues,* 32, no. 2 pp. 47–68, as quoted by Yinger, *Achieving Racial Integration,* p. 19 fn. 8.

[80] Hellerstein, "The Benign Quota, Equal Protection, and the Rule in Shelley's Case," Rutgers L. Rev. 531, 553–58 (1963); also Comment, "Race Quotas," 8 Harv. C.R.–C.L. L. Rev. 128, 177–78 (1973).

the nondiscrimination component of Title VIII alone, we effectively condemn blacks to ghetto living once again and to no aspirations for future assisted-housing programs. Those whites who need assisted housing lose out too.

In the end, it comes down to a political decision. If the white majority overwhelmingly feels that it best serves its and American society's greater purpose to keep blacks as a separate nether-class for as long as possible, this can be best accomplished by recognizing only the nondiscrimination intent of Title VIII. If, on the other hand, white society sees it necessary for its own and the general good to intervene and accelerate black entry into the American mainstream as true equals, the integration intent of Title VIII must be given greater priority when it comes into conflict with nondiscrimination.

What's in a Name?—The Diversity of Racial Diversity Programs

By Alexander Polikoff*

A few years ago—in the late 1970s I believe—something prompted me to take special note of reports appearing in the daily *New York Times* on a particular theme. At that time, according to the articles I began to clip, the Flemish and the Walloons were attacking each other in Belgium. Black-skinned Kenyans were throwing brown-skinned Kenyans out of their civil service jobs. French-speaking and English-speaking Canadians were visiting violence upon one another. Australians had enacted stringent new Oriental exclusion laws. The Catholics and the Protestants in Northern Ireland were killing each other in their unremitting conflict, as were the Jews and the Arabs in the Middle East. There were others I have forgotten; I lost heart and stopped my clipping after less than a week.

America, too, has had its share of violence stemming from racial, cultural, religious, and other prejudices. Nathan Glazer's introduction to Stanley Elkin's masterpiece on American slavery summarizes how slavery in this country was the most awful the world has ever known. The slave's existence as a human being was not acknowledged. His children could be sold, his marriage was not recognized, his wife could be violated, he could be subject to frightful barbarities without redress, he could not be taught to read or write, could not practice religion without permission, and had no hope of a changed state. This was not what slavery meant in the ancient world, in Europe, or in Brazil and the West Indies. Elkin forces us to look deeply into the American soul and consider why America—unlike slave countries in the rest of the world—sought to strip its blacks not only of their rights, but of their humanity.[1]

From the abyss of that experience, Americans were able to advance, painfully, to the 13th and 14th amendments, and then—slowly and painfully again—to the civil rights enactments of the post-World War II period. We still contend with the legacy of our past, and in existential terms the full promise of our constitutional and statutory enactments remains to be realized. But probably nowhere in the world has such an elaborate structure of minority rights been created as is now provided by the American legal system. On paper, at least, we have come a long way from our American version of the "peculiar institution."

Perhaps the intensity of these unique aspects of the American experience—the depth of the abyss and the grandeur of the promise—is reason for hope that the latter will in fact be realized. One would like to think so, for we are quickly becoming a nation of "minorities." Blacks are already in the majority in a number of our cities. Our Hispanic population is

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[1] Stanley M. Elkins, *Slavery* (Grosset & Dunlap, 1959); Introduction to the 1963 edition by Nathan Glazer.

growing faster than our black. California tells us that by the year 2000 over 50 percent of all California school children are expected to be members of racial or ethnic minorities. In the Midwest, as I drive Interstate 94 to southern Wisconsin, road signs appear in Spanish.

It is a commonplace observation that one of the areas in which the promise is farthest from realization is housing. The legal and sociological revolution of the civil rights movement has met with much more success in overcoming discrimination and segregation in public facilities and transportation, employment, politics, even education, than it has in combating residential segregation. As editor Max Green said in this summer's issue of *New Perspectives,* "Residential segregation by race may be the area of American life left most untouched by the landmark civil rights legislation of the 1960s."[2]

We are also beginning to understand, I believe, that racial residential segregation does not persist solely because of the shortcomings of legislation or litigation. There is the stubborn fact that, like waves on the beach that erase the sand-ripple evidence of their predecessors, each movement in the direction of residential integration seems soon to be erased by ensuing demographic developments.

One example of that phenomenon is the Chicago suburb of Markham, Illinois. In 1967 the Markham Commission on Human Relations issued a report that spoke glowingly of Markham's "stable racial integration":

> Markham enjoys substantial and stable racial integration. In the strife ridden 60's, here Negroes and whites have learned to live together as colaborers, learn together as students, govern together as equals and worship together as brothers. . . .We pledge ourselves to strive for the full attainment of the integration goal. We welcome all people of good will to share in this rich interracial life. We are pledged to demonstrate the success of racial integration to our metropolitan area.[3]

However, the report also questioned Markham's ability to fulfill its pledge to demonstrate the success of racial integration:

> This Commission worked actively to implement peaceful integration and cooperated with the Veteran's Administration, Illinois Commission on Human Relations and the real estate brokers handling nonwhite sales. Now that we are working just as hard to maintain that integration we find not only a lack of cooperation from these sources but actual opposition. . . .In the past, all-Negro subdivisions have developed in the Chicago suburbs and some suburban areas have gradually changed into non-white sections, but we believe our situation marks the first significant extension of the Chicago pattern of block-by-block transition to the suburbs.[4]

The fears expressed in the report were well founded. Today the integration that existed in much of Markham has vanished. Although the black population of many neighboring communities has remained below 1 percent, most of Markham's neighborhoods have either become entirely black or are steadily losing their white residents. The human relations commission is defunct.

Other instances of resegregation—the block-by-block transition of virtually all-white neighborhoods to virtually all-black neighborhoods—are familiar to all. Few major American cities have *not* experienced such resegregation, and the pattern now seems to be repeating in suburbia. For example, in several of Chicago's southern and western suburbs, where municipal governments and residents accepted the Fair Housing Act of 1968 as the law of the land to be followed, not subverted, the in-migration of minority residents has not produced long term integration. Instead, either white residents have fled, or few white homeseekers have chosen to enter. At varying speeds, such communities have resegregated, while neighboring towns have remained virtually all white.

One of the most disappointing examples of this phenomenon I know is an area of nine municipalities in the near west suburbs of Chicago. The housing stock throughout the nine communities is similar, and the nine are served by a single real estate board. Yet six of the communities remain over 99 percent white, while in the three others—where black population has risen to between 30 percent and 75 percent—resegregation appears to be well underway.

It is true that a few scattered towns and neighborhoods have enjoyed long term integration. But I cannot think of a single one in which such integration has not been the result of conscious, diligent, sustained effort by both residents and community officials.

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[2] Editorial, *New Perspectives,* Summer 1985.

[3] Markham Commission on Human Relations, *The Extension of Urban Patterns of Racial Transition to the Suburbs* (Jan. 24, 1967), p. 1, quoted in Peter W. Colby and Larry McClellan, for *Can Public Policy Decisions Prevent Suburban Racial Resegregation?,* Institute for Public Policy and Administration (Park Forest South, Illinois: Governors State University, 1980), p. 25.

[4] Ibid., quoted in Colby and McClellan, p. 18.

Why? Why is it so difficult to foster long term integration? Why does it appear that most of today's "integrated" communities may be way stations on the road from segregated white to segregated black? (For simplicity I speak only of black-white segregation, but the issue embraces Hispanics and other minorities as well.)

Tomes have been written on that question. At a high level of generality, however, I think we know at least part of the answer. As one thoughtful observer puts it:

> Given decades of history that the entry of blacks into a neighborhood signals its transition to an all-black neighborhood; given that many neighborhoods are still closed to blacks; given the natural tendency of minority families to seek housing in areas where they know they will be welcomed; given the wider range of choice open to whites—all these factors push newly integrated neighborhoods in the direction of becoming all-minority neighborhoods. When illegal racial steering is added, the resulting transition to a resegregated neighborhood becomes almost inevitable.[5]

What is being done to attempt to deal with this "resegregation syndrome"? A number of suburban communities, particularly in the Cleveland and Chicago areas, have been exploring ways to foster and maintain racial diversity. These efforts are frequently called "integration maintenance." (I believe that "racial diversity" may be a preferable term because it emphasizes the positive value of diversity.) Though often uncritically lumped together, racial diversity techniques ought to be examined individually, as I propose to do briefly here.

Preliminarily, however, let me observe that commentators frequently fail to distinguish between techniques that limit or restrict the housing choices of homeseeking families, such as the quotas employed in Starrett City, and techniques that entirely lack choice-limiting characteristics. For example, in the letter inviting me to participate in this meeting, I was asked to discuss, among other topics, "the range of suburban municipal ordinances employed in racial occupancy control programs. . . ." As I hope to make clear, most of the ordinances to which I believe the letter refers cannot fairly be described as employing racial occupancy controls because they do not involve restrictions or limitations on homeseekers' choices. In a speech 2 years ago to the National Association of Realtors, HUD Secretary Samuel R. Pierce, Jr., said that HUD had "looked hard" at a representative sampling of municipal racial diversity programs, but had not found any ordinance or program that in HUD's view amounted to a quota, as integration maintenance critics had charged.[6]

The essence of a "racial occupancy control" is a racially based restriction on the freedom of homeseekers to select and secure the home or apartment they wish. In cases such as *Williamsburg, Otero,* and *Burney,* as well as in *Starrett City,* a racial quota was employed, i.e., families otherwise eligible for the housing in question were passed over for racial reasons, and thereby denied—or delayed in obtaining—the housing of their choice.[7]

In the present state of the law as I understand it, except in certain remedial contexts following an adjudication of discrimination, such restrictions on families' housing choices are not permissible. As a matter of public policy, I agree with that state of the law. As I have said before:

> I believe that a great deal of the controversy about integration maintenance derives from the misconception that its purpose is to achieve racial balance. In fact, the purpose is to eliminate constraints on free choice so that whatever racial residential patterns ensue (whether segregated or integrated) will be the result of informed free choice by home and apartment seekers, not of constraints imposed by discriminatory practices and persisting effects of past discrimination. It is true that as an American I hope that the result of free choice will be a sizable number of integrated communities. But free choice, not racial balance, is the objective. If free choice leads to segregation rather than integration, so be it. Free choice is a higher value than integration.[8]

Contrary to the assumption implicit in numerous discussions, many racial diversity techniques do not involve the restriction of choice that marks a "racial occupancy control." Moreover, their purpose is to *expand* housing choice by combating stereotypical

[5] Kale Williams, Donald DeMarco, and Dudley Onderdonk, *Affirmative Action in Housing—an Emerging Public Issue,* Institute for Public Policy in Administration (Park Forest South, Illinois: Governors State University, 1980), p. 4.

[6] Remarks prepared for delivery by Samuel R. Pierce, Jr., before the National Association of Realtors, Nov. 14, 1983, p. 3.

[7] Williamsburg Fair Hous. Comm'n v. New York City Hous. Auth., 493 F. Supp 1225 (S.D.N.Y. 1980), *aff'd and remanded without opinion,* 647 F.2d 163 (2d Cir. 1981); Otero v. New York City Hous. Auth., 484 F.2d 122 (2d Cir. 1973); Burney v. Hous. Auth., 551 F. Supp. 746 (W.D. Pa. 1982); Arthur v. Starrett City Assocs., 89 F.R.D. 542 (E.D.N.Y. 1981).

[8] Letter from the author to William Wynn, U.S. Department of Housing and Urban Development, July 26, 1984.

attitudes and conduct in housing markets, so that black homeseekers will feel freer to include predominantly white neighborhoods among their housing options, and white homeseekers to include integrated neighborhoods among theirs.

An example is the technique of affirmative marketing. Under HUD's affirmative marketing regulations, FHA program applicants are required to "carry out an affirmative program to attract buyers or tenants. . .of all minority or majority groups to the housing for initial sale or rental."[9] HUD asks applicants to state which groups are least likely to apply for the housing in question without special efforts, and to conduct special "outreach" to such groups.[10] The purpose of these special efforts is to:

> assure that any group(s) of persons normally not likely to apply for the housing without special outreach efforts (because of existing neighborhood racial or ethnic patterns, location of housing in the SMSA, price or other factors), know about the housing, feel welcome to apply and have the opportunity to buy or rent.[11]

This approach, long employed in HUD programs, may also be used in nongovernmentally financed housing, either voluntarily by individual homesellers or as part of a municipal racial diversity program. Such an *inclusionary* technique, designed to assure that persons least likely to apply for available housing receive relevant information and are made to feel welcome, does not restrict housing choice. On the contrary, its purpose is to *expand* opportunity by providing information that may free homeseekers from the persisting constraints of the (racially) dual housing market. In a public statement last year, William Bradford Reynolds of the Justice Department said: "We have no opposition to affirmative marketing efforts in order to reach out and encourage more minorities to move into communities where they aren't, and to encourage whites to move into minority communities."[12]

Another such non-choice-limiting technique is an antisolicitation statute or ordinance. For example, an Illinois statute makes it a misdemeanor to solicit for the sale, lease, listing, or purchase of any residential real estate after receipt of notice, in the manner prescribed, that an owner does not wish to be solicited.[13] Such a law is one of the means by which governments seek to enable neighborhood residents to fight the panic peddling by some real estate brokers that still is unhappily prevalent more than 17 years after by the Fair Housing Act outlawed panic peddling practices.

A third racial diversity technique that does not restrict housing choice is fair housing counseling. In a recent letter that discussed this activity (among others), John Knapp, HUD's General Counsel, reaffirmed a longstanding HUD view that "pro-integrative" counseling by such agencies does not violate Title VIII.[14] Indeed, such encouragement of integration seems to be perfectly proper when carried on by real estate salespersons as well. The National Association of Realtors (NAR) once announced that "perfectly *proper* racial statements (in the form of encouragement of integration) take place between *broker* and potential *buyer,*" a view Mr. Knapp explicitly endorsed in his letter.[15]

A fourth racial diversity device that involves no restriction on choice is publicity that promotes integrated living patterns. The Knapp letter discusses a newspaper advertisement, placed by a fair housing agency, that touted two southwest Chicago suburbs as one of "Chicagoland's hottest markets." The two suburbs were overwhelmingly white. The couple pictured and named in the ad was black. The NAR questioned whether the ad was consistent with HUD guidelines precluding the selective use of human models in advertising.[16] Knapp replied that it was:

> [T]he use of minority models in advertising referring to these communities is more likely to convey a message of inclusiveness rather than of exclusiveness. Given the present population profile of these communities, the advertising appears clearly "designed to attract persons. . .who would not ordinarily be expected to apply. . . ."[17]

The same view should be taken when tax dollars are used for such "integration promotion." In the

[9] 24 C.F.R §200.620(a) (1985).

[10] HUD Handbook 8025.1 Rev. 1, August 1982, app. 4, p. 3, and app. 5, illustration A.

[11] Ibid., Instructions for Form HUD-935.2, app. 4, p. 3.

[12] CBS videotape of Phil Donahue Show, Nov. 28, 1984.

[13] Ill. Rev. Stat. Ch. 38, §70-51.

[14] Letter from John J. Knapp to William D. North, Aug. 6, 1985.

[15] Ibid., p. 12. The emphasis is the NAR's. Fair housing counseling may, of course, also be carried on by municipalities. HUD has noted that counseling by a governmental entity might have a coercive impact, though this is "not a conclusory judgment, since the question is one of fact in any case." Ibid., p. 18.

[16] Letter from William D. North to John J. Knapp, Apr. 30, 1985.

[17] Letter from John J. Knapp, p. 3.

Bellwood case, the Supreme Court spoke of the "adverse consequences attendant upon a 'changing' neighborhood," and held that a municipality had standing to challenge sales practices by the defendant Realtors that allegedly had begun to "rob Bellwood of its racial balance and stability."[18] This holding obviously supports the use of public funds to foster a community atmosphere in which wrongful real estate practices could not thrive.

The use of municipal resources to conduct litigation against steering and other improper practices by real estate brokers is, of course, another non-choice-limiting racial diversity technique that is expressly sanctioned by the *Bellwood* decision.

Still another racial diversity technique that limits no one's choices is so-called "equity assurance," an insurance program designed to assure homeowners that the integration of their neighborhoods will not cause them harm through diminished property values. In the Oak Park, Illinois, version of this technique, the municipality guarantees the equity of a resident's home on the basis of an appraisal, and will reimburse the homeowner should this amount not be realized upon a sale. The program is publicly financed, and any homeowner may join by paying an enrollment fee to cover the cost of an appraisal. Protection commences after 5 years.[19]

Other programs involving payments or other monetary benefits to individuals are also coming into use. For example, under a program initiated this year by the Ohio Housing Finance Agency, designed with the aid of a number of lending institutions, a portion of the proceeds of an OHFA bond issue has been set aside for 9.8 percent fixed rate 30-year mortgages to first-time homebuyers who make moves that help integrate neighborhoods in Cuyahoga County. Approximately half of the $6 million set-aside has already been subscribed, about equally by black and white families.[20]

It should be added that the gathering of racial data is obviously essential to the effective employment of several of these techniques. Data collection is itself a proper, non-choice-limiting activity.[21]

The legal status of other techniques designed to foster racial diversity is more questionable. Apart from Starrett City-type quotas, already mentioned, ordinances banning residential for sale signs are under a cloud of uncertainty by virtue of the *Linmark* case, albeit for first amendment rather than Title VIII reasons.[22] And of course, any program or activity is subject to abuse by unfair or coercive administration. But my point is not to pretend to definitive analysis, or to attempt to identify all the programmatic possibilities. It is rather to show that "racial occupancy controls" involving quotas or other limitations on choice must be sharply distinguished from a number of programs that do not involve such limitations. Lumping both kinds of activities together under the rubric "integration maintenance" does not conduce to constructive dialogue.

I wish, in addition, to examine briefly the criticism of racial diversity efforts of all kinds that has been voiced by some blacks. For example, William Simpson, of the Far South Suburban (Chicago) Chapter of the NAACP, makes several points. First, he attributes to racial diversity proponents a certain philosophical stance—that majority-black communities cannot be viable and "are not good." Second, he attributes to them a particular set of techniques: "managing population percentages to maintain desirable ratios" between blacks and whites by programs that "limit the access of black families." These premises lead inexorably to the conclusion that, "The possibility of diversity does not justify the abridgment of civil rights to maintain it."[23]

These criticisms seem to me to reflect erroneous assumptions, at least about the racial diversity proponents I know. Their philosophical stance is rather, to quote Simpson himself, that "It is laudable to aspire to live in a pluralistic, diverse racial atmosphere." The techniques they employ eschew limiting anyone's "access" or housing options. From these different premises a very different conclusion emerges: "The possibility of diversity *does* justify non-choice-limiting steps to achieve and maintain it."

Critics such as Simpson also tend to explain the "white flight" phenomenon solely in terms of white prejudice. Then they argue that it is demeaning and

[18] Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 110–11 (1979).

[19] "The Legality and Efficacy of Homeowners Equity Assurance: A Study of Oak Park, Illinois," 78 NW. U.L. Rev. 1463 (1984).

[20] *Cleveland Plain Dealer,* July 3, 1985, p. 4–C.

[21] Montgomery County v. Fields Road Corp., 386 A.2d 344 (Md. App. 1978); New Jersey Buildings, Owners and Managers Ass'n v. Blair, 228 A.2d 855 (1972).

[22] Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

[23] *Chicago Tribune,* Mar. 29, 1984, sec. 1, p. 19.

stigmatizing to blacks to base public policy on bowing to white prejudice.[24]

I believe this argument is seriously flawed. Racial diversity programs are enacted to fight the resegregation syndrome, not racial bigots. (Racial diversity proponents would not care one lick if all white bigots in a community moved out promptly after the first black residents moved in, if a nondiscriminatory real estate market continued to provide healthy buying demand from both black and white families.) Prejudice cannot be gainsaid, but it is a distorting simplification to explain the resegregation syndrome, and the conduct of white homeowners who fear it, simply in terms of white prejudice.

When black families choose not to be the first "pioneer" to move into an all-white neighborhood, we do not attribute their decisions to prejudice (though some black families may, in fact, be prejudiced). Instead, we acknowledge the serious risks of hostility and isolation that families who make such moves may encounter; and we accept a family's choice not to run such risks as a sensible human decision made in unhappy circumstances. We know that both history and current events justify such decisions.

History and current events also evidence the persistence of the "changing" neighborhood phenomenon—as Justice Powell termed it in the *Bellwood* case—and the consequences that frequently ensue.[25] Justice Powell's opinion for the Court focused particularly upon the adverse economic consequences of that phenomenon, but he added that, "Other harms flowing from the realities of a racially segregated community are not unlikely," specifically referring to the close linkage between school segregation and housing segregation.[26] If we credit this description of the adverse consequences that so frequently flow from racial change, as we should, why do we not similarly acknowledge that it may be the desire to avoid the risk of these consequences, not prejudice, that motivates many white families to leave or decline to enter what they perceive to be changing neighborhoods (though some white families may in fact be prejudiced)? Indeed, many black families move from changing neighborhoods for precisely these reasons.

Thus, just as black families understandably fear hostility in all-white neighborhoods, though most whites would not be hostile and hostility will not be encountered in all such neighborhoods, so white families understandably fear the resegregation syndrome and its possible consequences, though most blacks would not want resegregation, and the full range of adverse consequences do not always follow resegregation.

It should be emphasized that one of the principal reasons resegregation cannot be ascribed solely to white prejudice is the conduct of the real estate industry. Unlawful racial steering of both whites and blacks remains pervasive. A white acquaintance of mine, intending to move back to Chicago, was shown some 22 different housing possibilities—including condominiums, rental apartments, townhouses, and single-family homes—by a number of different brokers in a variety of locations. The opportunities offered had only one element in common: None was in an integrated neighborhood. When my acquaintance finally obtained an apartment in an integrated building without a broker's aid, one broker was miffed. "Why didn't you tell me you were interested in *that* kind of building?"

There is a new subdivision in one of Chicago's southern suburbs in which the first few homes were sold to both blacks and whites. Real estate brokers promptly labeled the subdivision "integrated," and thereafter steered blacks to it and whites away from it. Without prejudice or white flight—indeed, black and white homeowners in the subdivision fought together against racial steering, and not a single white family "fled"—the subdivision became virtually all black.

These anecdotal examples reflect a prevalant reality. In a speech earlier this year HUD's regional administrator in the Chicago area told a HUD-sponsored conference that a minority family seeking to purchase a home had a 50 percent chance of being discriminated against, and that a minority family seeking to rent an apartment had an astounding 75 percent chance of encountering discrimination.[27] HUD Secretary Pierce said last year that, "The evidence clearly shows that discrimination is pervasive in American housing markets,"[28] while other

[24] Ibid.

[25] Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 110 (1979).

[26] *Id.* at 111.

[27] Remarks of Judith Brachman, HUD Regional Administrator, Fair Housing Conference, Chicago, Illinois, Apr. 25, 1985 (unpublished).

[28] *Recent Evidence on Discrimination in Housing*, HUD Report PDQR-786, April 1984, p. i.

HUD officials tell us that more than a decade and a half after the enactment of the Fair Housing Act, not only does discrimination continue to be a common and widespread problem,[29] but that it is becoming more subtle and sophisticated.[30]

Indeed, with specific reference to the racial diversity controversy, Secretary Pierce has said:

> I cannot ignore the fact that this [integration maintenance] controversy has become most pronounced in those metropolitan areas which, at least in popular perception, have been the most marked by continuing racial discrimination in housing.
>
> All of these metropolitan areas exhibit the classic pattern of urban racial discrimination—a large concentration of minorities in the central city. Large numbers of the inner city black population are moving to the suburbs, just as others did before them. But where some suburban communities remain closed to minorities, the pressure of minority expansion has become channeled into the neighboring communities whose doors have been opened. It is the efforts of these open communities to preserve the racial diversity which they have welcomed which have become an issue.
>
> I find a cruel irony here. I recognize the serious and important issues which are present in this controversy. But I cannot ignore this burning fact: it is the many communities which have remained closed to minorities that are largely and directly responsible for the existence of this controversy.[31]

I would add only that those closed communities could not have remained closed during the more than 17 years since the enactment of the Fair Housing Act without the active participation of the real estate industry, the "gatekeepers" of our society.

In addition to familiar and newer forms of discrimination by real estate brokers, many brokers specialize in—that is, have listings only or predominantly in—either white or black and transitional areas. Such brokers may also specialize in soliciting purchaser prospects of the same race that predominate in their listings. Thus, a firm may have listings predominantly in black and transitional areas of Chicago's southern suburbs, while it solicits most of its prospective purchasers from among blacks on Chicago's virtually all-black south side.

I am aware of one firm, for example, that seeks listings almost entirely in predominantly black or integrated areas, ignoring other nearby communities that are predominantly white. This firm also solicits its prospective purchasers mostly from black areas in the central city and from black and integrated areas in the suburbs. A principal solicitation mechanism is telephoning. Some 23 solicitors spend a minimum of 10 hours per week making approximately 250 calls each, for a total of about 5,750 calls every week. Some 20 percent of the calls are to prospective sellers, about 80 percent to prospective buyers. It is viewed as a desirable sales technique to have the same person called 10 or more times. Business is apparently good because the firm plans to expand by almost quadrupling the number of telephone solicitors in its current market area. Not surprisingly, some 85–95 percent of the firm's sales are to black customers; virtually all of these customers are led to purchase homes in predominantly black or integrated areas.[32] Such patterns of doing business inevitably steer blacks to one set of neighborhoods and whites to another. They are a high-octane fuel for the engine of resegregation.

It is against this background that we should view the extreme statements that come from some officials of the real estate industry on the subject of racial diversity. For example, the executive vice president of the Ohio Association of Realtors poses the question, "Does fair housing mean equal access or dispersion of minorities equally?"—as if these were the alternatives.[33] William North, a senior official of the National Association of Realtors, says that those seeking to foster racial diversity are the most "flagrant" and "powerful" offenders of fair housing laws.[34] Such statements—which are not representative of the views of all Realtors—serve only to distract us from the serious dialogue in which we should be engaged.

From the viewpoint of fostering constructive dialogue let me close by referring to a recent article

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[29] Ibid., p. 13.

[30] Remarks of Susan Zagame, HUD Deputy Assistant Secretary for Fair Housing, Fair Housing Conference, Chicago, Illinois, Apr. 25, 1985 (unpublished).

[31] Remarks prepared for delivery by Samuel R. Pierce, Jr., p. 3..

[32] Deposition of Roger Bowen, September 1985, taken in South Suburban Hous. Center v. Greater South Suburban Bd. of Realtors, No. 83 C 8149, United States District Court, Northern District of Illinois.

[33] *Ohio Realtor,* September 1985, p. 28.

[34] Statement of William North before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 11, 1978, p. 173.

by Professor Rodney Smolla of the University of Arkansas Law School.[35] Professor Smolla "endorse[s]" affirmative action, which he distinguishes sharply from "integration maintenance."[36] In Professor Smolla's usage, "integration maintenance" is, or includes, racial quotas and racial steering, practices that Professor Smolla condemns (rightly, in my opinion) as denying freedom of housing choice to minority homeseekers.[37] However, Professor Smolla fails to make clear that his definition of "integration maintenance" does *not* include the non-choice-limiting techniques to which I have referred. Indeed, most of these are not even mentioned in Professor Smolla's article.

How many of Professor Smolla's readers will understand that his discussion of integration maintenance is *not* a discussion of these latter racial diversity techniques? How many descriptions of the professor's article will lead to the misunderstanding that Professor Smolla opposes affirmative marketing for racial diversity purposes? Or prointegrative counseling?

My purpose is not to carp. It is rather to counsel that we should not allow the uncritical use of a phrase—"integration maintenance"—to snuff out the thoughtful dialogue we should be having about racial diversity before it begins. Racial diversity may be one of the great domestic issues of the remainder of the century, and we cannot afford less than the most fairminded and responsible analysis. As we move toward an America whose population is composed predominantly of what we used to call "minorities," the avoidance in this country of the pattern of group warfare disclosed by my aborted *New York Times* clipping episode may depend upon our success in fashioning legally valid and morally responsible techniques to foster racial diversity among our peoples. The Lebanon of today may be a harbinger for the world of tomorrow unless we in America succeed in demonstrating that there is another way.

Last month, in the third article in a series on suburbs, *USA Today*'s headline read, "Suburban Racial Stability: Integration's Proud Legacy."[38] Though the headline and the story are prematurely optimistic, there seems to me to be a growing awareness of our need to find out *how* to achieve long term integration in ways that are consistent with our precious heritage of freedom. With sufficient hard work and good will, I think we can do it. As the ever-thoughtful Charles (Casey) Stengel is reported once to have observed, "They say it can't be done, but sometimes it doesn't always work."

[35] Smolla, "In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's," 58 S. Cal. L. Rev. 501 (1985).Ω
[36] *Id.* at 569.
[37] *Id.* at 512.
[38] *USA Today,* Oct. 16, 1985, sec. D, p. 1.

FEDERAL ENFORCEMENT

Housing Discrimination in Rent-Controlled Markets

By Thomas W. Hazlett*

Racial and other forms of "noneconomic" discrimination in housing are generally discussed in the context of privately owned residential property subject primarily to the market forces of supply and demand. This is most often the policy framework under which economic analysis proceeds,[1] as well as the focus of concern to policymakers crafting regulations to ameliorate (presumably) the antisocial consequences of such behavior. This paper seeks to investigate a different sort of housing market altogether: residential rental units under locally imposed price controls. Such controls currently cover about 10 percent of all apartment units nationally.[2] Moreover, the price-regulated market presents interesting and distinct public policy concerns for the administrator charged with the task of combating discrimination in housing.

The sources of potentially harmful discrimination under rent controls are numerous and complex, springing from both the supply and demand sides of the housing market. On the supply side occur the more familiar forms of discrimination based on personal or sociological characteristics: As landlords and managers are faced with long queues of prospective applicants (assuming no vacancy decontrol), they are free to exercise both racial preferences and a quasi-economic bias that strongly, if indirectly, handicaps the disadvantaged, in general, and the elderly, families with children, and ethnic minorities, in particular.

There exist other likely sources of landlord discrimination under rent controls, however, that merit discussion and further investigation. As the central feature of rent controls is a suppression of market prices and, in that prices are the medium of communication and coordination in a market economy, such controls must inevitably "signal" rational economic agents to change their plans from what would obtain under a regime of free-market pricing. In the housing market, an effective unilateral (i.e., exogenous) lowering of rents will not only induce excess demand, and hence a shortage of rental units, but will lower the capital values—and prices—of apartment buildings. These policy-induced losses, so to speak, inherently create opportunities for profit: Those who learn how to most effectively minimize such economic losses will reap economic returns. We will argue that this form of "noncompliance competition" will be likely to introduce potentially large elements of housing market discrimination.

The demand side, interestingly enough, can also be seen as an active participant in discrimination under rent controls. The pursuit of controls themselves can best be modeled as a monopsonistic renters' cartel designed to exclude outsiders from bidding up the price of their currently occupied

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[1] See Becker, 1958.

[2] Citron, 1984.

rental units. This economic discrimination forecloses competing renters from free entry into a community's housing market, and is a device that is sure to segment, or segregate, neighboring populations. Indeed, this may be its intention. It also appears clear that rent controls are as much a tool to keep established renters *in* as to keep potential customers *out,* thus serving the needs of those who fear the possibility of more racially integrated living quarters elsewhere. Above all, the most apparent and least debatable discriminatory effect of rent control would have to be its negative impact upon new residential, and particularly rental, construction. Any truncation of the housing market, particularly of moderate-income, multifamily dwellings, cannot help but be disproportionately felt by economically disadvantaged consumers. We shall take any such "macro effect" to be a very definite source of housing market discrimination.

Discrimination on the Supply Side

In an unregulated market, equilibria between quantities supplied and quantities demanded are established by price fluctuation. Shortages and surpluses are thus eliminated by prices rising or falling, respectively, such that excess demand and excess supply, respectively, are eliminated. The effect and, indeed, the *intent* of a rent-control program is to prevent the market price of rental units from reaching its equilibrium, market-clearing level. Rents are designed to be fixed where they induce a permanent excess demand for apartments.

While a political authority most certainly may suppress the nominal price of a quasi-fixed, geographic-specific good such as rental housing, it cannot both set its price and select the quantities supplied or demanded. It, therefore, is powerless to stop the general momentum towards equilibrium that the price control sets into motion. (The local government may affect that readjustment process, however, with additional policy measures—tightening eviction rules and placing prohibitions on condominium or co-op conversions are examples of just such efforts.) The inevitable motion created then, by effective controls, will take the form of competition to capture the "discount margin" of rent controls; that is, the amount by which controls actually lower the mutually agreeable price of rental housing.[3]

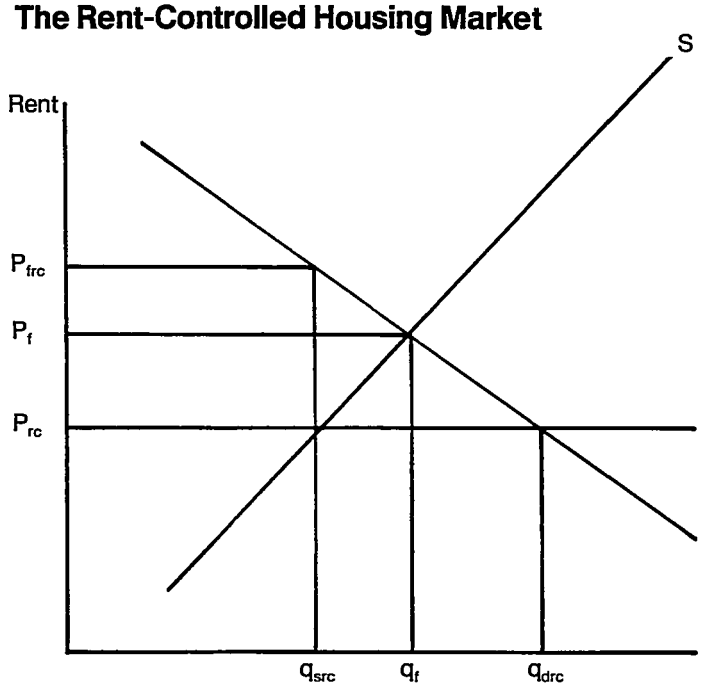
Despite the author's best intentions, a graphical analysis of the situation appears in figure 1. With the implementation of controls, price falls from P_f to P_{rc}, inducing a decline in number of units supplied to q_{src}. (The rapidity with which demolitions and conversions may affect supply no longer makes this supply response solely a long-run consideration; see table 3.) What we are left with is a market in which the law constrains landlords to charging P_{src}, while some consumers are willing to pay P_{frc} for the very same unit. (In strictly controlled communities such as New York or Santa Monica, California, the P_{frc}/P_{rc} ratios can average two or more, so very substantial "discount margins" are possible.) The rent control policy has not eliminated the high cost of rental units; in fact, it has exacerbated it via reduction of the rental supply. It has, however, dramatically affected the form of the payment.

Owners of rental buildings may no longer charge a monetary rent above P_{src}, but will be able to charge P_{src} dollars plus as much as $(P_{frc}-P_{src})$—the "discount margin"—in nonmonetary payments. (These payments actually do come in the form of currency when illegal bribes to owners, or generally legal "key money" payments to *non*owners, such as managers or subletting tenants, are made.) Indeed, owners *must* decide on a means whereby the "discount margin" is charged because there must be some *rationing* of excess demand at $P = P_{rc}$, the rent-controlled price.

The owner, then, will generally "charge" prospective tenants by allowing consumers to compete to outbid one another with nonpecuniary (and, hence, legal) offers. Three general predictions follow. First, the owner will be quick to entertain apartment units as consumption goods and live in them personally, rent them to family members, or simply leave them vacant. As the opportunity cost of foregoing rents in such units has been lowered by at least (P_f-P_{rc}), consumption by the landlord is made this much less expensive. Hence, we observe local governments routinely setting forth rules on evicting tenants even where a landlord should like to take possession of the unit in question to house a friend or relative. Nepotism becomes widespread, and gaining "connections" becomes a prerequisite for tenancy. (And one very large landlord in Santa Monica is said to be withholding more than 100 units from the market.)

[3] See Cheung, 1974.

FIGURE 1
The Rent-Controlled Housing Market



P_f = uncontrolled market price.
P_{rc} = controlled price.
P_{frc} = level which rents would immediately jump to if controls lifted.
q_f = quantity demanded = quantity supplied, assuming no rent control.
q_{src} = quantity of units supplied under rent controls.
q_{drc} = quantity of units demanded under rent controls.

Another implication of "nonprice" competition is that quality will be predictably allowed to deteriorate. As excess demand exists, maintenance expenditures have no positive economic return in the current period (up until the quality falls so far as to make the rent controls nonbinding). Interestingly, even prorent-control Santa Monicans surveyed in opinion polls indicate strong agreement with the view that the 1979 rent-control initiative has brought a widespread deterioration in apartment quality.

The third predictable effect of the discount margin would be a lowering of the "shadow price" of landlord discrimination. Whereas a free-market consumer may, indeed, be the victim of racial or other discrimination, a natural limiting factor is the following: Should an individual, being the highest bidder for an apartment, be turned down due to the ethnic predilections of the owner, *both* parties to the failed deal have lost something. The prospective renter has lost a preferred residence, due to racial discrimination, but the landlord has also lost that unit's *highest* bidder. This imposes a cost upon discriminating owners not borne by unbiased (or "colorblind") landlords, leading to the increased profits and competitive superiority of the latter. (Indeed, over time we may expect that unbigoted owners would simply *buy out* bigoted landlords as the former are correctly maximizing profit and the latter are not.)

A regime of effective rent controls, however, reduces the implicit cost (called a shadow price) of indulging in some on-the-job racism to zero. As a host of prospective renters willing to pay in excess of P_{rc} queues up, the renter is free—indeed, is forced—to employ some discriminating filter. It is apparent that these filters are likely to take at least two forms, neither of which should lessen housing market discrimination:

(1) Pick and choose based upon the personal preferences of the owner. (In essence, consumers "bid" up to (P_{frc}-P_{rc}) with their skin color, good looks, etc.)
(2) Select the low-cost tenant. Who will that be? In Santa Monica, where the "BMW factor" is a sociological fact of rent-controlled life, the incentives are quite clear cut:

> I'm interested only in prospective tenants rich enough to pay the rent on time without trouble, and whose lifestyle will produce the least wear and tear on my property...*Affluent Singles.* With them, there's never a problem collecting the rent on time. They're not home much, so

water bills are lower and wear and tear on property is reduced.[4]

The author of this statement, an anonymous "rent-control landlord" writing in a local publication, also delineates just which tenants he or she stays from: children ("the nasty little sods have the repulsive habit of expectorating their worn-out bubble gum on the common walkways"); Middle Easterners ("their cooking. . .odors seep into the very walls of the building"); senior citizens ("they remember all too well how it used to be, the days when tenants were so valued that the landlord was happy to redecorate every few years and replace a refrigerator"); *Consumer Reports* subscribers ("their purpose in life is to uncover every last thing they are entitled to and demand you supply it at once"); law firm employees ("it costs them nothing to sue—it's one of their fringe benefits, like parking spaces"); the self-employed ("read 'unemployed'"); out-of-staters ("people in jeans, men in cowboy boots, and blacks who call you 'brother'.").[5]

The tone is rude and the intent is discriminatory—but that is precisely what the 73 rental applications in this landlord's file (all from people who would love to rent at controlled prices from a racist) give him every incentive to be. ("It is not uncommon for upwards of 400 people to apply for one vacancy."[6]) Indeed, to the extent that owners are nice and fair minded to all, they've got a *bigger* problem rationing an even longer queue. Whereas a free-market racist *pays* a premium, the rent-controlled racist *gains* one.

There is more than one way to dissipate a "control margin," and discriminating among tenants is utility maximizing, perhaps, but certainly not profit maximizing. This difference turns out to be significant. Although no profit is had from purchasing some prejudice at a zero price, there are strategies landlords may employ that do, indeed, increase black ink.

To deduce what direction these tactics will take, we must only return to the central behavioral response to binding price control: the instant quest by owners to "slide up" $P_{frc}P_{rc}$ and the instant search by potential consumers to meet them there. Hence arises the necessity of existing tenants to organize diligently, demonstrate, and litigate against the "enemies of rent controls." The incumbent tenants know all too well that there exists an active conspiracy involving current landlords and potential tenants that stands ready to sweep their interests aside. But this brings into clear focus the perverse relationship between landlord and tenant under rent controls.

In an unregulated market, an owner is rewarded financially according to the size of the spread he or she creates between price and cost. Thus, a landlord will rationally undertake all measures that increase the price-cost ratio (i.e., total revenue-total cost), such that a new Jacuzzi is only offered if tenants would be willing to increase their rental "offers" as much or more than the marginal cost of the spa. This gives the owner the proper (proconsumer) motives: The owner maximizes profit by maximizing consumer welfare.

Under rent controls, however, tenants are no longer allowed (legally) to express their preferences monetarily. The landlord will still attempt to maximize the price-cost spread, but has many fewer options as to how to go about it. Two basic strategies are:

(1) Landlords lower quality. As long as a line of customers awaits, depreciate—as discussed above.
(2) Make life miserable for the long term (low-rent) tenant. Under open markets, the lifetime tenant gets a discount and a Christmas card; under rent controls, they get snarls. This is so for at least two reasons. First, there may well be vacancy decontrol, meaning that long-lived tenants are costing landlords as much as several thousands of dollars yearly. Very obviously, stringent eviction controls must accompany rental ordinances with vacancy decontrol, or the rent-controlled period would only last through one 30-days' notice. (And it is often true, even under New York City's old controls which do not have vacancy decontrol, for instance, that an immediate jump in rents is allowed for each turnover.)

The second reason the rent-controlled landlord likes to see tenants move frequently is that the owner's one shining moment under controls is that of selection of a tenant under conditions of severe shortage. With an unrented unit, a landlord may entertain personal indulgences of renting to a cousin, movie starlet, or business client's daughter. He or she may also engage in more direct financial transactions: Lump sum payments, particularly through

[4] "S.M.," 1985.
[5] Ibid.
[6] Citron, 1984.

third-party agents, are common arrangements in rent-controlled communities. Moreover, even where cities forbid eviction for condominium conversion, vacated apartments can often be "remodeled" or "reconditioned" to qualify for substantial rent hikes. The key to all this is that as soon as the tenant takes the apartment, the landlord begins *losing:* The tenant will pay less than the unit's opportunity cost. From the moment the tenants move in, then, the landlord is thinking up ways to get them out.

This grossly perverse economic relationship gives rise to a predictable form of competition in the landlord market. Nice people do not relish the prospect of speedily evicting unemployed tenants for missing a month's rent, nor do they gain utility from "staking out" an apartment around the clock to obtain proof that a tenant is illegally subletting an apartment. Further, they are apt to continue the 10-year painting cycle, or perhaps stretch it to 12, but simply cannot let "their building," with "their tenants," get shabby.

Enter the economic man. A ruthless profit maximizer, he will forego any nicety, and exploit any legal (or thereabouts) opportunity, to increase the picture on the bottom line. In an open market, not many consumers would be attracted to this sort of landlord—which is, presumably, why he might rationally find a different line of work. *But,* under conditions of price-controlled shortage, this anti-public relations landlord is paid a handsome return. Insofar as he can more efficiently evict, coerce, depreciate, and deal (under the table), he can make a higher return than the caring soul who plays by all the rules, and aims for *compassion* as well.

The housing market may be controlled in terms of nominal rents, again, but capital markets remain free and liquid. As "good sports" quickly lose their shirts under controls, tougher players soon come to dominate the market. Indeed, the nice-guys-finish-last observation is glaringly born out by the *pro forma* control procedure whereby rents existing at a point in time are used as the base for all future allowable rent hikes. Federal data clearly show that the rental market, which is tremendously deconcentrated and boasts of many small-scale, family-owned or "retirement-money" buildings, is slower to adjust to inflation than other markets; we may presume this lag has something to do with (some) friendly landlords "rewarding" their long term customers. But it is just this landlord who goes broke *first* when controls freeze rents at levels previously set (up to market-clearing levels) by *landlords.* This not only punishes compassion—it capitalizes the loss by perpetuating it.

One ethnic implication of this conflict is that those who feel less identity with the tenants of their building will likely be more dedicated and successful in their antitenant activities. One would expect, for instance, that foreign ownership of rent-controlled buildings would increase. The further removed, socially speaking, tenants are from a given landlord, the less costly it is for that landlord to inflict harassment. This "competitive discrimination" amongst landlords then—wherein disparate ethnic group members who have few local community ties are selected as more profitable landlords—may lead to increasing tension and acrimony between tenants and owners. A straightforward response would be for the owner to engage in open discrimination *in favor* of the landlord's *own* ethnic group. (Of course, closely knit ethnic communities could also effectively bypass the controls program altogether by arranging market-clearing rent payments through complex favor-for-favor exchanges, enforced by custom and "family honor.")

The bottom line in this selection of the coldest is that (a) landlord-tenant relationships become increasingly hostile and litigious, and (b) the tenants most likely to lose their housing opportunities under such circumstances are likely to be disproportionately poor or elderly. These groups generally have little information regarding their legal rights; even where access to legal aid is available, it will be difficult to continually protect renter's rights where preemptive landlord action or calculated intimidation has proven successful in raising landlord profit.

Discrimination on the Demand Side

The supply-side discrimination occurring under rent controls is one of the rare issues commanding wide concurrence on both sides of the question. Landlords in rent-controlled Santa Monica, for instance, openly concede that they look for upper income tenants. One major apartment owner claims that he goes so far as to interview prospective tenants in their own living rooms "to see if they're all they purport to be."[7] A real estate broker, however, believes that tenants, whom many land-

[7] Fabian, 1984.

lords rely on for references (so as to avoid being deluged when a "for rent" sign is posted), are a force in the "yuppie-ization" of Santa Monica as well. "The tenants have a communication network with their friends and let them know [about vacancies]. It's tenant snobbishness creating the yuppie phenomenon more so than the owner's selection."[8] And while rent-control advocates agree with the trend, they dispute the impetus: "They [tenant group spokespersons] suggest that landlords are trying to change the city's demographics by renting to higher income tenants who won't care as much as less affluent tenants if the political winds threaten to blow rent control away. . . ."[9]

Although many sources have noted the trend towards elitist selection in post rent-control Santa Monica, the city's 1983 housing element policy report importantly endorses the perception:

> Income discrimination is believed to be an increasingly pervasive practice which is resulting in fewer housing opportunities for low- and moderate-income persons, reducing the diversity of the community. It is believed that as the demand for affordable rental housing has increased, some landlords have discriminated against low- and moderate-income tenants.[10]

Although this city report takes this phenomenon as a (private) market failure, and although rent control antagonists often characterize it as an unexpected consequence of rent control, we argue herein that a whole range of discriminatory effects in the housing market resultant from rent controls are often the *intent* of and political motivation *for* such regimes.

First, consider the essence of rent control as a policy: Existing tenants face rents which are increasing and, importantly, expected to go far higher. (The Santa Monica median rent rose 125 percent between 1970 and 1980, while the Consumer Price Index was increasing 103 percent. [Rents would have risen more save for the implementation of controls in April 1979.] But the median-priced Santa Monica home rose 656 percent, 1970–80. In that the home price is the present capitalized value of future rental payments, the unregulated rent-paying future looked grim, indeed.) The reason that rents are increasing, however, is—on the demand side—increasing competition from "outsiders," tenants elsewhere who would like to relocate to existing units. As bids from rival renters go up, incumbent tenants must either increase their offers or move.

Having to pay higher rents is utility decreasing in any framework, but the option to move to cheaper quarters, thus allowing higher bidders to acquire existing units, is particularly interesting. Although the argument is sometimes made that rent control is a necessary tenant protection because it is costly to pick up and move should an unjustified rate hike be imposed, it is curious that the two strictest rent-control measures in California have been instituted in cities having abundant low-priced housing nearby. Santa Monica borders the Venice, Mar Vista, Inglewood, and southwest Los Angeles neighborhoods, while Berkeley borders Oakland (Oakland was not rent controlled when Berkeley adopted controls in 1978, and today has a relatively weak ordinance—including vacancy decontrol/recontrol—that still allows for a relatively high vacancy rate of 5.3 percent; the California average is 5.1 percent). The inescapable observation is that "affordable housing" does exist in nearby neighborhoods, but in areas that are less affluent and less white. If renters in Berkeley and Santa Monica did, indeed, feel "hostage" to their landlords, they must concomitantly have felt that the move to adjacent lower priced residences was a very threatening state of affairs.

The move to cap rents legally, then, may be seen as a way to cut off two-way migrations: potential tenants in and incumbent tenants out. Left to a free market, vested tenants would quickly be outbid and sent to find less costly units in less desirable neighborhoods. The political option of rent control is an enforcement mechanism for a buyer's (renter's) cartel: Because tenants are so deconcentrated as a group as to make voluntary collusion impossible, particularly when *outsiders* would quickly outbid the existing tenants altogether, the city is asked to fix rents (i.e., prosecute cartel "cheaters"). It is undeniable that the direct effect of this government-mandated monopsony cartel is discriminatory. Purchasers of housing space not currently vested are foreclosed from an equal chance to bid for the apartments of protected incumbents. What is more controversial, however, is the motivation for this protectionist legislation: Is it economic based (controls surely *do* reward some tenants with greater

[8] Comment of Wesley Wellman, ibid.

[9] Fabian, 1984.

[10] Santa Monica, 1983, p. 8.

TABLE 1
Multifamily Construction Rates for California Rent-Controlled Cities vs. State

Jurisdiction	(a) 1970–75 permit ratio[1]	(b) Three-year precontrols ratio[2]	(a) (b)	% increase (decrease) in "housing crisis" period
Berkeley (9/78)	1.07 (10^{-3})	4.88 (10^{-5})	21.90	(95.4)
Beverly Hills (3/79)	1.45 (10^{-3})	3.74 (10^{-4})	3.90	(74.4)
Hayward (2/80)	3.94 (10^{-3})	4.61 (10^{-3})	.86	16.3
Los Gatos (10/80)	2.45 (10^{-4})	9.55 (10^{-4})	.26	284.6
Los Angeles (8/78)	.121	.141	.86	16.3
Oakland (9/80)	1.09 (10^{-2})	8.40 (10^{-3})	1.30	(23.1)
Palm Springs (4/80)	7.03 (10^{-3})	1.27 (10^{-2})	.55	81.8
San Francisco (4/79)	2.24 (10^{-2})	1.51 (10^{-2})	1.48	(32.4)
San Jose (7/79)	2.84 (10^{-2})	1.57 (10^{-2})	1.81	(44.8)
Davis (10/78)	3.79 (10^{-3})	2.63 (10^{-3})	1.44	(30.6)
Santa Monica (4/79)	1.23 (10^{-2})	5.62 (10^{-3})	2.19	(54.3)
Thousand Oaks (7/80)	7.52 (10^{-3})	5.08 (10^{-3})	1.48	(32.4)
California	1.00	1.00	1.00	0.0

[1]Proportion of all California building permits for dwellings of more than three units in control period.
[2]Proportion of State multifamily building permits in 3 calendar years prior to rent control enactment (year of enactment included in 3-year period if controls passed in July or later).
Source: U.S. Census Bureau, C40 Construction Reports (Annual 1970–83).

wealth), or is it elitist (i.e., an attempt to preempt social and ethnic integration in the housing market)?

Interestingly, the possibilities are not mutually exclusive, and evidence from both the political and economic worlds indicate that either motive may be in force. For instance, the city of Los Angeles adopted rent controls in mid-1978 due to pressure from residents in affluent west Los Angeles and, to a lesser extent, the San Fernando Valley. The leading antagonist of Los Angeles' rent controls has been (and remains) a black councilman from an inner-city district, David Cunningham. As an advocate of lower income tenants, Cunningham sees his mandate not as a mission to suppress rising rents, but to promote the creation of new housing opportunities altogether. Yet the "chilling effect" of rent controls on new rental construction is well documented; hence, Cunningham sees controls as an essentially antiblack public policy designed to allow affluent whites the privilege of staying in relatively homogeneous white neighborhoods without having to pay for the privilege:

> There is another issue that underlies this—there is a lot of racism involved. In the community I represent rental housing is a good deal. Rents are very reasonable, there are a number of vacancies. When I go to buy a pair of shoes I shop all over the city to find where the best bargain is. But there are some people who want to feel safe in their own racial enclaves and are not willing to take advantage of some economic deals in rental housing that are available.[11]

It should be noted that Cunningham's position on rent controls is not anomalous. In an interesting political exchange, Los Angeles Mayor Thomas Bradley was "caught" helping Councilmember Cunningham in a move to derail rent controls shortly before Bradley's gubernatorial compaign in 1982. Although the behind-the-scenes decontrol movement involved much of the city's downtown black political establishment, Bradley unceremoniously heeded the advice of his wealthy Westside (largely white and Jewish) political contributors to publicly disavow the antirent-control reforms once the politi-

[11] Hazlett, 1980, p. 17.

TABLE 2
New Santa Monica Construction, January 1976-August 1981

	1976	1977	1978	1979	1980	1981*	Total
Single family	10	5	2	19	5	3	44
Condominium	163	86	104	161	424	220	1,158
Rental apartments	167	265	141	15	6	0	28
Mobile homes	0	0	0	0	0	0	0
Commercial/residential	0	0	0	0	0	0	0
Total	340	356	247	195	435	225	1,798

*January-August 1981.

First rent control (unsuccessful) election: June 6, 1978.
Second rent control (successful) election: April 10, 1979.

Source: Santa Monica Planning Department (as listed in table 67 of the Technical Appendix to the Santa Monica Housing Element [1983]).

TABLE 3
Santa Monica Demolitions and Removals, January 1976-August 1981

	1976	1977	1978	1979	1980	1981*	Total
Single family	27	40	37	56	28	6	194
Condominium	0	0	0	0	0	0	0
Rental apartments	52	61	302	735	38	25	1,013
Mobile homes	2	3	172	89	58	7	331
Commercial/residential	0	2	3	0	0	0	5
Total	81	106	514	780	124	38	1,643

Source: Santa Monica Planning Department.

cal maneuvering became public information. Moreover, when given the chance to vote on the issue in the debate over Los Angeles County rent controls, "Blacks and Latinos voted against [the] rent-control measure."[12]

Economic evidence of the discriminatory intent of rent-control movements starts with the realization that, as David Cunningham spells out, controls are clearly antidevelopment. The reasoning that lowering returns to apartment owning will, in turn, lower investments in apartment building and apartment maintaining needs to rely only on the profit-maximizing motives of investors for its veracity. (That new units are typically exempted from rent controls is a formalistic difference only a lawyer could love—and only a lawyer with someone else's money on the line.) Investors understand market signals: The information that city X is willing to expropriate last period's investors is a very loud signal to this period's potential investor. Rental construction in Santa Monica has essentially dwindled to zero post controls, despite a legal "exemption" (see table 2).

If local voters and governments truly are interested in alleviating the plight of the moderate- or low-income renter, and rent controls are simply a desperation measure implemented to deal with a housing market crisis, we should expect to witness additional policy measures taken to encourage housing opportunities by municipalities facing severe supply problems. In this light, then, it is noteworthy to point out that, only a few months into its rent-control program, Santa Monica imposed a blanket

[12] Luther and Decker, 1983.

moratorium on *all* new construction in the city. This appeared to add fuel to the fire: Demolitions of apartment units totaled 1,294 in 1978 (the year of a losing rent-control initiative) and 1979 (the year the initiative passed), a 592 percent increase over 1976–77. Further, over 500 rental units were converted to condominiums in 1978–79 (see table 3). It is questionable that a policy that encourages this sort of divestiture from rental housing investment is a benefit (net or gross) to hard-pressed, moderate-income tenants. The city's 1983 report was led to conclude:

> It is believed that Santa Monica today has fewer low- and moderate-income people than anytime in its recent history and it is unlikely that private sector and governmental action can restore the previous economic diversity of this community in the next ten years. . . .[13]

Lest the argument be made that such antigrowth consequences were the unfortunate and unintended consequence of a rent-control program that is designed to serve the public interest generally (and not solely the interests of fortunate incumbent residents), we should expect that Santa Monica's housing policies would, as the rental crisis gathered, become increasingly liberal (that is, zoning, planning, and permit-granting agencies would become more pro growth). A simple test of the "public spiritedness" of Santa Monica's housing policies, then, would be to compare the level of multifamily construction (the exact measure, *rental* housing, was unavailable, but using the multifamily data biases this test towards the "public-interest hypothesis" by counting condominiums, essentially, as rentals) just prior to the advent of rent controls with the level of construction in some previous control period, adjusted for regional or macro trends. The public interest view of rent controls suggests that, as the rental market becomes tighter, multifamily construction should *rise.* In that the private market responds positively to increasing prices (i.e., supply curves are upward sloping), the political authorities should find increased building activity achievable simply by self-imposed restraint—i.e., the ability not to *tighten* land-use controls during a time of (or just before) rapidly rising rents.

The evidence, however, is that Santa Monica's multifamily construction rate in the 1970–75 period (used as a control) was 2.19 times as high as in the 1976–78 period immediately preceeding the imposition of rent controls. (As these rates are relative to California State multifamily construction, they cannot be ascribed to interest rate increases or other microeconomic fluctuations.) In fact, in 8 of the 12 rent-controlled California cities for which census data are available, building rates declined during the precontrol "rental crisis" period (see table 1). Some declines were dramatic: 96.4 percent (Berkeley), 74.3 percent (Beverly Hills), 54.3 percent (Santa Monica), 32.4 percent (San Francisco and Thousand Oaks). This evidence is inconsistent with the view that local governments impose controls to alleviate problems suffered by renters *as a class* in a tight housing market, but supports the hypothesis that local voters and policymakers institute controls as part of a generally exclusionary housing policy that restricts access to (potential) new residents, first by growth controls, and then by rent controls. (Although demand shifts in local housing markets could, indeed, influence changes in construction levels, and should be included in a fuller explanatory model of rent-control imposition, it is implausible that it was decreasing demand in the precontrols period which caused construction levels to fall. The emergence of controls, after all, is allegedly a political reaction to "tight housing markets" which, by definition, are exhibiting no such demand declines.)

In summary, demanders of rent control may be seen as pursuing an economic discrimination against potential competitors, with motives that could well be both "economic" and "social." The segregation of tenants according to apartment tenure is a strategy that may be profitably employed by residents in "good neighborhoods" to the detriment and isolation of those in not-so-good ones. Ironically, rent controls' predictable effects—lowered rental housing availability, increased landlord discrimination, lessened mobility—may make rent control *more,* not less, attractive to particular electorates. Construction data from rent-controlled California cities appear to support the hypothesis that rent controls are motivated by exclusionary concerns.

Conclusion

Unicausal explanations are treacherous in the social sciences, and none will be attempted here. It is worth noting, in fact, that it is difficult to model all

[13] Santa Monica, 1983 p. 17.

rent-control programs as intentionally discriminatory. Washington, D.C., experience serves as an example of rent controls that may well have promoted sufficient apartment depreciation that the relatively affluent must simply shop elsewhere. City Councilmember at large John Ray recently noted that:

> All too often, people of moderate income find it impossible to find reasonably priced rental housing in the District. But price is not the key factor; what makes the difference is that the same amount of money buys better housing in the suburbs, because the suburban jurisdictions have managed to stimulate more housing construction and renovation.

Ray goes on to cite the comments of "civic activist" Andrew Corley:

> The housing conditions in the District are driving middle-class renters—particularly the young, educated black renter—into Maryland and Virginia. We are losing a whole generation of middle-class blacks to Prince George's County. If they remained here, they would be the future taxpayers, civic leaders, homeowners, and voters of our city. We are losing them because they will not live in drug-infested buildings.[14]

Perhaps, then, rent controls in the District of Columbia were earnestly "enacted for the best of motives to protect middle- and low-income tenants," as U.S. Senator Thomas Eagleton once believed. Even here, however, the implications for housing opportunities for the disadvantaged are grim. As Eagleton, an original rent-control proponent who conducted a congressional study of the District's controls in the mid-1970s, now concludes: "rent controls. . .actually work against the very people they were designed to aid."[15]

The symmetry of *results* between controls pursued for preservation of privilege and those imposed to create affordable housing opportunities for the poor is what looms as most essential. In addressing the issue of housing discrimination, policies that restrict supply, limit mobility, and place a tax on growth while subsidizing destruction and discrimination are inherently suspicious. They deserve to be squarely confronted on their merits and on their effects—whether pursued for the best, or the worst, of motives.

[14] Ray, 1985.

[15] Eagleton, 1977.

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Exercises in Irrelevance: Federal Enforcement of Fair Housing in Federally Subsidized Housing

By Irving Welfeld*

In an article, "Federal Subsidized Housing: Still Separate and Unequal," that appeared in the summer 1985 issue of *New Perspectives* (a journal published by the U.S. Commission on Civil Rights), the author, Craig Flournoy, brought evidence to the effect that the current subsidized housing programs, particularly the public housing program, are segregated—with black families getting the short end of the stick. He also accused the past and present officials of the Department of Housing and Urban Development (HUD) of failing to practice in their own programs what the government has not only preached, but also legislated and regulated. HUD has issued rules with respect to the Civil Rights Act of 1964 prohibiting any action that would "subject a person to segregation or separate treatment in any manner relating to his receipt of housing." Title VIII of the Civil Rights Act of 1968 prohibited racial discrimination in public and multifamily housing and, ironically, placed the primary responsibility for enforcing the act on HUD.

As evidence of HUD's failure to enforce the fair housing laws, Mr. Flournoy lists a whole series of actions that HUD should have taken. Before dealing with the specific measures that HUD in its wisdom chose not to take, it may be helpful to put the matter in perspective by presenting a very short history of HUD-subsidized housing programs. It may provide an insight into why such a distinguished fighter in the battle for civil rights, the late Patricia Roberts Harris, after serving as a HUD Secretary, could say that "fair housing wasn't a high priority."

A Precarious Perch

In approaching the kingdom over which HUD presides, one is struck by its size and variety. HUD in 1985 had close to 4 million units of assisted housing eligible for receiving financial assistance under a jumble of program names and numbers that it took the Federal Government close to a half-century to create. One might assume that we are dealing with a powerful government agency whose sneeze causes local governments and those involved in the provision of housing to shudder. In truth, subsidized housing even in the "best of times" has occupied a precarious perch.

President Roosevelt in his Inaugural Address in 1937 spoke of one-third of the Nation as ill housed. However, public housing was not a high priority New Deal program. It was a program of last resort. It was also a program whose purposes included

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reducing unemployment, stimulating business, and eliminating unsanitary housing conditions and slums.

Roosevelt had overwhelmed Landon and the ratio of Democrats to Republicans in the House was 4:1 and in the Senate 3:1. Nevertheless, the legislative program of the administration had turned into a fiasco as the President moved to pack the Supreme Court. As the session moved to a close, the administration had nothing to show for its efforts. It was only at this point that an interest was shown in the public housing legislation that had been repeatedly passed by the Senate, under the leadership of Senator Wagner, only to die a lingering death in the House Committee on Banking and Currency. Chairman Steagall got a message from his chief, and the House bill started to move. It steamrolled through the House making a shambles of the deliberative process. The House committee had its first hearing on the bill on August 3, 1937. By August 18, 1937, after 3 hours of debate, the bill had passed the House of Representatives. The statements in the "debate" attest to the haste of the process. Representative Steagall's (whose name the bill carries) opening address seems to have been penned for the White Rabbit:

I must hurry on. We are necessarily limited in this discussion. I am not responsible for it. I am doing it the best I can. . . .We have gone about it hastily.

Representative Hancock put the matter correctly:

There is not a member of the committee who would stand here in the Well and tell you he understands this bill in its present form.

The Senate and House bills were reconciled and on September 1, 1937, President Roosevelt signed the bill.

The 1937 law proved to be a reasonably adequate instrument for the provision of low-rent housing. The chief problems of the vast majority of the tenants were directly related to the economic depression. The defense and war period saw the conversion of the program to a defense housing program. During this whole period, subsidized housing followed the "law" of the land, namely, segregated housing. It was a period when the Federal Housing Administration counseled lenders on the importance of racial covenants in single-family housing mortgages in order to protect property values and reduce the financial risk.

America was on the brink of a new era of race relations in the late forties when Congress had a chance to take a second look at public housing. Both the Democratic and Republican party platforms in 1948 contained provisions that would have mandated operating public housing on a nondiscriminatory basis. Unfortunately, public housing found itself on the wrong side of a new Federal policy. The Housing Act of 1949 enunciated the objective of a decent home and suitable living environment for every American family. But this objective was to be reached by encouraging private enterprise to serve as large a part of the total need as possible. And public housing served many who in a postwar prosperous era could afford the private product.

If public housing was to be continued by a conservative Congress, it would have to be insulated from the private market. It would be redirected to the very poor. Many conservatives still had grave doubts about the cost and fairness of a program that provided new housing for the poor. Their doubts were partially stilled by Senator Taft, who explained that there "was no other method of meeting the problem of low-income families, except by starting at the bottom and replacing existing slums with permanent buildings."

The argument prevailed in the Senate and the bill was passed by a handy majority. The House of Representatives was another story. An amendment to strike the public housing provisions initially prevailed in the House. The decision was reversed by a razor-thin margin—209–204 (with then-Representatives Nixon and Ford voting in the negative).

The price of passage was high. As I explained in a recent article in *New Perspectives,* "Federal Subsidized Housing: The Limits of Good Intentions," fair housing supporters had to forego an amendment mandating nondiscrimination in order to retain southern support for public housing. In addition, limiting public housing to the very poor had profound and predictably negative consequences. These consequences were set forth quite clearly in a report that Secretary Weaver provided to the Senate Committee on Government Operations on December 30, 1966:

Increasingly and inevitably, public housing served those whom general prosperity had bypassed because their problems were multiple. Their poverty, unemployment. . .tended to be of long standing, and their other problems tended to run the gamut from inadequate education, ill health, and broken homes. . . .

Just as the tenants of our public housing projects were beset by multiple interrelated problems so was the public housing program itself. Increasingly "de facto" racial segregation added to the earlier effects of "de jure" racial segregation. Increasingly too, appropriate sites for low-rent housing became harder to find. . . .

Low-rent housing, with its emphasis on lower costs. . .was among the first to be priced out of the market for central city improved land. . . .

Other areas of the city where vacant land was available and where land prices were not prohibitive tended to be withheld. . .because it was felt that large enclaves of low-rent housing would depress property values. Local resistance was even greater when a majority of the proposed project tenants were of a race different from the inhabitants of the area. Unlike privately owned housing which cuts across municipal boundary lines. . .public housing is generally limited to the area of the political subdivision whose citizens it is intended to serve. *The formidable problems of finding suitable sites. . .became increasingly difficult (because locally more controversial) as a conscious effort is made to eliminate "de facto" racial integration.*

The very fact that sites were limited resulted in a frequent choice of relatively high cost land in the central city. This, in turn, forced excessive reliance on tall structures, high densities, and economies of design and construction. Such economies. . .detracted from the livability as well as the appearance of the projects.

It was little wonder that the program came to a virtual halt in large city areas. . . .Many of the projects tended to be found in smaller towns. . .and in the field of housing for the elderly. . . .[emphasis added]

It was little wonder that beginning in the sixties, with the realization that public housing could not produce the necessary volume of housing, the emphasis was placed on subsidizing private enterprise. New players did not change the rules of the game. In the wake of the Johnson landslide victory in the 1964 Presidential election, a rent supplement program was proposed to perhaps the most liberal Congress since the Depression. The bill, after substantial alteration, did fairly well until it came to appropriating money. After an initial defeat in the Senate Appropriations Committee, the Senate approved $12 million in funding by a vote of 46–45. The design, location, and cost controls, however, assured that the program was to be a puny one.

In 1968 the Johnson administration went back to the drawing board and came up with interest subsidy programs. They were met by a set of amendments in Congress designed to cripple the programs. The amendments were adopted, but to the surprise of all the lawmakers and the chagrin of many, the result was the most successful *production* programs in American history.[1] After running for about 4 years, the management and cost implications of the programs led to the 1973 moratorium and the ultimate demise of the programs.

After studying the problem for a full year, HUD came back with another program. After some congressional mangling, and a few years of learning how to make the program work, this program also began to churn out large numbers of units. A budget-conscious administration and a deficit-conscious Congress have brought this program to a halt.

The nutshell history of housing programs for low-income families should provide at least a partial explanation of the low priority given to civil rights during the administrations of the HUD Secretaries. The institutional imperative of producing housing in an atmosphere in which a program was either dying or a program was being born in a somewhat misshapen form did much to concentrate the minds of the Secretaries to the task at hand. Given the long development time of multifamily projects and the short tenure of the Secretary (seven Secretaries in the 18 years HUD has been a department), there is a natural desire by the incumbent to attend groundbreakings rather than to tend to the graveyard of near insoluble problems, such as integrating public housing projects, that are deemed to be the mistakes of past administrations.

Straightforward but Simple

Is the problem of integrating subsidized housing so difficult, or is it as former Secretary Weaver, who is quoted in the Flournoy article, "purely a case of the Federal government not carrying out its responsibilities"? The article sees the matter as a straightforward and simple question of weak-kneed administrators:

Congress has provided HUD with powerful penalties to ensure that city officials, local housing authorities, and private developers comply with fair housing laws. . . .

* * *

. . .HUD secretaries during the past 19 years have not invoked the laws' strongest measures. For example:

[1] For a more detailed history of the programs, see my article, "That 'Housing Problem'," *Public Interest,* Spring 1972, p. 78.

No HUD Secretary has ever used the authority provided under Title VI to cut off Federal funds to an. . .authority. . .or landlord who operated a Federal rent subsidy development. . . .

* * *

Top HUD officials seldom have revoked Community Development funds from communities. . . .

To quote a quip attributed to Secretary Weaver, there are people who have "hearts of gold and heads of lead." What would be accomplished by cutting off the funds of a housing authority? Who would be hurt? The administrators who perpetrated the segregation may have been replaced by a new reform administration. Even if the same "bad old guys" are in charge, the rooms that would go unheated and the buildings whose roofs would leak would not be inhabited by the administrators, but by poor tenants. Extending the circle of guilt for the failure of an independent local authority makes little sense. The loss of community development funds is likely to strike hard at the low-income person or child—likely a resident of a subsidized project—who is currently benefiting from a job training or a Head Start program.

Selective and More than Equal

Subsidized housing is unique, and this uniqueness causes difficult dilemmas when it comes to the issue of integration. Public education is available to all. It is a universal "subsidy" program. Subsidized housing is available only to a relatively small portion of the poor. Although the benefit received may not equal the cost paid by the government, the resident, even in a segregated project, is in a favored position. The choice that administrators of the programs have often faced is between segregated or no housing. As Senator Taylor commented during the 1949 debate on an equal housing amendment to the public housing legislation, "We cannot be too self-righteous and be ready to let other people go without housing in order that we may stand by our principles."

The other unique aspect is that the difficulty in enforcing civil rights in public housing arises from the fact that minority residents are not only separate, but also unequal. In numerical terms, *nonwhites are more than equal.* They have more than their share of the units available. Of the 1.1 million occupied public housing units in 1978, blacks and Hispanics occupied 59 percent of the apartments and whites occupied 34 percent pf the apartments (Indians, Orientals, and other minorities accounted for the remaining occupants).[2]

These figures understate the disparity, since it includes the elderly. The latter group represents 46 percent of public housing occupants.[3] Sixty percent of the elderly occupants moving into public housing in the year ending September 30, 1979, were white. In contrast, only 26 percent of the nonelderly families moving into public housing during the same time period were white. Fifty-three percent of the move-ins were black and 18 percent of the move-ins were Hispanic.[4] In the private subsidized rent supplement program (which serves the same very-low-income group as public housing), the statistics are approximately the same for move-ins, 25 percent white, 62 percent black, and 8 percent Hispanic.[5]

The disparity in favor of minorities is not the usual problem faced by civil rights advocates, In the usual case, the problem is the minority is not getting its fair share—whether it be of policemen, firemen, or medical school students. Even in the case of housing, the focus is the residential area in which the minority group is occupying fewer units than would be expected if income were the sole criterion. If income were the sole criterion, the complexion of subsidized housing would be quite different. Although the poverty rate of whites in 1983 was 12 percent, compared to 36 percent for blacks and 28 percent for those of Spanish origin, there were 24 million poor whites as compared to 10 million poor blacks and 4 million poor of Spanish origin.[6]

Quotas—For and Against

In the case of subsidized housing, the traditional ploughshares of minority improvement are turned into weapons against minorities. If integration is to be achieved, goals and quotas have to be used to limit the number of blacks. The target of affirmative marketing must be the white community. In these cases, integration, if it is to be achieved, must be achieved at the "expense" of poor blacks rather than at the "expense" of whites. Whose ox is being gored? What is "fair housing" in such a different context?

[2] HUD, *1979 Statistical Yearbook,* p. 206 (table 64).
[3] Ibid., p. 207 (table 65).
[4] Ibid., p. 208 (table 66).
[5] Ibid., p. 200 (table 58).
[6] Census, *Money Income and Poverty Status of Families and Persons in the United States: 1983,* p. 3 (table B).

Simultaneously, HUD was the defendant in the two following lawsuits:

1. Applicants for housing alleged that the affirmative fair housing marketing goals required by HUD were being used by project sponsors as quotas that discriminated on the basis of race in tenanting their projects.[7]
2. A tenant selection and assignment plan approved by HUD was attacked as contributing to segregation of an integrated public housing project and racial quotas were sought to maintain a racial balance in the project.[8]

In the *Williamsburg* case, the court, with HUD's approval, struck down a quota system that achieved the goal of integration; namely, a project that apportioned 25 percent of the apartments to Puerto Ricans and blacks and 75 percent to Hasidim (white Jews) in an area which is one of the major Hasidic centers in the world and where within a half-mile a project (Roberto Clemente Plaza) was being built, with a community understanding that the ratio would be 75 percent nonwhite to 25 percent white.

In the sphere of subsidized housing, some civil rights organizations have come full circle as far as the need for a colorblind interpretation of the laws. Roger Starr noted the irony of the situation in "New York City: Aftermath of the Civil Rights Revolution" in the spring 1985 issue of *New Perspectives:*

> After many years in which the goal of minority group advocates was the development of racially integrated housing, the local branch of the NAACP went to court in New York City to oppose the efforts of Starrett City management to ensure exactly that. The Starrett City policy was endorsed by a firm majority of its residents both black and white. The cornerstone of the policy was a principle that minority groups have accented without hesitation in recent years, namely that purely color-blind policy would not be sufficient to ensure racial integration. Given that there was no shortage of well-qualified applicants. . .it seemed clear that only a token number of whites would live in the development unless they felt the percentage of blacks was to be less than overwhelming.
>
> The Starrett management. . .deliberately limited the number of minority residents to approximately 30 percent of the total units. . . .Since minority families tended to be larger than white families, the actual number of. . .whites in Starrett City is little more than 50 percent. . . .That. . .would seem totally consistent with the racial distribution of the general population of New York City, and thus with the goal, long dreamed of, of racially integrated housing. That numerical congruity. . .causes discomfort to many advocates of integrated housing. That is that the program is not itself color-blind. A number of black families were refused admission. . .simply because of their race. . . .Many people. . .find that the policy of refusing admission. . .on the basis of race is troubling and distasteful. But. . .the NAACP supports the exclusion of some job applicants and the inclusion of others on the basis of race to meet quotas and guidelines.
>
> * * *
>
> . . .[T]he institution of the suit suggested that the NAACP had replaced integration in housing with the goal of achieving the maximum number of units for black occupancy, and that whether the blacks were to live separately from whites and other minorities or together with them was no longer a matter of supreme interest.

What has occurred is that the National Association for the Advancement of Colored People has gone back to basics—the advancement of colored people. At one time, the goal of advancement was by the means of integration. Advancement and integration are not, however, synonyms. The NAACP would not complain that a work force on a construction job was not integrated, since all the plumbers were black. No lawsuit has ever been brought against the National Basketball Association for the lack of white ballplayers. In this context, what happened in Starrett City could and should have been expected. The purpose of the NAACP is not to make whites feel better at the expense of providing good quality housing for blacks at subsidized prices. What is confusing is that in most other areas, including nonsubsidized housing, advancement is coming by means of integration.

When the self-interests of the parties are clear, settlements can be reached. The NAACP wanted more State-funded (Starrett was State funded and federally subsidized) units for blacks, and the owner wanted a racially stable project. A settlement was reached that allowed Starrett to continue its practices and imposed on the New York State Division of Housing and Community Renewal the obligation to use its best efforts to raise to 20 percent the black occupancy of other projects supervised by the agency. Everybody won. Alas, the Justice Department, more concerned with principles than with the interests of the parties, has reverted to a strict construction of the colorblind principle. It entered the case and sued Starrett for violating the fair housing law by using a quota.

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[7] Williamsburg Fair Housing Comm. v. N.Y.C. Housing Authority, 493 F. Supp. 1225 (1980).

[8] Vann v. Housing Authority of Kansas City, Mo., 87 F.R.D. 642 (1980).

Exercises in Irrelevance

The rethinking within the minority communities may require a retooling of the traditional fair housing methods in such situations as *Williamsburg* and *Starrett*. The latter cases are, however, exceptional situations—the minority is still a minority. The really difficult problem is the present set of de facto segregated projects that are spread throughout the country.

There is no possible tenant assignment system that is going to integrate the large projects in minority areas in which not only the pattern of occupation but the waiting lists are minority dominated. As Robert Kolodny has written, "[A]s a result of the self-segregation of non-elderly whites who have generally moved out of public housing altogether, even good-faith efforts are helpless to reintegrate the housing since there are so few majority residents."

The *Vann* v. *Kansas City Housing Authority* case provides an excellent example of the present irrelevance of tenant assignments in the majority-minority situation. The housing authority first followed a "freedom of choice" policy. It then adopted in 1977 a "first come, first served policy" coupled with an immediate housing option and a minority preference option. The latter provided a preference in assignment to any project in which that person's race represented less than one-third of the population of the project. An applicant who does not exercise this preference remains on the waiting list until his name comes to the top. The immediate housing option permitted applicants to choose immediate housing at any of three locations with the highest percentage of vacancies. The plaintiffs in the case wanted something more to protect integration in the two projects that still had a substantial number of whites. The judge found that the plaintiffs didn't have standing to sue:

> [T]he Court is not convinced that plaintiffs would be able to demonstrate. . .a causal connection between [their] injury and the tenant assignment policies adopted. . . .[T]he racial composition seeking admission to and finding placement in the. . .seven developments in the past has been as follows: 1975—85% non-white, 15% white; 1976—91% non-white, 9% white. . . .There is nothing to suggest to the Court of any method of assignment which defendants could adopt would have any significant effect on the racial identity of those individuals who apply for public housing. To the extent that. . .problems of maintaining an integrated environment. . .can be attributed to a lack of white applicants, the Court does not believe that plaintiffs have demonstrated a causal connection between the injury and the defendants actions.

If the solution must be looked for outside the four walls of public housing and into the housing market of the metropolitan area, the theoretical answer would be to build more public housing in suburban areas. The suburbs in most urban areas do not operate discriminatory public housing programs. They don't operate public housing programs. The Federal statute requires a local determination of need, the approval of each contract by the local governing body, and the execution of a cooperative agreement. Most important, they don't want to pay for the privilege of housing the city's poor. Financial outlays are required to make up the difference between the mandated tax-abated revenues of such public housing and the locality's expenditures for education and other municipal services.

The foreign experience, where race is not a factor, parallels the American experience. Cost and class are the decisive factors. In a paper delivered before the American Political Science Association, entitled "Residential Allocation in London and Stockholm," Professors Anton and Williams reported:

> In deciding who should have access to the new apartments. . .the interest of the city [Stockholm] and its suburbs were very nearly opposed. . . .Since municipal budgets are supported primarily by personal income taxes. . .the more people in the community the better the tax base—*providing they are the right kind of people*. . . .The danger was from the suburban point of view that the city given access to more housing units outside its boundaries would use the access to "dump" its poor into the suburbs.
>
> Suburban politicians. . .insisted that. . .in offering suburban apartments to people in the city. . .all offers. . .would result from "joint consultations. . . ." The latter amounted. . .to a suburban veto over who would be allowed in.

In a paper delivered at the congress on "Post-war Public Housing in Trouble," in Delft, the Netherlands, in October of 1984, Anna-Lisa Linden Thelander of Sweden wrote:

> Equality and integration between different types of households is emphasized strongly as an essential goal of housing policy in the eighties. . . .At the same time we have never stood further from the objective of integration. . . .than we do just now. Segregation has increased throughout the seventies in every aspect of integration, that is to say. . . .integration of households according to size, economic resources and ethnic affiliations.

Moving from the academic plane, even if a substantial number of subsidized units were to be built in the suburbs, there is no shortage of poor people already residing there. In 1983 there were approximately 2 million poor families living in suburban areas (compared to 2.7 million in central cities.)[9] To make things worse, substantial amounts of new construction of subsidized housing in suburban (or any other) areas is a thing of the past. The huge costs of building new housing for the poor—an average of $6,000 per unit per year for decades—has finally put the programs high on the budget cutters' list. From a high point of 559,000 new units in 1972 (immediately before the moratorium), new construction dwindled to 12,500 in fiscal 1985 (with a moratorium scheduled for fiscal 1986).

In terms of integrating public housing, the government's only tool is the granting to current residents of housing vouchers (section 8 certificates) to be used for renting decent housing in nonminority areas. This prospect takes us back to the *Gautreaux* litigation.

Mrs. Gautreaux and her family of six were living in a one-bedroom apartment in Chicago. She applied to the housing authority (CHA) seeking a unit in an integrated building. All Chicago had, in 1968, were 60 projects containing 29,000 units that were 99.5 percent black and 4 projects that were 95 percent white. In the ensuing legal controversy, good intentions by the housing authority and HUD were not accepted by the courts. The fact that the only real choice, as a political matter (the city council had to approve sites and aldermen had an informal veto over projects in their wards), was public housing in minority areas (where whites did not wish to reside) or no public housing did not sway the judges.

In 1968 the court request to the CHA to use its best efforts to build 1,500 units of public housing in areas where less than 30 percent of the inhabitants were minority came to nought. Three years later, after CHA failed to meet a timetable for submitting sites, the district court judge ordered the withholding of model city funds until sites were approved. The circuit court, seeing no reason for punishing the innocent, overruled the order. Seeing no hope of achieving integration within the city, the plaintiffs sought a metropolitan order. The district judge turned down the request, since the suburban entities were never in the case and it would enable "the principal offender, the CHA, to avoid the politically distasteful task before it by passing off its problems to the suburbs." The circuit court, hearing the *Gautreaux* case for the fourth time, again overruled the district court, deciding that a metropolitan solution was necessary.

The Supreme Court ruled that, although no equitable relief could be granted against the suburban communities, there was an appropriate remedy. The problem was to be resolved by using the section 8 leasing program, in which HUD can contract directly with private owners to make leased existing housing units available to eligible lower income families. The participation of local housing authorities and the approval of local governments would no longer be a constraint.

In 1976, HUD and the attorneys for the plaintiff undertook a series of activities that were characterized as "one of the most significant and visible Federal efforts to explore ways of providing metropolitan-wide housing opportunities for low-income Americans."[10] The demonstration was intended to assist members of the plaintiff class in nonracially impacted areas throughout the Chicago SMSA. The assistance consisted of extensive counseling and the availability of 400 subsidy certificates for the first year of the demonstration and 470 for the second year. During the first year, 168 families were placed, and 287 families were placed in the second year. As of May 1979, 18 percent of these families had ceased to participate.

Although every demonstration has growing pains and by now no doubt all of the certificates are being used and most of the families are glad they made the decision, there is less to the program than meets the eye.

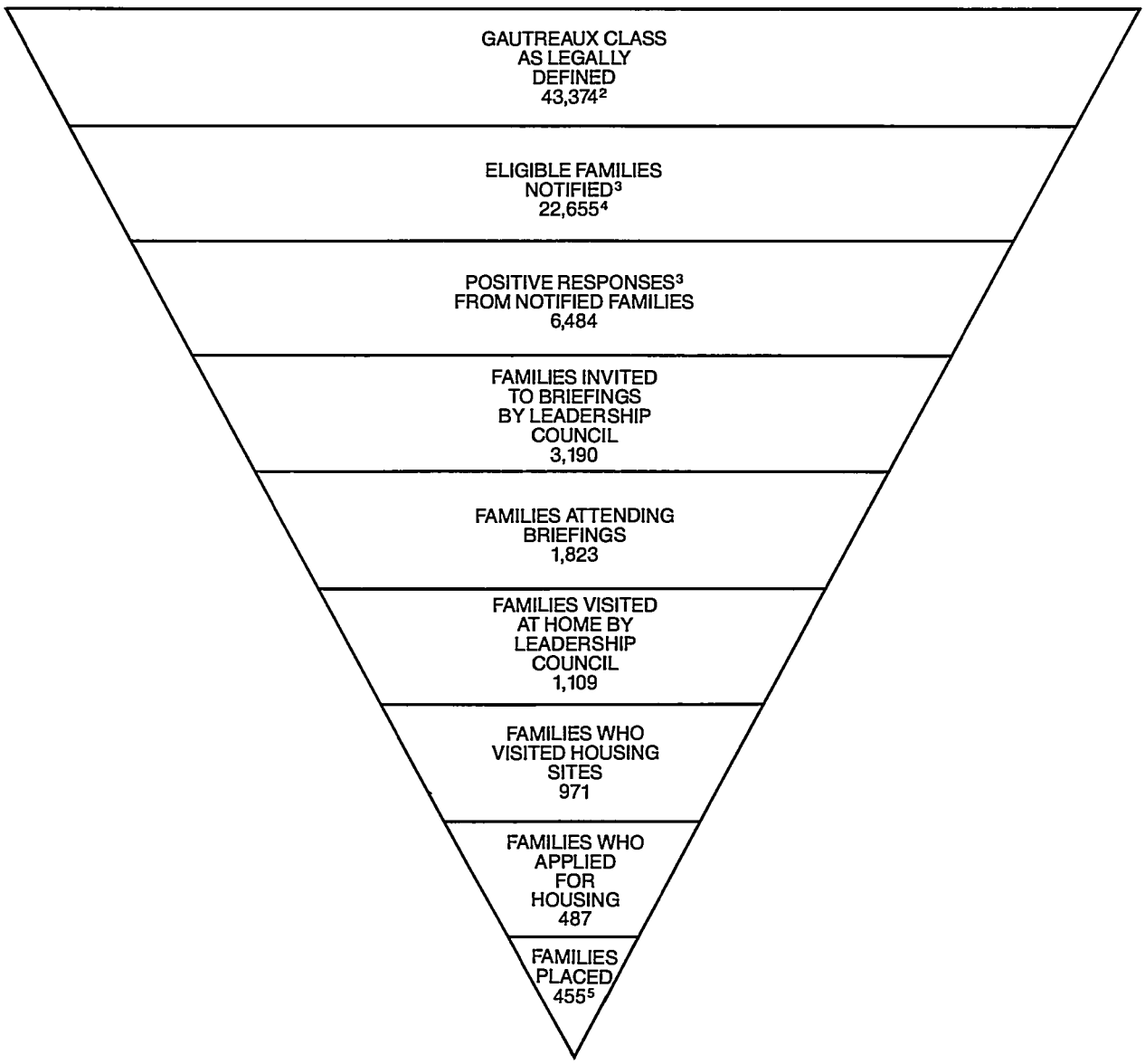
1. *Mrs. Gautreaux, had she lived, would not have received a certificate.* The Leadership Council for Metropolitan Open Communities concentrated on smaller families (due to the absence of large apartments) who had their own cars.
2. *Only 12 percent of the eligible families desired to live in the suburbs.*
3. *The program placed 1 percent of the eligible families.* If exhibit B were drawn to scale, the top line of the inverted triangle would be 11 times larger.

[9] Census, *Characteristics of Population Below the Poverty Level: 1983,* p. 13 (table 4).

[10] HUD, *Gautreaux Housing Demonstration: An Evaluation of Its Impact on Participating Households,* p. i (December 1979).

EXHIBIT B

Stages in the Identification, Notification and Placement of Gautreaux Families[1]



[1]All numbers were provided by the Leadership Council for Metropolitan Open Communities.
[2]This number includes 30,518 tenants in family projects operated by the Chicago Housing Authority and 12,586 families on the waiting lists for these projects as of July 1978.
[3]Many families were notified twice, and some families responded more than once.
[4]This number includes all families, as of July 1978, who were tenants in or applicants for 0, 1, and 2 bedroom units operated by the Chicago Housing Authority.
[5]This is the number of families placed in the section 8 existing demonstration; in addition, 104 families were placed in new construction or loan management housing, bringing the total to 559 as of March 31, 1979.

4. *The demonstration did nothing to integrate public housing in Chicago.* The tenants who moved were replaced by black families. The case lasted so long that the participants forgot what the issue was.

The New Jerusalem

If we must at present forego the possibility of integration in large portions of public housing, are there any measures that can be taken? In a recent interview in the Sunday *New York Times,* the mayor of faction-torn Jerusalem, Teddy Kollek, may have provided a model:

> The mistake made by many people is to look for integration. We are not looking for it. . . .Do you think the Armenians want to be integrated? They came here to be Armenians in the City of Christ. They remained Armenians under the Byzantines, under the Arabs, under the Persians, under the Turks, under the British, under the Jordanians and now under us. They don't want to become something else. . . .
>
> If there is a model. . .[it is] the Church of the Holy Sepulcher. . . .Walk into that church and you discover that every stone, every pillar, every individual mosaic tile is claimed by one of the six major Christian denominations that share the holy spot. . . .
>
> * * *
>
> As with the Church. . .so with Jerusalem. Everyone has his corner, and each group's claim has to be balanced against those of all others.

Does this have any relevance in a pluralistic secular America? To answer a question with a question (as is common in Jerusalem), is the Kollek model much different from the universal model described by the American Society of Planning Officials in a paper entitled "Problems of Zoning and Land-Use Regulation," prepared for the National Commission on Urban Problems in 1968?

> It is customary to see the identity versus diffusion problem as a struggle between those who favor segregation and those who favor integration. In this form. . .integration must prevail. However, discrimination is a special case of a much broader problem that is a true dilemma.
>
> It is a common trait for a man to prefer associating with and living near persons similar to himself. The characteristics that he considers most important to judge similarity will vary. It may be religion, national origin, economic status, occupation, native language, recreational interest, social position, race, or skin color. . . .
>
> The individual gains a sense of identity by living among his peers. He is protected from a society that he does not understand or that does not understand him. He preserves and reinforces values that are precious to him. Beyond the benefit to the individual is a possible benefit to society. The homogeneous group may be stronger, more useful than the heterogeneous crowd.

The basic distinction between the Jerusalem, the typical American, and the public housing situation is the element of choice. The choices of the public housing tenant are extremely limited. He doesn't chose his apartment; he is assigned a unit. The rent that he pays is determined by a formula that has nothing to do with the quality of the unit. If he decides to move, the subsidy is lost. The resident of public housing is totally isolated from the mainstream of the American housing market.

What is needed in public and subsidized housing is a completely new subsidy structure in which apartment rents reflect something other than the tenant's economic situation and tenants are transformed from supplicants into consumers by granting them the right to take the subsidy and move into the private market. Although the details of such a system are beyond the scope of this paper,[11] the implementation of such a system would change the character of public housing. It will not result in a system that is multiracial. It should be remembered that 88 percent of the black residents in the Chicago public housing system chose to remain residents. It will, however, defuse the issue of segregation when every recipient of a Federal housing subsidy is living in a unit that represents a free choice as far as rent and location.

[11] See Irving H. Welfeld, "Mainstreaming PHAs: A Systemwide Solution," *Journal of Housing,* May/June 1985, p. 79.

The Federal Fair Housing Enforcement Effort: What's the Point?

By Jane Lang McGrew*

The caption of this statement is not facetious. It is, however, intended to capture attention—something that the Federal fair housing enforcement effort has failed to do.

In contrast to the effort to eliminate discrimination in employment, the attack on housing discrimination and segregation has been weak, vacillating, and sporadic. I attribute this to poor management, lack of focus, and lack of will.

I want to assure you that this is not a partisan statement, for I know of no time in the history of this country's consciousness of fair housing that the efforts of the Federal Government could be characterized in significantly more favorable terms. The major difference today is that this administration seems to be deliberately hobbling its own endeavors. I will say more on this shortly. By the same token, I should add that at all times, including now, there have been, in government, individuals who possessed competence, good ideas, and good intentions in this area. However, no one of them has ever created a momentum for change sufficient to overcome both the lethargy and active resistance that impeded fair housing enforcement by the Federal Government.

In 1979 this Commission issued a report on the Federal fair housing enforcement effort. The report is a comprehensive, well-documented, and well-researched catalog of the activities, as well as the shortcomings, of every department of the Federal Government that has fair housing responsibilities. I have not attempted to update this major undertaking across the board. I have, however, interviewed both former and incumbent fair housing officials at HUD and the Department of Justice, as well as the Veterans Administration and the Farmers Home Administration. I am also an ongoing observer of HUD's programs and activities, including those in the fair housing area, and have closely followed the tortuous path of the pending fair housing amendments in the Congress. While General Counsel of HUD in the Carter administration, I negotiated the settlement of the then 14-year-old *Gautreaux* litigation in Chicago and oversaw the implementation of relief in the 26-year-old Whitman Park case in Philadelphia.

Sadly, all of this leaves me with an overwhelming sense that little has changed in this area, a conclusion that is consistent with this Commission's report of November 1983. Worse, I do not see any prospects for significant change in the near future, and I am not sanguine that there is anything I or anyone else could say to you that would alter this result. Nevertheless, as a persistent believer in the Great Society, I offer these thoughts on fair housing enforcement by the Federal Government.

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Fair Housing Enforcement Must Be a Federal Priority

I could not say better than Richard Nixon did in June 1971 how important it is to end housing discrimination that breeds racial "estrangement that all too readily engenders unwarranted mistrust, hostility and fear." He asserted that "no nation is rich enough and strong enough to afford the price which dehumanizing living environments extract in the form of wasted human potential and stunted human lives—and many of those living environments in which black and other minority Americans are trapped are dehumanizing." He decried the cost to the Nation of the inability of minority Americans to live near the suburban jobs they could work at, and he declared, "we will not countenance any use of economic measures as a subterfuge for racial discrimination."[1]

There is not a President in recent history who has not spoken, often eloquently, against housing discrimination and in favor of fair housing enforcement.[2] But there is no President who has organized his administration to make the elimination of housing discrimination—never mind the achievement of integration—a top domestic priority. It continues to be a sincerely felt ambition, but one that is invariably subordinated to other policy and program objectives.

This has several practical consequences. First, the resources for fair housing monitoring and enforcement are, and always have been, inadequate. This Commission and other observers have repeatedly made this observation. It remains true. Reviewing the statistics on budgets and staff once again would serve no purpose.[3]

Second, those departments, including HUD, that administer housing programs consider production (in numbers of units, loans, guarantees, and the like) the measure of their success. Equality of access to the housing they finance, directly or indirectly, is rarely considered except by those assigned to think about this matter. Consequently, fair housing is usually an afterthought when the occasional new program is developed, such as the housing development action grant program of last year.

There is often a legitimate policy question as to whether housing and community development program goals should be secondary to fair housing objectives. But this question is almost never resolved in favor of fair housing. A President and a Secretary who cared about fair housing enforcement not just in a personal way, but in a programmatic way, could change this. If, for example, every housing program administrator were obliged to identify means of furthering fair housing objectives, if these means were scrutinized for effectiveness with the same degree of care and attention that OMB now devotes to reviewing program rules, if performance of these steps were then monitored and personnel reviews tied to the individuals' success in achieving those goals, then there could be some movement. Short of such measures, fair housing will remain, at best, ancillary to production programs. At worst, it will be viewed (as it often is) as an impediment.

Third, a byproduct of this fact of life is that, by and large, the most competent, creative, and ambitious Federal employees do not see fair housing as the place to make a mark. Those who meet that description but remain committed to fair housing work frequently become bitter or resigned to intradepartmental defeat. With neither prestige nor clout, a fair housing staff has little to gain from vigorous initiatives.

Because of this history, it will take more than an annual fair housing week (or month) to establish fair housing as a top priority. And unless the President himself makes it his message, which is repeated over and over, I foresee another generation of reports, hearings, and audits that chastise one administration after the other for failing to make fair housing enforcement effective.

HUD Must Carry Out Its Leadership Responsibilities for Fair Housing

Shortly before leaving office, President Jimmy Carter issued Executive Order 12259 directing HUD to promulgate regulations that, among other things, would describe agencies' responsibilities and obligations in assuring that Federal programs and activities are administered and executed in a manner affirma-

[1] Statement by the President, "Federal Policies Relative to Equal Housing Opportunity," June 11, 1971.

[2] President Carter, for example, listed more vigorous enforcement of Title VIII as one of his priorities in his state of the Union address in 1979. More recently, President Reagan announced his desire to "put real teeth" into the Fair Housing Act in a radio speech on July 9, 1983.

[3] *See, e.g.,* U.S. Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (November 1983), pp. 72–112 (hereafter cited as 1983 Commission Report).

tively to further fair housing. HUD was also instructed to describe "the nature and scope of coverage and the conduct prohibited" by the Fair Housing Act in regulations. This order simply makes explicit what HUD's implicit Title VIII obligations are, and have been, since 1968. Nevertheless, years after enactment, no such regulations have even been proposed.[4] Absent interpretive regulations, the Supreme Court's assertion that HUD's interpretation of the Fair Housing Act "is entitled to great weight"[5] is of little moment.

Whether the explanation is administrative inertia or defiance, the fact remains that courts, litigants, industry, and Federal agencies, including the Veterans Administration and the Farmers Home Administration, need the kind of guidance that HUD is responsible for providing. It has not been forthcoming and the result is predictable. There is, for example, no monitoring of VA lenders to assure Title VIII compliance. In fact, there is no fair housing office at all at the VA, save one individual with little clout and no resources. At Farmers Home, the situation is little different though there is a four-person equal opportunity staff with the responsibility for overseeing fair housing compliance in 46 State offices, 300 district offices, and 2,000 county offices. Both agency staffs hunger for a directive from HUD stating what minimum compliance with fair housing means. To date, only the courts provide guidance in the heat of a controversy. This reflects an abdication of leadership by HUD.

Leadership also entails the undertaking by the Federal Government to put its own house in order if it is to persuade the private sector that it is serious about fair housing compliance. FHA activity should be monitored to assure that this insurance program is not being used, as it has been in the past, by market manipulators to promote instability in integrating neighborhoods. Recipients of community development funds, including urban development action grants, should be audited regularly for Title VI compliance. It is also important that the assisted housing programs be scrutinized to eliminate the vestiges of segregation.

It took a sweeping decision by a Federal district judge in Texas this summer to energize the Department to begin to scrutinize the tenant selection and assignment practices of public housing agencies. In *Young* v. *Pierce,* the court held that:

> HUD's intent to discriminate is established by the combination of HUD's disingenuous assertions of ignorance, its actual knowledge of segregation and its continuing financial support of each and every public housing site from the class counties. In those instances where HUD responded at all to its knowledge of discrimination, it has been only through the use of compliance agreements which have been shown by HUD's own data to be ineffective in dealing with discrimination.[6]

What kind of leadership is it that awaits a court order to direct the government to do what the law has long required?

Had this been the first fair housing case involving public housing agencies (PHAs), HUD's inaction might be explicable. However, these cases date back to the 1950s[7] so no claim of surprise is credible. Nor is *Young* v. *Pierce* unique in recent history.[8]

Even now, HUD has provided no legal guidelines to housing authorities that sincerely wish to examine their practices and, if necessary, take corrective action. PHAs do not know the definition of an unlawful "dual system." They do not know what remedies they are obliged or permitted to implement, or what the law prohibits. For example, under what circumstances can tenants be transferred to achieve a "unitary" system? When can applicants be given a preference to promote integration?

It is not enough to accelerate audits; HUD has an obligation to provide the guidance necessary to enable PHAs to assess their situations and take appropriate action. The Department has failed to do this, thus perpetuating confusion and deferring remedies. Moreover, it has made it clear that if, as in the east Texas case, tenant transfer or costly outreach efforts will be involved, HUD, the authority's sole source of financial support, will provide no assistance. For this and other reasons, I wonder what HUD expects to achieve through its belated fair housing thrust in the public housing program.

[4] HUD completed a draft of proposed Title VIII regulations in December 1980. The new administration refused to allow the proposal to be sent to the Congress for review when it took office in January 1981.

[5] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972).

[6] Young v. Pierce, C.A. No. P-80-8-CA, slip op. at 43 (E.D. Tex. July 31, 1985).

[7] *See, e.g.,* Cohen v. PHA, 257 F.2d (5th Cir. 1958); Heyward v. PHA, 238 F.2d (5th Cir. 1956).

[8] *See, e.g.,* Clients' Council v. Pierce, 711 F.2d 1406 (8th Cir. 1983).

Certainly, it falls short of the affirmative action called for by Title VIII.[9]

I have not been gentle in my criticism of HUD in the fair housing field though I care deeply about the Department and its mission. More criticism could be directed at its backlog of complaints, its data collection methods,[10] and its faulty investigation. However, I would rather turn to some positive signs of actions that should be recognized and encouraged. Two of these—HUD's testing initiative and proposed Fair Housing Act amendments—are legislative proposals which I'll touch on shortly. But one—the fair housing assistance program—is an impressive undertaking already underway.

This program, begun by HUD in 1980, was designed to assist State and local agencies in processing complaints. Initially, HUD funds the development of local capacity to handle complaints; later, when the capacity exists, funds are provided on a per case basis to help with the actual processing. In return for this Federal assistance, the local agencies must handle complaints referred to them by their local HUD office.

An evaluation of this program has recently been concluded, and though it is not yet available to the public, indications are that it rates the program very highly. Local agencies have apparently responded to the financial incentives by improving their investigative techniques, increasing their in-process caseload, and expanding their outreach activities. I understand that more cases are being resolved more quickly and greater monetary relief is being obtained.

It's unclear to me whether overall relief is more satisfactory than it was, or if these good results are attributable to a few isolated locations, so I will withhold final judgment until I can read the evaluation myself. There are doubtlessly ways in which the program can be improved after the evaluation is studied. However, since this approach seems so promising and fits so nicely into the statutory scheme, I would urge the Department to see that the fair housing assistance program achieves all that it can achieve with good staffing, adequate funding, and high level attention. One program does not a leader make—but it's a good first step.

Aggressive Enforcement of the Fair Housing Laws in Court Is Essential

HUD does not have the authority to enforce fair housing laws in court. It must rely on the Department of Justice (DOJ) to do so, based either on HUD referrals or its own initiative. Even then, Justice is restricted to "pattern or practice" cases and may seek only equitable relief under section 3613. Individual victims of discrimination can sue for damages in their own behalf.

For years, Justice and HUD carried out their respective enforcement responsibilities in proud and suspicious isolation. HUD would first read about Justice lawsuits in the press, and HUD pursued its investigations without regard for DOJ's evidentiary needs. Last year, however, HUD and Justice signed a memorandum of understanding primarily intended to coordinate investigative efforts. The result has been a marked rise in the level of cooperation and mutual respect. For example, Justice Department field surveys, resumed in 1983, are being assisted by HUD regional office fair housing staffs. It is extraordinary, in retrospect, that until 1984, HUD and the Justice Department operated on separate tracks, rarely sharing information and often going head-to-head over policy matters relating to enforcement. It is refreshing to see that this is changing.

As the sole agency with fair housing litigation authority, the Justice Department bears a heavy burden under Title VI and Title VIII. For the same reason, it has a special responsibility to use this authority vigorously and effectively. In fact, the Civil Rights Division, which is charged with this responsibility, has had an excellent record of success in court. However, as this Commission noted in its 1983 report, Justice has lately jeopardized the enforcement of Title VI and Title VIII by basing its cases on a showing of discriminatory intent rather than effect.[11] As many commentators have noted, this is a major policy reversal. In my opinion, it reflects a decision to allow political ideology to override the law.

Of course, a good lawyer handling a discrimination case, whether employment or housing, cannot afford to rely exclusively on evidence of impact. The strongest case is built on a showing of both intent and impact. Often, in particular cases, those

[9] See p. 36.

[10] For example, one impediment to HUD's PHA audits is the absence of current information. The only occupancy data that HUD possesses on a project basis go back to 1977. Today, data are collected on an individual tenant basis and must be aggregated to develop project profiles. This has not been done.

[11] 1983 Commission Report, pp. 185–86.

standards of proof come close to merging. However, to eliminate any arrow from the litigant's quiver when going to court most assuredly weakens a case. The Department of Justice has done this consciously. I believe this is wrong and irresponsible.

Ordinarily, I would think it more important to examine the nature of the cases brought in an area than the quantity per se. However, the numbers are so striking in the fair housing area that they must be noted. In each year up to 1981, 20 to 32 fair housing cases were filed by the Civil Rights Division. Frankly, I don't find these numbers impressive. But during the next 2 years, only three additional suits were filed. In 1984, 24 cases were initiated, and in 1985 to date, only 11 suits have been commenced, although I've been assured that fair housing investigations are at an all-time high. In the face of the "widespread evidence of housing discrimination" noted by this Commission,[12] these numbers are truly baffling and a discredit to the Federal commitment to fair housing.

How much more could be and should be done? One Justice Department official estimates that the Civil Rights Division could handle at least 75 more cases each year with the current legal staff if it had authority to bring individual suits. Even in the absence of new authority, however, it seems apparent that Justice has more litigating capacity than is currently being utilized. Many of the cases it now styles as "pattern or practice" cases are built inferentially from individual incidents. It may be that HUD would refer more cases to the Justice Department if this were better understood.

I do not know what would be an appropriate or adequate litigation volume. The number of housing discrimination complaints filed with HUD during the first 9 months of this year—4,490—compared with the number of successful conciliations during the same time period[13] —756—suggests that there is ample material for more litigation. However, a more substantive review of the pending cases, as well as those that have been closed, would be necessary to set a goal for the appropriate level of litigation activity. This kind of analysis would be much more helpful than a pure numbers approach.

The nature of Title VIII litigation initiated by the Justice Department in the past 2 years also deserves some mention. Several cases involved time-shared homes; others challenge restrictive covenants, steering, and rental policies. No exclusionary zoning suits have been brought; in fact, there have been no new suits against any local governments. On the plus side, I think it is a good strategy to target fair housing enforcement geographically as the Department evidently did by bringing six suits against Chicago real estate firms last year, and to target particular segments of the real estate industry as it did with respect to time-sharing developments.

Whether those particular areas really warrant this commitment of enforcement resources seems dubious to me, however. I would focus more closely on municipal practices and the low-income rental market in cities where vacancy rates are low, simply because I believe that government investigations and lawsuits are essential in this area to expand access to housing opportunities by low-income minorities. I infer from the activity of the Justice Department to date that, regrettably, its current priorities lie elsewhere.

Assisted Housing Resources Are Essential to Remedy Discrimination and Promote Integration

In 1980 I had the privilege of concluding an agreement to settle the *Gautreaux* case in Chicago, which had been in court for over 14 years at that time. At issue was the location of public housing that, for years, had been concentrated in minority neighborhoods. When the settlement was reached on a preliminary basis, the court notified the class—all actual and prospective public housing tenants—of the terms of the agreement and invited them to present their comments to the court at a fairness hearing in January 1981.

The hearing was an extraordinary experience for the litigants as well as the court. Approximately 500 members of the class—all but one black women—appeared, and each had the opportunity to address the court. None of them commented on any provision of the proposed decree. But each one told a story of years on the public housing waiting list, in overcrowded and overpriced units, and often appalling conditions. Except for the few who occupied public housing, these women wanted to know how

[12] Ibid., p. 213.

[13] These numbers are obviously not directly comparable, since many of the conciliations relate to complaints filed in earlier years. They are indicative of a gap between claims and remedial action, however. The number of successful conciliations includes results achieved at the State level. *See* FHEO Title VIII activity report (as of Aug. 30, 1985).

much longer it would be before a unit would be offered to them.

I wish I could recreate for you the powerful impact of their unplanned and untutored testimony. In the jargon of lawyers, none of them had been "woodshedded," but they could not have been more eloquent exponents of the need for more assisted housing.

The court was deeply affected by this testimony, and it plainly reinforced its resolve to approve the settlement agreement. But, sadly, the decree did not end the case, for what happened thereafter has deprived the class of its victory. Provision of relief under the *Gautreaux* decree was premised on the availability of funds for assisted housing construction. There are no more funds available for this purpose. There will never be complete relief provided to the class as a result. Incomplete relief to the class means no relief to most of those black women who came to court that day. So, as I asked at the outset, "What's the point?"

What's the point of auditing public housing projects to determine whether remedial action is necessary to desegregate when there is a 3-year waiting list of minority applicants and no new units in the pipeline? What's the point of challenging a municipality that has engaged in exclusionary zoning to the detriment of low-income minorities who would like to live and work in the suburbs if there are no additional resources to house them? What's the point of requiring a housing assistance plan if no more units will become available?

The provision of funds to meet the housing needs of low-income families is inextricably part of the action essential to promote fair housing. Those funds have disappeared as low-income housing has dropped lower and lower on the congressional list of priorities.

This is an appropriate point at which to restate that this is not a partisan perspective. With few exceptions, such as Congressman Gonzalez and Senator Dodd, the entire Congress has turned its back on assisted housing. It is too expensive to build or acquire housing for the poor, it is said, so low-income families should be housed in older stock with rent assistance. After all, they reason, this is an income problem, not a housing problem.

Those who buy that point of view should consider, first, the annual rate of abandonment and demolition of units (*at least* 350,000), in contrast to the rate of subsidized multifamily construction (11 percent of total rental housing starts in 1984),[14] and explain where the poor will live. They should then address a second question: Where shall we find the resources to enable us to "replace the ghettos 'by truly integrated and balanced living patterns'",[15] as the sponsors of Title VIII intended?

Housing vouchers and section 8 finders-keepers certificates don't meet these needs. Even in concept they don't replenish the housing stock. And in practice, they accomplish neither desegregation nor integration.[16] By eliminating low-income housing production from the budget, the administration and the Congress have together hobbled the achievement of equal housing opportunity. Indeed, it might be said that *fair* housing is becoming a luxury and *decent* housing for both the urban and rural poor is what requires our first attention.

In this connection, it is noteworthy that in 1983 this country spent $9 billion on rental housing programs for families with incomes under $10,000. In the same year, homeowners received almost $34 billion in the form of mortgage interest and property tax deductions. Almost a third of this amount went to families earning $50,000 per year or more.[17] I do not believe this reflects appropriate national priorities. I do believe it assures that we will not soon see an allocation of resources commensurate with need or with our professed desire to achieve fair housing.

Effective Fair Housing Enforcement Requires New Legislation

This administration has recognized the need for amending Title VIII. However, if any amendments are to be achieved, more zealous support is essential, or Members of Congress will be content to remain at loggerheads over assorted issues that have paralyzed them for at least 10 years.

[14] Mark K. Nenno and Cecil E. Sears, *Rental Housing in the 1980's* (NAHRO 1985), p. 24, table 19. This figure is all the more alarming when one considers that 43.4 percent of all renter households have annual incomes below $10,000. Ibid., p. 10, table 4.

[15] Remarks of Sen. Walter Mondale, 114 Cong. Rec. 3422 (1968). These remarks were quoted by the Supreme Court in explaining "the reach of the proposed law" in 1968. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

[16] Raymond J. Struyk, *Housing Vouchers for the Poor* (1981), p. 14.

[17] *Better Places To Live,* report of the NAHRO Task Force on the Future of the Public Role in Housing and Urban Development (1984), p. 29.

The focal point of the dispute is the enforcement process. The so-called liberal position favors the creation of an administrative hearing process as a prelude to litigation in court. At one time, it was contemplated that the presiding administrative law judge would have cease-and-desist powers. That power has been abandoned, but the administrative hearing process remains the cornerstone of the Kennedy-Mathias bill and its successors.

The major alternative to this proposal is the administration bill, which would authorize the Department of Justice to sue on behalf of individuals. This approach has been criticized because of the delay that litigation entails and because it is feared that Justice would not give individual cases adequate attention.

I have written elsewhere that I do not favor an administrative process that would provide an incomplete remedy to complainants, offer no assurance of speedier processing, and build in the potential for additional delay.[18] At the same time, in the past, the skepticism about DOJ's appetite for individual cases, as distinct from pattern or practice cases, has been warranted. Additionally, the transference of cases from HUD to Justice costs time and dilutes HUD's clout in conciliation. For these reasons, I have preferred HUD litigating authority. I envision a kind of litigating strike force that targets particular markets or practices and works in tandem with local agencies as well as Justice, where appropriate. It is not feasible to expect that such a team would have the staff or budget sufficient to handle the 5,000 charges that are filed each year. But, with the development of expertise and a standard litigation support package, it could have selective impact.

Perhaps more important, this compromise would put teeth in the conciliation process that is now just an invitation to chat. It would also break the legislative logjam and induce Congress to go about the rest of the business of amending Title VIII to eliminate the $1,000 ceiling on punitive damages, eliminate the qualification on the availability of attorneys' fees, provide for civil penalties, and add the handicapped to the list of protected groups. Additionally, it should enable the Justice Department to demand access to records—an important investigative power it doesn't have currently.

I concede that this approach is imperfect, but so are all the alternatives. In the meantime, this dispute over procedures plays directly into the hands of the opponents of effective fair housing enforcement.

There is an additional piece of legislation that deserves both mention and support: the private enforcement initiative of the administration's fair housing initiatives program. This proposal would fund private entities to conduct fair housing investigations and testing. As such, it would be an extremely valuable boost to the fair housing assistance program, since testing demonstrably improves the rate of successful conciliations and litigation. The legal status of testing is beyond question; the practical importance of this technique is equally clear. Funding this program would vastly increase the return on our investment in fair housing.

Integration Should Be Promoted as a Goal of Fair Housing Law

The Supreme Court recognized in 1977 that there is a "strong national commitment to promoting stable, racially integrated housing" implicit in the Fair Housing Act in *Linmark Associates, Inc.* v. *Township of Willingboro.*[19] Again in 1979 the Court reaffirmed this principle, citing in addition, the "harms flowing from the realities of a racially segregated community" in *Gladstone Realtors* v. *Village of Bellwood.*[20] Consistent with the objective of integration, Title VIII explicitly directs the Secretary of HUD to administer departmental programs "in a manner affirmatively to further the policies of this Title."[21] In fact, all Federal agencies are supposed to cooperate with the Secretary to further this and other purposes of the Fair Housing Act.

Complementing these mandates, the Housing and Community Development Act of 1974, which created the community development block grant program, stated as its objective: "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income."[22] Additionally, the section 8 housing assistance program under the United States Housing Act of 1937

[18] Jane McGrew, *et al., Fair Housing: An Agenda for the Washington Lawyers Committee for Civil Rights,* 27 How. L.J. 1291–337 (1984).

[19] 431 U.S. 85, 94 (1977).

[20] 441 U.S. 91 (1979).

[21] Section 3608(d)(5).

[22] Pub. L. No. 95–128 §101(c)(6).

was enacted "for the purpose of aiding lower income families in obtaining a decent place to live and of promoting economically mixed housing."

It is true that economic and racial integration are conceptually different. As a practical matter, however, in this country, they are integrally related. Consider these facts:

1. Blacks remain disproportionately concentrated in central cities where they are 22 percent of the population as compared to 6 percent of the suburban population nationwide.
2. In 1982, 20 percent of black males of all ages were unemployed whereas the figure for white males was 9 percent.
3. Manufacturing jobs in the suburbs increased by 20 percent from 1970 to 1980, but declined in the cities by 5 percent.
4. The labor force participation rate for blacks has declined since 1960 by about 3.5 percent whereas for whites, it has increased by 5.5 percent.
5. About 60 percent of unemployed blacks live in central cities whereas 30 percent of unemployed whites live there.
6. Approximately 50 percent of blacks and about 15 percent of whites with incomes under $7,000 occupy unsound housing units.

In summary, segregated housing markets perpetuate economic disadvantage by limiting access to employment opportunities. This, in turn, reinforces disparate housing conditions.

Another manifestation of the harms resulting from housing segregation is the segregation of large city school systems. This linkage was also noted by the Supreme Court in the 1979 *Bellwood* decision mentioned above. It is even more clear today. In several cities, including Washington, D.C., Detroit, Chicago, Newark, and Atlanta, over 80 percent of the students attend public schools where whites are less than 1 percent of the school population. School desegregation orders must fail in such situations unless interjurisdictional transfers are possible. What is required is coordination of fair housing and school desegregation efforts, with housing integration as the objective. This is feasible if HUD takes seriously its affirmative Title VIII mandate and recognizes integration as one of its statutory responsibilities.[23]

The political consequences of racial isolation and minority concentration in the cities are also troubling. As urban interests become identified with minority interests, divisiveness is engendered in the political process. Urban revitalization and housing subsidies have lost the across-the-board political support that is necessary to secure adequate funding. This phenomenon is plainly associated with racial living patterns. The trend is, thus, to heighten conservatism, reinforce racial isolation, and repress the impulses toward integration.

It is not possible, of course, to cure all these problems simply by integrating housing, even if that were a simple task. However, the proponents of the Fair Housing Act knew that the best way to provide the opportunity for interracial contact, for the identification of common interests, and for the dissipation of fear is to share a neighborhood. For this reason, it is important that we not lose sight of the integration objectives of Title VIII.

The Federal efforts to eliminate segregation and promote integration in the housing market have had limited success. Despite the acceptance of the proposition that sites for assisted housing may not be restricted to areas of minority concentration, it has continued to be difficult to achieve local acceptance of low-income housing construction. Although section 8 certifications and the more recent vouchers enable individuals to shop for units outside minority areas, the families are generally inhibited by the lack of information and mobility. The experience in the Chicago area is that intensive counseling and personal assistance are required if these programs are to be used effectively as tools of integration.

We have missed opportunities to promote integration because we waited too long, invested too little, or backed off from hard decisions. It is now incumbent upon us to look more diligently for opportunities to promote housing integration. The urban development action grant, housing opportunity development action grant, rental rehabilitation, and public housing comprehensive modernization programs should all incorporate as a positive selection factor in the competition for limited funds the promotion of housing integration. Affirmative efforts to promote the mobility of certificate and voucher holders should be supported. School desegregation consent decrees should include a fair housing component to the maximum extent feasible. And community resistance to integrated, low-income housing should not be countenanced.

[23] Gary Orfield has written insightfully of the possibilities for coordinating housing and school integration techniques in *Toward a Strategy for Urban Integration* (Ford Foundation, 1981).

In 1979 when it was my job to oversee the implementation of the orders to build Whitman Park in Philadelphia, I anguished over that decision and, at least twice, considered whether the Department could find a way around building that project which had been the source of neighborhood hostility for over 20 years. Frankly, if there had been any choice, the project probably would not have been built. Fortunately, there was none, and although the Whitman Park neighbors draped their doorways in black crepe the day construction began, it is now a well-integrated townhouse project where black and white kids play football on the grounds. I have seen them. And while the original members of the class in that case have probably not benefited personally from the litigation, American society has. If HUD had done its job of enforcing Title VIII and Title VI earlier, this would have happened sooner and would have strengthened the backbone of the Federal Government in facing up to its responsibilities elsewhere.

In the end, the elimination of segregation and the achievement of integration depend on people, not laws. However, the Fair Housing Act has been successfully used from time to time to change behavior that, in turn, has changed attitudes towards integration. This kind of change is the ultimate point of Federal fair housing enforcement policy, in my opinion. In the words of Talmudic scholar Rabbi Tarphon: "The day is short and the matter is urgent. It is not upon thee to finish the work but thou art not free to desist from it."

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