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Racial Integration and Community Revitalization

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Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit

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I. INTRODUCTION

A growing national debate about the future of race, housing, and urban policy in the United States is reflected in the recent controversy over the administration of the Low-Income Housing Tax Credit[1] ("LIHTC") program, the largest federal program that supports building low-income housing.[2] Administered by the Treasury Department, the program allows investors in residential rental property to claim tax credits for the development or rehabilitation of property to be rented to low-income tenants.[3] The program is implemented mainly through state agencies which distribute the credit to developers on a competitive basis.[4] Part of the LIHTC statute, which passed without debate as a later amendment, gives preference in allotting credits to very poor areas.[5] Consistent with a common interpretation of this preference, many state agencies have allocated significant numbers of credits to areas with high concentrations of minorities and people with low incomes.[6]

The concentration of low-income housing in already racially segregated neighborhoods, however, arguably violates the Federal Fair Housing Act of 1968 ("FHA").[7] The FHA responded to the government agencies' tendency to impede integration by building low-income housing in poor, segregated neighborhoods. The legislative debate and the judicial and regulatory interpretation of the duty to affirmatively further fair housing reflect the understanding that such

1. 26 U.S.C. § 42 (2005).

2. Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law*, 52 U. MIAMI L. REV. 1011, 1011-12 (1998); *see also* Jill Khadduri et al., LIHTC and Mixed Income Housing: Enabling Families with Children to Live in Low-Income Housing, Address at the Association of Public Policy and Management Conference 1 (Oct. 30, 2004), http://www.appam.org/conferences/fall/atlanta2004/sessions/downloads/3401.pdf (estimating that the number of LIHTC units is comparable to the number of public housing units).

3. *See infra* Part IV.B (discussing how the LIHTC works).

4. *Id.*

5. 26 U.S.C. §§ 42(d)(5)(C)(ii)(I), (m)(1)(B) (2005).

6. *See infra* Part IV.C (discussing data that experts have gathered on the LIHTC).

7. 42 U.S.C. §§ 3608(d)-(e) (2005).

building patterns fostered racial and social segregation.[8] The Act ordered the federal government and all agencies and grantees involved in federally funded housing to "affirmatively further" fair housing.[9] Courts and agency regulations interpreted this duty to require the federal government to use its programmatic leverage to support racial integration and to prohibit, with narrowly defined exceptions, the federal government and its grantees from developing low-income housing projects in areas where minority and low-income residents were concentrated.[10]

Reconciliation of the tax credit's preference and fair housing duties has received some attention among housing activists and scholars.[11] The government agencies responsible for fair housing and for administering the programs, however, have not provided specific regulatory guidance.[12] In 2003, a broad pre-litigation letter was sent by eleven state and national fair housing groups to the IRS administrator of the LIHTC program,[13] and meetings related to this issue are beginning within the agencies. Lawsuits have been filed in New Jersey and Connecticut[14] and are being considered in Massachusetts.[15]

After analyzing the national doctrinal issue, this Article uses as a case study the New Jersey case, *In re Adoption of the 2003 Low*

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8. *See infra* Part III.B-C (discussing the legislative history and judicial interpretation of the Fair Housing Act's requirement to "affirmatively further" the Act's goals).

9. *Id*.

10. *See infra* Part III.C (discussing the judicial interpretation of the "affirmatively further" requirement).

11. *E.g.,* Jim Schaafsma*, Focus on the Low Income Housing Tax Credit (LIHTC) Program*, MPLP NEWSL. (Mich. Poverty L. Program), Winter 2003, *available at* http://www.mplp.org/materials/Newsletter/03Winter/housing1.htm (citing Roisman, *supra* note 2, who revealed the extent of the problem to the broader legal and civil rights community and energized reform efforts from outside civil rights organizations).

12. *See* Memorandum of Understanding among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (August 11, 2000), http://www.usdoj.gov/crt/housing/mou.htm (noting that the Secretaries agreed to "promote enhanced compliance with the Fair Housing Act . . . for the benefit of low-income housing tax credit properties and the general public.").

13. Letter from Judith Liben, Staff Attorney, Massachusetts Law Reform Institute, et al. to Grace Robertson, Internal Revenue Service (March 30, 2004), http://www.prrac.org/pdf/IRSLetter.pdf.

14. Asylum Hill Problem Solving Revitalization Ass'n v. King, No. (X02)CV030179515S, 2004 Conn. Super. LEXIS 27 (Conn. Super. Ct. Jan. 5, 2004).

15. *See* Letter from Judith Liben, Staff Attorney, Massachusetts Law Reform Institute, et al. to Jane Grumble, Director of Department of Housing and Community Development, and Catherine Racer, Associate Director for Housing Development, Department of Housing and Community Development 12-13 (Jan. 7, 2004), http://www.prrac.org/pdf/MA2004LawReform.pdf (opposing current LIHTC fair housing compliance guidelines).

Income Housing Tax Credit Qualified Allocation Plan ("*In re 2003*").[16] In this case, the plaintiffs and civil rights and community organizations argued that the state housing finance agency violated its fair housing duty by allocating most credits for family housing in poor, segregated neighborhoods,.[17] The state agency argued that, while segregation might be harmful, the fair housing duty does not apply to the LIHTC program and that proposed race conscious remedies are unconstitutional.[18] The New Jersey Superior Court found the FHA duty to "affirmative[ly] further" fair housing to be applicable, but held that the state agency's plan, in part because of the statutory preference for LIHTC in low-income neighborhoods, did not violate that duty.[19]

The positions of the parties in the New Jersey case reflect broad differences between fair housing advocates and regionalists on one side and localist[20] practitioners of community development and urban political leaders on the other.[21] Civil rights and regionalist[22] advocates argue that concentrating federal and state-funded low-income housing in poor, segregated, and resegregating neighborhoods has contributed *substantially* to racial segregation and concentrated poverty. Regional racial segregation and housing discrimination, they argue, hurts both poor and middle-class blacks and Latinos by destroying job opportunities and dramatically worsening living conditions in central cities and older suburbs.[23] While acknowledging

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16. *See infra* Part V (analyzing *In re* 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1 (2004)).

17. *In re 2003*, 848 A.2d at 9, 15.

18. *Id.* at 28.

19. *Id*. at 10.

20. Some localists are regionalists as well. *See, e.g.*, David Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 704 (2003) (reviewing WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT AND THE NEW SOCIAL POLICY (2001)). *But cf.* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 64-66 (1999) (proposing decentralization of power from cities).

21. Barron, *supra* note 20, at 703-05; *see* FRUG, *supra* note 20, at 9-12 (noting the potential for tensions between community development advocates and regionalists).

22. Not all regionalists attach the same importance to race. *See* NEAL R. PEIRCE ET AL., CITISTATES 151-53 (1993) (arguing that race is less important to the regional dynamic than a shared agenda focusing on security, economic prospects, and quality of life).

23. *See, e.g.*, DAVID RUSK, CITIES WITHOUT SUBURBS 47 (1995) (arguing that city centers become "catch basins" for poor blacks and Hispanics and that fragmented local government "reinforces racial and economic segregation"); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: The Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1299-1300 (1995) (noting the racial segregation of public housing and the tendency of minority residents to earn "extremely low incomes"); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351, 1356-

that affordable units are critically important parts of racially stable, mixed-income neighborhoods, with racially and socially integrated schools, regionalists claim that concentrated poverty and resegregation cause communities to decline.[24]

Advocates of community development and city leaders assert that targeting affordable housing in poor neighborhoods can revitalize those neighborhoods.[25] Specifically, proponents link community development of housing with increased investment, government interest, community pride, and improved neighborhood appearance.[26] Regional approaches to problems in distressed areas, they argue, often lack the support of minority communities, which fear losing political power and community control of services.[27] Segregated, fiscally poor cities need investment of any kind, and the LIHTC is virtually the only capital available to neighborhoods that have been effectively redlined by the private market.[28]

While this Article uses *In re 2003* to illustrate the tension between the FHA and the siting preferences in the LIHTC statute, it is fundamentally about the deep legal and philosophical contradiction in the United States between civil rights guarantees—particularly the duty to affirmatively further fair housing—and state and federal low-income housing policy.

In Part II, the Article details the housing discrimination that results in the creation of neighborhoods of concentrated poverty. It discusses the demographic pattern of black and Latino suburbanization and how housing discrimination contributes to the process of resegregation of areas from all white to all people of color. It explains these changes in the context of a larger and related social

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60 (1995) (arguing that public housing and other federal programs create and maintain racial discrimination and concentrate poverty).

24. *See infra* Part II.A (discussing the regional problem of housing discrimination and concentrated poverty).

25. *See* PAUL S. GROGAN & TONY PROSCIO, COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL 99-101 (2000) (examining community development corporations' ("CDCs") successful neighborhood investment in housing); AVIS C. VIDAL, REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS 96-98 (1992) (listing success statistics for CDCs' affordable housing efforts).

26. *See* VIDAL, *supra* note 25, at 96-98.

27. BENNETT HARRISON, URBAN ECONOMIC DEVELOPMENT 128-30 (1974). Community-based development was embraced initially by people of color because attempts at integrating housing had been largely unsuccessful, due to white resistance. ROBERT HALPERN, REBUILDING THE INNER CITY 129 (1995).

28. Fiscally poor cities often seek out waste incinerators, prisons, gambling, and heavy industry that cities with a stronger fiscal basis would eschew. Attorneys, bond houses, and builders (some of whom are among the few successful minority contractors in a given region), also have deep interests in the maintaining direct investment in distressed areas and are often closely connected to the political establishment.

and fiscal stratification of U.S. metropolitan communities. Understanding the link between segregation, the concentration of poverty, resegregation, and community decline is at the heart of the FHA's "affirmatively further" provision. The costs of concentrated poverty caused by segregation and resegregation are outlined, as are the benefits of integration.

Part III places the federal FHA in historical and legal context, showing the development of the duty to affirmatively further integration. Part IV details the placement of LIHTC family units, which often have been concentrated in poor and resegregating neighborhoods, and discusses recent scholarship indicating that the siting of tax credit units is not revitalizing poor, segregated communities. Part V uses *In re 2003* as a case study, outlining the positions of the various parties in the New Jersey case, their arguments, and the court's decision.

In Part VI, the Article applies the FHA to the tax credit program. It argues that the history and significance of civil rights law requires that the fair housing duty be considered before all others, including the siting preferences guiding the LIHTC program. Based on law, regionalist policy, and empirical evidence, this Article argues that the government should prioritize locating low-income housing in places with strong schools, economic opportunity, and plentiful local resources. It provides approaches for preserving affordable housing in rapidly gentrifying neighborhoods with segregated schools and maintaining or enhancing integration in communities that are unstably integrated.[29]

29. These principles apply with equal force to the administration of the other important federal housing programs such as Hope VI, the Community Reinvestment Act, and the HOME program. *See* Philip Tegeler, *The Persistence of Segregation in Government Housing Programs*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197, 203-209 (Xavier de Souza Briggs ed., 2005) (examining desegregation and the concentration of poverty in the context of HOPE VI, the Community Reinvestment Act, and the HOME Program).

II. THE REGIONAL PROBLEM OF SEGREGATION AND CONCENTRATED POVERTY

A. Housing Discrimination and Concentrated Poverty

Pervasive housing discrimination by private actors helped to create and currently maintains poor, minority neighborhoods.[30] Until at least the end of World War II, physical violence, racial zoning, and discriminatory real estate practices kept blacks tightly confined in ghetto areas and out of white areas.[31] In many cities, white property owners attached restrictive covenants to deeds that forbade blacks from buying homes in their neighborhoods.[32] Real estate agencies engaged in a variety of discriminatory practices, including racial steering of blacks and whites away from each other and blockbusting, which involves selling a few homes in a white neighborhood to black tenants, buying neighboring homes at lower prices from panicked white homeowners, and then selling the homes to middle-income blacks at a premium.[33]

To this day, blacks and Latinos at all income levels are discriminated against by real estate agents, who show them only a small subset of the market and steer whites away from communities with people of color.[34] Mortgage lenders also systematically lend less mortgage money to blacks and Latinos compared to whites of comparable income and background.[35] These patterns of housing discrimination and resegregation do not stop at central city borders but also affect large parts of suburbia. A recent study of metropolitan

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30. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 12-14 (1993).

31. *Id.* at 36-37.

32. *Id*. Racially restrictive covenants were declared unconstitutional in the 1940s. Shelley v. Kramer, 334 U.S. 1, 13 (1948).

33. *See* MASSEY & DENTON, *supra* note 30, at 38.

34. *See* MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS 3-1 to 3-19, 6-1 to 6-13 (2002), *available at* http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (summarizing discrimination data from 2000); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST 51-61 (1995) (examining racial and ethnic steering phenomena); *see generally* George C. Galster, *Racial Steering in Urban Housing Markets: A Review of Audit Evidence*, 18 REV. BLACK POL. ECON 105 (1990) (same).

35. *See* John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339, 340 (1997) (providing research based on Home Mortgage Disclosure Act data finding that discrimination in housing and financing markets costs blacks and Hispanics, on average, more than $3,000 whether or not they actually encounter discrimination); YINGER, *supra* note 34, at 69-70 (1995) (analyzing HMDA data and finding stark racial differences in lending policy, even when controlling for differences in lenders and individual economic characteristics of the borrower).

Boston showed that nearly half of black homebuyers were concentrated in only 7 of 126 communities.[36]

Federal housing policy has also historically limited the housing opportunities of minorities. Starting in the 1940s, the Federal Housing Administration began to guarantee loans with 10 percent down payments, lower interest rates, and longer mortgage periods.[37] Although whites in overwhelming numbers used these loans to build homes in the suburbs, discriminatory practices prevented blacks from following them.[38] The housing authority would not provide low-cost loans to "inharmonious racial or nationality groups"—a code for blacks moving into white neighborhoods.[39] The private market followed the government's lead and did not make loans to individuals in neighborhoods that were "redlined" on Federal Housing Administration investment maps.[40]

Government siting of public housing has been particularly responsible for fostering segregation.[41] Since the 1930s, housing authorities have sited public housing in inner cities and, since 1969, filled them with poor tenants, instead of encouraging mixed income, racially stable communities.[42] Several studies have shown that if the federal government had not segregated public housing or the tenants of public housing, school desegregation would not have been necessary.[43] Though some officials claim that siting low-income housing in poor neighborhoods revitalizes those communities economically, a recent literature review commissioned by the Department of Housing and Urban Development ("HUD") found that

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36. GUY STUART, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SEGREGATION IN THE BOSTON METROPOLITAN AREA AT THE END OF THE 20TH CENTURY (2000), *available at* http://www.civilrightsproject.harvard.edu/research/metro/housing_boston.php (referring to evidence presented in the report's unpaginated executive summary). Additionally, white suburbanites are not shown integrated markets. TURNER ET. AL, *supra* note 34, at 6-1.

37. MASSEY & DENTON, *supra* note 30, at 53. Until the postwar period, it was hard for most Americans to own a home. *Id*. Homes, built one at a time, were expensive and required a 33 percent down payment, and a short five-to-ten-year period for payment. *Id*.

38. *Id.* at 54-55.

39. *Id.* at 54.

40. *Id.* at 55.

41. Schill & Wachter, *supra* note 23, at 1295; Roisman, *supra* note 23, at 1357; *see* Robert Gray & Steven Tursky, *Local and Racial/Ethnic Occupancy for HUD Subsidized Family Housing in Ten Metropolitan Areas, in* HOUSING DESEGREGATION AND FEDERAL POLICY 235, 239 (John M. Goering ed., 1986) (finding that HUD-subsidized rental housing was concentrated in a relatively small number of minority-occupied census tracts).

42. Schill & Wachter, *supra* note 23, at 1291-1300.

43. *See* Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 854 (1996) (discussing HUD-sponsored studies showing that had HUD housing been placed more proportionally in white or stably integrated neighborhoods, busing would not have been necessary).

the balance of evidence shows that low-income housing, by itself, does not have a revitalizing effect on very poor, segregated neighborhoods.[44] The review cited studies of Baltimore, Cleveland, Milwaukee, and Philadelphia, showing that adding low-income units in poor segregated neighborhoods is likely to further depress the value of housing.[45] As neighborhoods undergo the process of becoming deeply poor and segregated, they frequently lose significant population density.[46] The literature review followed several studies showing that in very poor segregated neighborhoods, low income tenants often move out of older, standard, habitable housing into newer, subsidized units.[47] Because market demand in these neighborhoods is not strong, the older, standard, habitable housing is simply abandoned leading either to no net gain or even a loss of affordable units.[48]

B. Resegregation and Racial Change

Concentrated poverty and minority isolation run intertwined with the process of resegregation. Typically, after a number of black or Latino residents move to a neighborhood, white demand for housing declines[49]—first in households with children and later for the broader

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44. *See* JILL KHADDURI ET AL., ABT ASSOC., TARGETING HOUSING PRODUCTION SUBSIDIES: LITERATURE REVIEW 68-73 (2003) [hereinafter ABT LITERATURE REVIEW] (examining various low income housing programs); JILL KHADDURI ET AL., ABT ASSOC., MAKING THE BEST USE OF THE LOW INCOME HOUSING TAX CREDIT 19-22 (2004); DAVID RUSK, INSIDE GAME OUTSIDE GAME (1999) (survey of community development corporations (CDCs), philanthropists, and housing groups showing that, during the 1970s and 1980s, the communities being served by these CDCs became poor and more segregated than surrounding communities, without exception); Henry Louis Taylor, Jr. & Sam Cole, Structural Racism and Efforts to Radically Reconstruct the Inner-City Built Environment, Address at the Ass'n of Collegiate Sch. of Planning Conference 3 (Nov. 8-11, 2001), http://thecyberhood.net/Urban_Syllabi/PD%20506%20Intro%20Urban%20Mgmt%20Syllabus%20Fall%202003.pdf ("The traditional approach to community revitalization has not produced a model for transforming inner city neighborhoods and making them great places to live, work, and raise a family.").

45. ABT LITERATURE REVIEW, *supra* note 44, at 42-43, 45, 58-63. In contrast, adding such units to high income or middle-class neighborhoods does not depress values and may even cause a modest increase or modest stabilization in value in neighborhoods that are just beginning the process of decline. *Id* at 75. It is important to note that these studies also found that there is no evidence that subsidized housing lowers home value prices in mixed income or affluent neighborhoods. *Id*. at 57-62.

46. *See generally* MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 54-55 (2002) (noting that, as poverty rises in central cities, middle-class flight and business disinvestment intensify and local retailers have fewer customers).

47. *See* ABT LITERATURE REVIEW, *supra* note 44, at 53-57 (analyzing "crowding out" data).

48. *See id*. at 53 (discussing crowding out and abandonment); Michael P. Murray, *Subsidized and Unsubsidized Housing Stocks 1935-1987: Crowding Out and Cointegration*, 18 J. REAL EST. FIN. & ECON. 107, 119 (1999) (same).

49. See MASSEY & DENTON, *supra* note 30, at 96 (noting that white housing demand falls as blacks move into the neighborhood).

middle-class—lowering housing prices.[50] In a housing market where Americans on average will change residences eleven times in their lives,[51] the black and Latino middle class are not large enough to sustain the demand and price of houses in the neighborhood.[52] Thus, when white middle-class families withdraw, the laws of supply and demand lower prices,[53] and low income minorities move into the housing left behind.[54] Businesses and jobs soon follow the white middle-class, taking with them a portion of the tax base.[55]

A study by the Institute of Race and Poverty ("IRP") found striking evidence of resegregation in some of the largest metropolitan areas in the United States.[56] An analysis of fifteen large metro regions between 1980 and 2000 found that a majority of blacks and Latinos now live in suburban cities.[57] The IRP found that many neighborhoods which at one point in time appeared to be integrated were actually in a period of racial transition.[58] Many of these neighborhoods experienced racial transition only if the non-white population exceeded 20 to 30 percent.[59] Census data also shows that integrated census tracts which had a black population percentage in the mid-30s in 1980 were more likely to make the transition to predominantly black during the next twenty years than they were to

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50. *See* ORFIELD, *supra* note 46, at 10.

51. Tom Vanderbilt, *Self-Storage Nation*, SLATE, July 18, 2005, http://slate.msn.com/id/2122832/.

52. *See* ORFIELD, *supra* note 46, at 13-14 ("[T]he ranks of middle-class blacks and Latinos in most metropolitan areas are currently too small to maintain a robust middle-class housing market if middle-class whites are not also interested in that market.").

53. *Id*. at 11.

54. *Id*.

55. The pattern of resegregation, flight and tipping is complex. *See* George Galster et al., *Identifying Neighborhood Thresholds: An Empirical Exploration*, 11 HOUSING POL'Y DEBATE 701 (2000) (arguing that once key indicators of quality of life, such as the percentage of professionals living in a neighborhood, reach threshold levels, rapid changes follow); Roberto Quercia & George Galster, *Threshold Effects and Neighborhood Change*, 20 J. PLAN. EDUC. & RES. 146, 154 (2000) (examining educational attainment and the threshold percentage of professionals in a neighborhood). Some have argued that the "invasion-succession" model may be less applicable in contexts involving Hispanic and Asian residents. David Fasenfest et al., *Living Together: A New Look At Racial And Ethnic Integration In Metropolitan Neighborhoods*, LIVING CENSUS SERIES, Apr. 2004, at 1, 15, *available at* http://www.brookings.edu/dybdocroot/urban/pubs/20040428_fasenfest.htm.

56. Myron Orfield and Tom Luce, Inst. on Race & Poverty, Minority Suburbanization and Racial Change: Stable Integration, Neighborhood Transition and the Need for Regional Approaches, Address at Race and Regionalism Conference 4 (May 6-7, 2005), http://www.irpumn.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf.

57. *Id*. at 1.

58. *Id*.

59. *Id*. at 8.

remain integrated.[60] Moreover, black and Latino suburbanites are more likely than whites to relocate to fiscally distressed suburbs. Although resegregation is not inevitable, integrated areas with a majority of black residents tend to become more black over time.[61] Communities that have practiced "managed integration"—employing a series of pro-integrative financial incentives, careful oversight of real estate practices, and marketing strategies geared to maintain the housing demand of whites when evidence of resegregation appears—have shown frequent success in maintaining social and economic integration for generations.[62]

Racial change in schools almost previews social change in the housing market. In most cases, when schools become more black and Latino, they become poorer, and within a generation, the neighborhood follows.[63] The most rapid racial and economic resegregation in schools is now occurring in older suburbs.[64] When middle-class black and Latino residents reach a critical mass in previously white neighborhoods and schools, white homebuyers perceive the community to be in decline[65] and choose not to buy there.[66] Once the minority share in a community school increases to a threshold level (usually 10 to 20 percent), racial transition accelerates until minority percentages reach very high levels (greater than 80 percent).[67]

Despite this evidence of discrimination, conventional wisdom holds that patterns of segregation are simply the result of individual preferences. The Supreme Court in *Freeman v. Pitts* exemplified this view by finding that a pattern of segregation was the result of private

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60. *Id.*

61. Lynette Rawlings et al., *Race and Residence: Prospects for Stable Neighborhood Integration*, NEIGHBORHOOD CHANGE IN URB. AM., Mar. 2004, at 1, 4, 8, *available at* http://www.urban.org/UploadedPDF/310985_NCUA3.pdf.

62. ORFIELD, *supra* note 46, at 125-26.

63. *Id.* at 9-11.

64. ERIKA FRANKENBERG & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 7 (2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf. Minorities continue to suburbanize in increasing numbers. In Minneapolis, for instance, 51% of blacks at or above median income lived in the suburbs, up from 44 percent a decade earlier. E-mail from Eric Myott, Geographic Information Specialist, Institute on Race and Poverty, University of Minnesota, to Scott Crain, Research Fellow, Institute on Race and Poverty, University of Minnesota (Sept. 12, 2005, 12:12pm) (on file with author).

65. This belief is fueled both by white racism and legitimate observation of the harms of resegregation on neighborhoods.

66. *See generally* HARVEY MOLOTCH, MANAGED INTEGRATION: DILEMMAS OF DOING GOOD IN THE CITY 148-73 (1972) (examining the "white flight" phenomenon).

67. Change occurs fastest at levels of 20% to 50% and proceeds in most cases until schools are highly segregated. ORFIELD, *supra* note 46, at 10.

choices. The Court approvingly cited a lower court's reliance on a study which indicated that blacks and Latinos preferred 50/50 integrated neighborhoods and whites were uncomfortable with more than a 10 percent black and Latino population, making segregation inevitable.[68] Courts and legal commentators have cited this finding as fact, and it has cast a huge shadow over the law and, hence, the landscape of reform. However, the study's authors have recently written that the Court's analysis was inadequate and that significant and increasing evidence shows the ability of blacks and whites to live together on a long-term stable basis, particularly when a conscious integration plan is in place.[69]

C. Harms of Residential Segregation and Concentrated Poverty

Discrimination, resegregation, and larger patterns of governmental fragmentation[70] limit most members of the black and Latino middle-classes to living in areas with increasing poverty and diminishing opportunity. By the year 2000, about half of both the black and Latino middle classes–over ten million households–had suburbanized in the 100 largest regions.[71] Because of housing discrimination, however, blacks and Latinos leaving the city often ended up in at-risk, older suburbs, which are characterized by older housing stock, slow growth, and low tax bases—the resources that support public services and schools.[72] The poorest of these places were either resegregated or deeply in the process of resegregation, with at-risk suburbs seeing twice the percentage of blacks and Latinos and nearly twice the number of poor children as regional averages.[73] This combination of factors clearly implies fewer opportunities for middle

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68. Freeman v. Pitts, 503 U.S. 467, 495 (1992).

69. Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUS. POL'Y DEBATE 763, 794 (1997) (summarizing statistics showing tolerance of integrated neighborhoods). The district court relied on an earlier study of Detroit by Reynolds Farley. *Id*. at 768-73 (citing Reynolds Farley, et al., *Chocolate City, Vanilla Suburbs: Will the Trend Towards Racially Separate Communities Continue?*, 7 SOC. SCI. RESEARCH 319 (1978)).

70. *See* ORFIELD, *supra* note 46, at 131-33 (noting areas of fragmentation by numbers of local governments per 100,000 residents).

71. Orfield & Luce, *supra* note 56, at 1.

72. *See* ORFIELD, *supra* note 46, at 37-42 (discussing the challenges faced by three categories of "at risk" suburban communities that are often a destination for minorities: "segregated," "older," and "low density"). Approximately 40% of metropolitan residents live in these sorts of suburbs. *Id*. at 2.

73. *See id*. at 37-42 (discussing the resegregation of "at-risk" suburban communities and noting that these communities' poverty rates are "nearly twice the regional average").

class minorities than their white counterparts in education, wealth acquisition through equity in homes, and employment opportunities.[74]

Few blacks and Latinos live in bedroom-developing suburbs,[75] which have average-to-below-average tax bases, low poverty schools, and some jobs and office space.[76] Still fewer minorities live in affluent job centers,[77] which have low poverty schools, high tax bases, and little affordable housing.[78]

Because of their concentration in distressed, racially segregated cities and inner suburbs, the majority of poor blacks and Latinos live in poor neighborhoods and attend overwhelmingly low income schools, while poor whites, who do not face housing discrimination and live more dispersed throughout suburbia, live in middle-income neighborhoods and attend middle-class schools.[79] Children who grow up in predominately poor neighborhoods and attend very low income schools face many barriers to academic and occupational achievement, even if they themselves are not poor. Studies show they are far more likely than their middle-class counterparts to drop out of high school or to become pregnant as teenagers.[80] Long-term racial and social isolation in deprived

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74. In Chicago and Atlanta, for instance, the black middle class moved to socially and fiscally limited suburbs. *Id.* at 14. Additionally, the black middle-class in Washington D.C. is moving southeast of the city to Prince George's County, one of the poorest suburban counties in the nation, while job opportunities move west toward Dulles Airport and beyond. MYRON ORFIELD, METROPOLITAN AREA RESEARCH, WASHINGTON METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 43 (1999); *see* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 135-36 (2004) (arguing that black suburban enclaves, like Prince George's County, "are usually in the opposite direction from the centers of highest economic growth").

75. These comprise about 25% of the metropolitan population. ORFIELD, *supra* note 46, at 2.

76. *Id.* at 33, 42-44.

77. These areas comprise about 7% of the metropolitan population. *Id*. at 3.

78. *Id.* at 44-46.

79. While there are some very high-poverty white neighborhoods in Appalachia and in some older rust belt cities, more than 95% of poor whites in the United States live outside of high-poverty neighborhoods. *See* PAUL A. JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 135-36 (1997). By contrast, approximately 25% of poor blacks and Latinos live in neighborhoods of high poverty. *Id.*

80. Jonathan Crane, *Effects of Neighborhoods on Dropping Out of School and Teenage Childbearing*, *in* THE URBAN UNDERCLASS 299, 317-18 (C. Jenks & P. Peterson eds., 1991). Dropout rates of 50% or more are thirty times more common among schools where the majority of students are minorities. *See* ROBERT BALFANZ & NETTIE LEGTERS, JOHNS HOPKINS UNIV. CTR. FOR SOC. ORG. OF SCHS., LOCATING THE DROPOUT CRISIS 2-3 (2004) (identifying the lack of a direct and common measure of high school dropout or graduation rates at the school level and proposing "promoting power," a comparison of the number of freshmen at a high school and the number of seniors four years later as a viable indirect measure); CHRISTOPHER B. SWANSON, THE URBAN INST. EDUC. POLICY CTR., WHO GRADUATES? WHO DOESN'T? A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION CLASS OF 2001 4-9 (2004) (discussing United States Department of Education Common Cire Data (CCD) and a Cumulative Promotion Index (CPI)

neighborhoods with high percentages of single parent families also leads to the formation of gangs and other forms of "oppositional culture."[81] In addition, racial and social isolation leads to linguistic isolation, limiting employment opportunities for poor minorities.[82] Concentrated poverty neighborhoods have very high crime rates, often multiples of the suburban violent crime rate, and huge health disparities resulting from the concentration of environmental hazards, stress, inadequate health care facilities, and poor quality, expensive food.[83] These problems associated with poverty make it even more difficult for teachers to do their jobs in public schools.[84]

D. Benefits of Racial and Socioeconomic Integration

All individuals—including poor people of color—benefit from living in affluent and opportunity-rich neighborhoods with large tax bases and abundant entry-level jobs. Overwhelmingly, these are majority-white neighborhoods. The facts and outcome of *Hills v. Gautreaux*, discussed extensively in Part III, show the effect of poor black families' exposure to concentrated opportunity rather than concentrated poverty.[85] The remedial program allowed largely low-income black households to live in three types of areas: poor segregated neighborhoods, white revitalizing neighborhoods (with poor segregated schools), and affluent neighborhoods.[86] Researchers studying the families found that women with low incomes who moved to the largely white, opportunity rich suburbs clearly experienced

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calculated from this data as a basis for arriving at high school graduation rates); GARY ORFIELD ET AL., HARVARD CIVIL RIGHTS PROJECT, LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 9-10 (2004) (asserting that "the most useful and accurate estimates of high school graduation rates" are calculated using the CCD and CPI).

81. Signathia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54, 55-58 (1988); *see* John Ogbu, *Minority Education and Caste*, *in* MAJORITY AND MINORITY 370, 379 (Norman R. Yetman ed., 1985) (discussing how the racial "caste" system prompts black parents to socialize their children in a manner that does not "teach [these] children the instrumental behavior necessary for achieving their academic goals").

82. *See* Joleen Kirschenman & Kathryn Neckerman, "*We'd Love to Hire Them, But . . . ": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS, *supra* note 80, at 203, 220 (reporting that employers view job seekers negatively if they cannot communicate in standard English).

83. *See, e.g.*, Robert Bullard, *Building Safe, Just, and Healthy Communities*, 12 TUL. ENVTL. L.J. 373, 380-85 (1999) (arguing specific environmental and health hazards present in housing projects to be evidence of a "legacy of environmental racism").

84. Gary Orfield, *Urban Schooling and the Perpetuation of Job Inequality in Metropolitan Chicago*, *in* URBAN LABOR MARKETS AND JOB OPPORTUNITY (George E. Peterson & Wayne Vroman eds., 1992).

85. *See infra* Part III.C.2 (discussing the *Gautreaux* litigation).

86. *Id*.

improved employment and earnings, even in the absence of job training and placement services.[87] Individuals who lived in affluent white suburbs, as opposed to predominantly black city neighborhoods, were about 14 percent more likely to be employed than those who remained in the city.[88] The families also noted, when interviewed, that they found the suburbs to be much safer for their families.[89] Finally, the *Gautreaux* children performed significantly better in school after moving to more affluent areas.[90] Rosenbaum found that the children of suburban movers dropped out of high school less frequently than the city movers (5 percent versus 20 percent) and maintained their grades despite the higher standards of suburban schools.[91] These children were also much more likely to be on a college track, with 54 percent going to college, compared with 21 percent of those who stayed in the city.[92] Moreover, 75 percent of the suburban youth had jobs, compared with 41 percent in the city.[93]

The families in "revitalizing areas" made some gains but not as substantial as the families who moved to the suburbs. The schools in these revitalizing neighborhoods differed from the racial and socioeconomic makeup of their neighborhoods. They were either segregated or in a rapid progress of segregation, and the evidence showed that the children did not experience the same change in opportunity that the suburban movers did. Nor did the parents, who had essentially the same access to the employment as they did before moving, experience much more economic opportunity.

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87. James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs*, *in* THE URBAN UNDERCLASS, *supra* note 80, at 342, 343, 348. These researchers studied the groups as "city movers" and "suburban movers," not necessarily analyzing the three-part complexity of the remedial program. *Id.* at 348.

88. *Id*. at 350. Employment was easier to find in the suburbs because there were more jobs, they said. *Id*. at 352. The new suburban residents said that simply living in the suburbs gave them a stronger motivation to improve themselves and get jobs. "[The housing project] deteriorates you. You don't want to do anything . . . . [Living in the suburbs] made me feel that I'm worth something. I can do anything I want if I get up and try it," said a young woman who had recently been promoted at work. *Id*.

89. *Id*. at 352.

90. LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 164-66 (2000); *see* John Goering, *Political Origins and Opposition, in* CHOOSING A BETTER LIFE?: EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT 37, 40 (John Goering & Judith D. Feins eds., 2000) ("[The *Gautreaux*] children were less likely to drop out of school and more likely to take college-track classes than were their *Gautreaux* peers who had moved to poorer, relatively segregated parts of Chicago.").

91. RUBINOWITZ & ROSENBAUM, *supra* note 90, at 164.

92. *Id*. at 165.

93. *Id*. at 166.

The above findings from *Gautreaux* as well as other research bear out the consensus by social scientists that integration has long-term benefits for people of the black and Latino poor. Blacks, Latinos, and whites from desegregated elementary schools are more likely than their counterparts from segregated schools to attend a desegregated college, live in a desegregated neighborhood, work in a desegregated environment, and possess high career aspirations.[94] A study of some of the nation's most selective law schools showed that the vast majority of the students had attended desegregated colleges.[95] Moreover, diverse educational settings contribute to students' ability to participate in a pluralistic society.[96]

III. HISTORY AND INTERPRETATION OF THE FAIR HOUSING ACT

The Fair Housing Act and subsequent federal case law developed in response to the harms of segregation and resegregation. The authors of the FHA understood that the processes of housing discrimination, racial and economic segregation, disinvestment, white racism, and resegregation can only be countered by a strong systemic response. The FHA ordered all federal government entities involved in housing and all their grantees[97] to use, in language quoted in a circuit court opinion, their "immense leverage"[98] to support a balanced and integrated living pattern. This obligation orders a recalcitrant federal bureaucracy and its grantees to end their complicity in deepening existing segregation and in accelerating the resegregation of racially transitional neighborhoods to disadvantaged poor minority neighborhoods.

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94. Robert Crain & Amy Stuart Wells, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 541-52 (1994); JOMILLS HENRY BRADDOCK, CTR. FOR SOC. ORG. OF SCHOOLS, MORE EVIDENCE ON SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE MINORITY SEGREGATION: THE RELATIONSHIP OF SCHOOL DESEGREGATION AND EMPLOYMENT DESEGREGATION 3 (1983).

95. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* DIVERSITY CHALLENGED 143, 156 (Gary Orfield ed., 2001).

96. *See, e.g.*, *id*. at 159-66 (discussing the perceived benefits of attending a desegregated law school).

97. *See In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 12 (2004) ("Most federal cases addressing the 'affirmatively to further' issue hold or suggest that local housing agencies are bound by the Title VIII requirement."). This is not regarded as a settled question, as the U.S. Supreme Court has yet to issue a ruling; however, other federal and state courts have either expressly accepted the applicability to grantees or have declined to address the issue. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 21:1 nn.7-8 (2004) (citing cases in which courts have accepted applicability to grantees or declined to address the issue).

98. NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987) (quoting NAACP v. Harris, 567 F. Supp. 637, 644 (D. Mass. 1987)).

Section 3608(d) of the FHA directs the federal government to use its powers to combat segregation and is of central importance to this Article. It provides, in part, that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner *affirmatively to further the purposes* [of Title VIII]."[99] As its social and legal context show, the Fair Housing Act of 1968 attempted to respond directly to the harms caused by racial and social isolation to individuals and communities.[100]

A. Social Context of the Fair Housing Act

The Fair Housing Act arose out of a history of recent and longstanding housing discrimination. In 1966, Martin Luther King, Jr., brought the southern civil rights movement north to Chicago to focus on open housing.[101] At the time, the city under Mayor Richard J. Daley was in the midst of a largely federally funded urban renewal project that destroyed huge swaths of low-income housing in segregated neighborhoods.[102] According to Daley's plan, the displaced poor blacks were moved into massive housing projects dozens of blocks away from the business district—the now notorious Robert Taylor and Henry Horner homes.[103] In the minds of Daley and his planners, the dilapidated bricks and mortar and the abandoned lots of the "pre-improvement" neighborhoods were to blame for the horrific social conditions. Despite claims by advocates of urban renewal that

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99. 42 U.S.C. § 3608(d) (2005) (emphasis added). The section in its entirety provides:

> All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the [HUD] Secretary to further such purposes.

Id.

100. Some have noted that the FHA was stripped of its enforcement provisions until the Fair Housing Amendments Act of 1988 and only provided a weak response to an overwhelming problem. *See* David Lyons, *The Jurisprudence of Slavery Reparations: Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1394 (2004) ("Congress enacted a Fair Housing Act in 1968, but only after it was stripped of enforcement provisions.").

101. ADAM COHEN & ELIZABETH TAYLOR, AMERICAN PHARAOH 355-56 (2000).

102. Arnold Hirsch provides the most in-depth account of the massive relocation of low-income housing and concentration of poor blacks in Chicago. ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960, at 241-46 (1983); *see also* COHEN & TAYLOR, *supra* note 101, at 188-90 (detailing how existing segregation was reinforced by a miles-long strip of public housing projects divided from adjacent neighborhoods by a new expressway).

103. *See* Gautreaux v. Chicago Hous. Auth., 296 F.Supp. 907, 909-14 (N.D. Ill. 1969) (holding that racially discriminatory site selection for public housing projects violated the 1964 Civil Rights Act).

modern, high-rise housing would revitalize neighborhoods,[104] areas with projects had, at best, only very short term improvements.[105] By 1970, these tracts showed the same declining opportunity and living conditions as the other parts of the south and west-side ghettoes.[106] Moreover, they retained their racially segregated character.[107]

The Kerner Commission, whose report was influential in the passage of the FHA, recognized housing discrimination's harms.[108] In the summer of 1967, more than 150 social disturbances ranging "from minor disturbances to major outbursts including sustained and widespread looting of property" had occurred in the United States, overwhelmingly in segregated, black ghetto neighborhoods.[109] In response, President Lyndon B. Johnson appointed a distinguished bipartisan presidential commission chaired by Otto Kerner, a former governor of Illinois.[110] After investigating the riots and surveying the growing social science literature on the consequences of concentrated poverty, the Kerner Commission found racial segregation and ghettoization was a core cause of the riots.[111] It recognized how segregation limits opportunities: "although jobs were rapidly moving to the suburbs. . .eighty percent of the nonwhite population of metropolitan areas in 1967 lived in central cities."[112] Echoing the rhetoric of *Brown v. Board of Education*,[113] the Kerner Commission Report concluded that "[o]ur nation [was] moving toward two societies,

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104. *See* COHEN & TAYLOR, *supra* note 101, at 186 (noting that even "progressives" in Chicago backed Mayor Daley's efforts to build large high-rises on larger plots because they thought such development would give the city "the feel of a suburb").

105. *See id.* at 331-32 (showing that "in the three years since the first family moved in, [a major public housing project] had spiraled downward").

106. MASSEY & DENTON, *supra* note 30, at 56-57 (discussing the "new segregation of blacks – in economic as well as social terms . . . [b]y 1970, after two decades of urban renewal, public housing projects in most large cities became black reservations, highly segregated from the rest of society, and characterized by extreme social isolation").

107. *Id.*

> By 1960 the growth and development of Chicago's black areas of residence confirmed the existence of the city's second ghetto. . . . Slums had been torn down . . . their occupants sent to feed the swelling movement of blacks into newly occupied provinces farther South or on the city's West Side.

HIRSCH, *supra* note 102, at 253.

108. John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1295-98, 1305-06 (1993).

109. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 15-16 (1968) [hereinafter KERNER REPORT]; *see* Boger, *supra* note 108, at 1292-95.

110. KERNER REPORT, *supra* note 109, at 1.

111. *Id.* at 5-6.

112. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 153 (1969) (citing 114 CONG. REC. 3421 (1968)).

113. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) ("[s]eparate education facilities are inherently unequal").

one black, one white—separate and unequal."[114] The Commission recommended that a comprehensive civil rights bill with powerful integrative measures be enacted.[115]

Three days after the release of the report the Senate voted cloture on the filibuster that had been blocking the fair housing bill for two years.[116] The Senate passed the bill on March 11, 1968, sending it to the House where it faced a long struggle to emerge from the Rules Committee.[117] On April 4, 1968, King was assassinated in Memphis. Riots erupted in Washington and around the country, and within days, the bill was dislodged from the Rules Committee and brought to a vote by the full House on April 10.[118] President Johnson signed it the next day.[119] Just as Johnson and congressional leaders used the tragic momentum of the Kennedy assassination to break the impasse with the 1964 Civil Rights Bill, they likewise used the momentum of Martin Luther King, Jr.'s assassination to move the final passage of Title VIII.

B. Legislative History of "Affirmatively Further"

The duty to "affirmatively further" fair housing in Title VIII came partially as a response to the resistance from HUD—which at the time was the primary federal source for affordable housing funds—and local housing authorities to build housing projects anywhere other than in poor, racially segregated neighborhoods.[120] President Kennedy, by executive order, forbade HUD from segregative housing practices,[121] but HUD continued to build housing in poor segregated neighborhoods. In the wake of the Civil Rights Bill of 1964, Lyndon Johnson's Great Society began one of the largest low

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114. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 33 (1983) (citing KERNER REPORT, *supra* note 109, at 1).

115. KERNER REPORT, *supra* note 109, at 263. Presciently, the commission also stated that while the nation should pursue a strategy of open housing and ghetto enrichment (community development) – that ghetto enrichment should be "no more than an interim strategy. Programs must be developed that will permit substantial Negro movement out of the ghettos. The primary goal must be a single society, in which every citizen will be free to live and work according to his capabilities and desires, not his color." *Id*. at 11.

116. *See* Dubofsky, *supra* note 112, at 149-59 (explaining the delay and debate on the Act).

117. *Id*. at 159-60.

118. *Id*. at 160.

119. *See* Act of Apr. 11, 1968, Pub L. No. 90-284, tit. VIII, § 800, 82 Stat. 81 (1968) (passage of the Fair Housing Act).

120. *See* KERNER REPORT, *supra* note 109, at 13 (arguing that "federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of federal racism").

121. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962).

income housing build-ups in history, giving mayors like Richard Daley the power and resources to even further concentrate poverty.[122]

When challenged, HUD and local housing authorities attempted to shift the blame. Local housing authorities with urban and suburban jurisdiction claimed their duty was to build housing and argued that they could not influence resistant white neighborhoods and municipalities.[123] HUD in turn argued that it was simply a funding agency and could not influence local decisionmaking.[124] In defiance of Kennedy's executive order, HUD and local housing agencies continued to fund segregated public housing, arguing that housing in segregated ghettos was better than no housing at all.[125]

As lawsuits progressed against HUD and the intransigence of housing authorities became clearer, pressure was building for a new civil rights act that would go significantly beyond Title VI of the Civil Rights Act of 1964. The sponsors of the FHA determined that the provisions of Title VI prohibiting discrimination in federally assisted housing needed to be strengthened.[126] During the legislative debate on the FHA, Senator Brooke noted that "an overwhelming proportion of public housing . . . in the United States directly built, financed and supervised by the Federal Government—is racially segregated."[127] Senator Walter Mondale also addressed the government's complicity in promoting or perpetuating housing segregation, noting, "[urban

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122. *See generally* COHEN & TAYLOR, *supra* note 101 (discussing Mayor Daley's housing policies).

123. *See* Alexander Polikoff, Gautreaux *and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 456-57 (1988) (showing that a housing authority could not escape liability on the basis that "practical politics" compelled it not to locate predominately African-American public housing projects in primarily white neighborhoods); Banks v. Perk, 341 F. Supp. 1175, 1179-84 (N.D. Ohio 1972), *aff'd in part, rev'd in part without opinion*, 473 F.2d 910 (6th Cir. 1973) (holding that a housing authority had an affirmative duty to locate public housing facilities in areas of varying racial composition).

124. Gautreaux v. Romney, 448 F.2d 731, 737-41 (7th Cir. 1971); Polikoff, *supra* note 123, at 455, 462. *But see In re* 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 23-24 (2004) (reasoning that a state agency was "a funding agency, rather than a siting agency" and had no statutory power to locate housing projects based upon neighborhood racial composition).

125. *See* RUBINOWITZ & ROSENBAUM, *supra* note 90, at 36 (noting choice between "funding [a] discriminatory program or depriv[ing] low-income families of much-needed housing").

126. Indeed, years before the passage of both the 1964 and 1968 Civil Rights Acts, civil rights leaders were calling for more executive and congressional leadership to strengthen civil rights protections. DENTON L. WATSON, LION IN THE LOBBY: CLARENCE MITCHELL JR.'S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS 445, 454-55 (1990).

127. Resident Advisory Board v. Rizzo, 425 F. Supp. 987, 1014 (E.D. Pa. 1976) (citing 114 CONG. REC. 2528 (1968)). Senator Brooke also stated: "Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed." 114 CONG. REC. 2527-28 (1968).

blacks] have been unable to move to suburban communities and other exclusively white areas."[128] The law specifically sought to prevent local authorities and HUD from avoiding responsibility for fair housing by blaming the other party for the lack of progress on integration. It did so by requiring the federal government and its grantees, including local housing authorities, to use their power and leverage to support an integrated housing market.[129]

The debates in Congress produced Title VIII of the Civil Rights Act of 1968. The linchpin of housing discrimination law is Section 3608(d).[130] It directs the federal government to use its powers to support an integrated housing market. Prohibitions on steering and blockbusting by real estate agents, practices that lead to racial turnover, also show that avoiding resegregation was an implicit part of the fair housing mandate.[131]

C. Judicial and Regulatory Interpretation of the Duty to Affirmatively Further Fair Housing

The development of HUD's housing project siting rules reflects a clear decision by the federal courts to apply the FHA to all government housing decisions. Because of the long history of segregation cases, the "affirmatively further" duty was developed through a back-and-forth process between and among courts and housing agencies.[132] The current regulation owes much of its shape to the Third Circuit's decision in *Shannon v. HUD*,[133] and the Supreme

128. *Resident Advisory Bd.*, 425 F. Supp. at 1014 (citing 114 CONG. REC. 2277 (1968)). Senator Mondale went on to implicate government, stating that "[a]n important factor contributing to [their exclusion] . . . has been the policies and practices of agencies of government at all levels." *Id.*

129. Although the 1968 Act provides the backbone and the moral force to require an integrated housing market, the 1988 amendments gave it teeth. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

130. *See* 42 U.S.C. § 3608(d) (2005) (requiring that "all executive departments and agencies . . . administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further [fair housing]"). Though the statute itself only requires the affirmative furthering of fair housing goals, the courts have glossed affirmative furtherance to include fostering integration. Roisman, *supra* note 2, at 1026.

131. *See* 42 U.S.C. § 3605 (2005) (prohibiting racial discrimination by "any person or other entity whose business includes engaging in residential real estate transactions"); 42 U.S.C. § 3606 (2005) (prohibiting discrimination by providing for "access to membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of renting or selling dwellings").

132. *See* Michael J. Vernarelli, *Where Should HUD Locate Assisted Housing?*, *in* HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 41, at 214, 216-20 (discussing cases "of particular importance" to the development of HUD's location policies).

133. Shannon v. United States Dep't. of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970).

Court's decision in *Hills v. Gautreaux*.[134] These cases focus on the harms noted by the Kerner Commission and on a growing understanding of the harms of segregation and resegregation.

1. *Shannon v. HUD*

In *Shannon v. HUD,* black and white residents of a racially integrated neighborhood in Philadelphia claimed that the planned construction of a Section 212[135] housing project on the site in their neighborhood selected by the local housing authority, located in an area with an already high concentration of low-income minorities, would further concentrate poor blacks in the neighborhood, thus leading to resegregation.[136] Plaintiffs argued that by funding this development HUD would violate its Title VIII duty to affirmatively further fair housing.[137] Although no regulations concerning the siting of public housing or Section 212 housing existed, anti-discrimination rules under the FHA and a low rent housing manual issued by HUD warned public housing agencies of the threat of resegregation.[138]

The court found that the Title VIII duty was broader than the right guaranteed by the Equal Protection Clause and previous civil rights and housing legislation.[139] Furthermore, with some narrow exceptions, the court found that the FHA forbids HUD from funding a project in a segregated or resegregating neighborhood. The court noted that maintaining or increasing racial concentration created "urban blight" and was "prima facie" unacceptable under the FHA.[140]

Significantly, the court held that HUD must take racial and socioeconomic data into consideration in siting housing, calling a colorblind approach "impermissible."[141] While leaving the development of this method to HUD's discretion, the court suggested that HUD consider the racial composition of neighborhoods and their schools; the location of public, middle-class, and luxury housing; the

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134. Hills v. Gautreaux, 425 U.S. 284 (1976); *see* Vernarelli, *supra* note 132, at 217-20 (discussing the *Shannon* and *Gautreaux* cases).

135. 12 U.S.C. §1715z-1 (2005). Subsection (n) amended this statute, prohibiting the development of any new projects, while still honoring existing projects under the program. 12 U.S.C. §1715z-1(n) (2005).

136. *Shannon,* 436 F.2d at 811-12.

137. *Id*.

138. *Id*. at 819-20.

139. *See id*. at 816 (reasoning that the FHA required HUD to "affirmatively promote fair housing"). At this time, the court cited regulations for public housing that did not fit this exact program, as the detailed fair housing regulations had not been developed. *Id*. at 816-17.

140. *Id*. at 821.

141. *Id*. at 820-21.

racial effect of local regulations; and past and current practices of local authorities.[142] Although the holding and its logic were clear and sweeping, the court hedged its bets with the following dicta: "[we are not] suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances where a pressing case *may* be made for the rebuilding of a racial ghetto."[143]

The principles of *Shannon* were adopted and articulated outside the Third Circuit in the late 1980s' case, *NAACP v. Secretary of Housing and Urban Development.*[144] The case involved the reviewability of alleged violations of the Title VIII duty in the administration of housing programs in Boston. HUD argued that, even if its actions were reviewable, its only duty under Title VIII was an obligation not to discriminate.[145] Then-Circuit Judge Stephen Breyer, writing for the First Circuit panel, rejected HUD's argument, applied the *Shannon* doctrine, and found that HUD should use its "immense leverage" to further integrated and balanced living patterns.[146] On remand, the district court issued a declaratory judgment that metropolitan area-wide relief was necessary to remedy HUD's failure to affirmatively further integration in Boston.[147] Outlining a model marketing plan, the court stated that the goal of the plan would be to "achieve a racial composition in assisted housing, in neighborhoods which are predominantly white, which reflects the racial composition of the City as a whole."[148]

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142. *Id.* at 821-22.

143. *Id.* at 822 (emphasis added).

144. *See generally* NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149 (1st Cir. 1987) (stating that Title VIII imposes a duty on HUD beyond simply refraining from discrimination).

145. *Id.* at 154.

146. *Id.* at 156 (citing NAACP v. Harris, 567 F. Supp. 637, 644 (D. Mass. 1983)). The First Circuit pragmatically argued the legislative history reflects an intention that HUD should "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d at 155.

147. NAACP v. Kemp, 721 F. Supp. 361, 368 (D. Mass. 1989).

148. *Id.* at 371-72.

2. *Gautreaux*

In the *Gautreaux* cases,[149] the plaintiffs sued to obtain relief from HUD and the Chicago Public Housing Authority for discriminatory siting practices.[150] The plaintiffs alleged violations of the federal Equal Protection Clause and pre-FHA civil rights acts, having filed the cases prior to the FHA's enactment.[151] The *Gautreaux* plaintiffs asked, as a remedy to past proven discriminatory housing policy, that 75 percent of new public housing be built in areas with fewer than 30 percent minorities and not within one mile of any area with 30 percent black population.[152] By the time *Gautreaux* arrived in the Seventh Circuit, the FHA had been passed, *Shannon* was in the courts, and the lower reviewing courts had discussed the duty to affirmatively further fair housing.[153] Noting that resegregation was a very real fear in Chicago, the Seventh Circuit stated that "'[w]hite flight' and 'black concentration' [are] the most serious domestic problem facing America today."[154] The part of the case concerning the legality of a metropolitan remedy for Chicago's public housing market eventually made its way to the U.S. Supreme Court. The Supreme Court declared a metropolitan area remedy to be "consistent with and supportive of" federal housing policy, including the duty of the federal government and local housing authorities to affirmatively further fair housing.[155]

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149. The plaintiffs initially brought two cases, one against HUD and the other against the Chicago Public Housing Authority, which were later consolidated. Gautreaux v. Chicago Hous. Auth., 503 F.2d 930, 931-34 (7th Cir. 1974). *Gautreaux* is one of the most important civil rights and local government law cases of the twentieth century, partly because it was a counterweight to *Milliken v. Bradley*, 418 U.S. 717 (1974), which effectively prevented busing plans from crossing suburban boundaries. *See* Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 106-07 (1990) (explaining *Gautreaux* in the context of local government power).

150. *Gautreaux*, 503 F.2d at 931-32.

151. *Id*.

152. Gautreaux v. Chicago Hous. Auth., 304 F. Supp. 736, 737-38 (N.D. Ill. 1969); E-mail from Alexander Polikoff, Attorney, Business and Professional People for the Public Interest, to David Arens, Managing Editor, Vanderbilt Law Review (Oct. 7, 2005, 17:09:00 CDT) [hereinafter Polikoff E-mail] (on file with author). When asked why he did not ask for 100% to be put in the suburbs as the *Banks* plaintiffs had, Alexander Polikoff, the chief litigator, said this was an *ad hoc* balancing appraisal to allow some funds to continue to flow to the inner city. He also said, "we just could not pull the rug out from everyone in the city." There were a lot of minority contractors and neighborhood groups that depended on these funds. *Id*.

153. Gautreaux v. Chicago Hous. Auth., 503 F.2d at 930; *see supra* Part III.C.1 (discussing the *Shannon* litigation).

154. *Gautreaux*, 503 F.2d at 938.

155. Hills v. Gautreaux, 425 U.S. 284, 301-02 (1976); *see* Gautreaux v. Chicago Hous. Auth., 503 F.2d at 937 (quoting then-HUD secretary George Romney as stating: "The impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to

After remand and years of gridlock in forging a remedy, the *Gautreaux* parties compromised and decided on a distribution scheme for newly placed, city-only public housing. One-third of the units could be placed in racially segregated areas,[156] one-third of the units would be placed in largely white areas,[157] and another third would be placed in what the parties defined as "revitalizing areas" or "areas which have substantial minority populations and are undergoing sufficient redevelopment to justify the assumption that these areas will become more integrated in a relatively short time."[158] The approving district court defined revitalizing areas as those areas that were seeing increased development, were in an advantageous location, and were not areas of minority concentration.[159] The plaintiffs, to achieve some progress, consented to locating some units in areas close to moderate-to-high poverty neighborhoods because they showed indicia of revitalizing and, therefore, a hope for economic integration, in the short run, and (perhaps) racial integration in the long run.[160]

3. Regulatory Codifications of *Shannon* and *Gautreaux*

In response to *Shannon* and *Gautreaux*, HUD promulgated siting regulations for construction of new public housing, Section 8 new construction, and senior housing.[161] The regulation set out various requirements for sites, crucially prohibiting new construction in "an area of minority concentration."[162] In addition, the regulation prohibited the siting of projects in neighborhoods of high poverty concentration, [163] resegregating neighborhoods,[164] neighborhoods

include the surrounding community . . . . To solve problems of the real city only metropolitan wide solutions will do.").

156. Gautreaux v. Landrieu, 523 F. Supp. 665, 680 (N.D. Ill. 1981).

157. *Id*.

158. Gautreaux v. Chicago Hous. Auth., 304 F. Supp. 736, 737 (N.D. Ill. 1969).

159. An area may be designated as a Revitalizing Area if it is:

> 1) undergoing visible redevelopment or evidences impending construction; 2) located along the lakefront, 3) scheduled to receive Community Development Block Grant Funds; 4) accessible to good transportation; 5) an area with a significant number of buildings already up to code standards; 6) accessible to good shopping; 7) located near attractive features, such as the lake or downtown; 8) free of an excessive concentration of assisted housing; 9) located in an area which is not entirely or predominantly in a minority area and 10) not densely populated.

Gautreaux, 523 F. Supp. at 671.

160. Polikoff E-mail, *supra* note 152.

161. Vernarelli, *supra* note 132, at 219; *see* Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 869 (3d Cir. 1981) (discussing HUD regulations as partially in response to *Shannon*).

162. 24 C.F.R. § 941.202(c)(1)(i) (2005).

163. *See id*. § 941.202(d) ("The site must . . . avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.")

detrimental to family life,[165] those with urban blight,[166] and those without access to basic, decent public facilities and services,[167] or reasonable proximity to jobs.[168] Although all these conditions tend to coexist, the regulatory scheme specifies them as independent prohibitions, requiring that each needs to be observed before new construction of federally subsidized low-income housing can commence.

The regulation sets out two exceptions to the general prohibition on locating public housing in areas of minority concentration. Housing can be sited in areas of minority concentration if there are 1) "sufficient, comparable opportunities . . . outside areas of minority concentration" or 2) "the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area."[169] Echoing *Gautreaux*, the regulations explicitly recognize that discriminatory resistance—presumably by white suburbanites—is not a sufficient reason for focusing on low-income neighborhoods.[170] Similar to the *Shannon* court, the regulations also hedged their bets by including language that discussed sufficient comparable choices and overriding needs.[171]

D. Constitutional Limits on Title VIII Remedies

All race-based governmental actions, including those that burden only whites, are subject to strict scrutiny.[172] Such classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests."[173]

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164. *See id.* § 941.202(c)(ii) (prohibiting siting in "[a] racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area").

165. *Id.* § 941.202(e).

166. *See id.* (prohibiting siting where "substandard dwellings or other undesirable elements predominate"). Siting in such areas is acceptable only if there is a "concerted program to remedy the undesirable conditions." *Id.*

167. *Id.* § 941.202(g).

168. *See id.* § 941.202(h) ("Travel time and cost . . . from the neighborhood to places of employment providing a range of jobs for low-income workers, must not be excessive.).

169. *Id.* § 941.202(c)(1)(i).

170. *See id.* (noting that the "overriding need" exception cannot be threat of racial discrimination).

171. *Id.*

172. City of Richmond v. J.A. Crosson Co., 488 U.S. 469, 494 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

173. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

1. Integration as a Compelling Governmental Interest

Several courts have suggested that ending racial segregation and furthering residential integration are compelling governmental interests. The Supreme Court has recognized the benefits of integration, specifically integrated housing.[174] In *Otero v. New York City Housing Authority*, the Court of Appeals for the Second Circuit upheld the housing authority's decision to accord a preference to white applicants for a newly constructed housing project on New York City's Lower East Side, in contravention of the authority's own regulation giving first priority to present and former occupants of the urban renewal site upon which the project was constructed.[175] Plaintiffs, mostly non-white former site occupants, argued that the preference for white applicants for the new housing project violated both Title VIII and the Civil Rights Act of 1964.[176]

The Second Circuit accorded precedence to Title VIII's duty to integrate over its prohibition of discrimination. The court held that "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."[177] The Second Circuit remanded the case to the district court to determine whether concentration of non-white residents in the new project would have the "tipping effect" the housing authority was attempting to prevent. The court indicated that if such a tipping effect were found, preventing it would be a sufficiently compelling interest to render the denial of housing to non-white applicants constitutionally permissible.[178] The court noted that such discrimination would be permissible if "[evidence exists] that a color-blind adherence to [a housing authority regulation] would almost surely lead to eventual destruction of the racial integration that presently exists in the community."[179]

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174. Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977) (citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)).

175. Otero v. New York City Hous. Auth., 484 F.2d 1122, 1125-25 (2d Cir. 1973). The authority's justification for giving priority to white applicants was to avoid turning the new project into "a non-white 'pocket ghetto' that would operate as a racial 'tipping factor' causing white residents to take flight and leading eventually to non-white ghettoization of the community." *Id.* at 1124.

176. *Id.* at 1126-27. The plaintiffs conceded (and the court agreed) that the housing authority had a duty to further integration under § 3608 of Title VIII. *Id*. at 1133-34.

177. *Id*. at 1134.

178. *Id*. at 1124.

179. *Id*. at 1136.

2. Integration and Narrow Tailoring

Several courts have found that rigid racial quotas, made without reference to empirical studies of tipping, that have a discriminatory effect do not satisfy the constitutional "narrowly tailored" requirement.[180] Courts have also found that such quotas can violate the Title VIII prohibition against racial discrimination in housing.[181] Most recently, the Fifth Circuit, in *Walker v. City of Mesquite*,[182] vacated a district court remedial order in a case in which HUD, the Dallas Housing Authority, and the City of Dallas had been found liable for unconstitutional racial discrimination and segregation in Dallas's public housing programs.[183] The district court's order in that case provided for the demolition of more than 2,600 public housing units in West Dallas and the development of more than 2,800 replacement units through both new construction and Section 8 vouchers. All new units were to be developed in "predominantly white" areas "until there are as many units in predominantly white areas as there are in minority areas."[184]

White homeowners sued[185] to enjoin the construction of two 40-unit public housing projects in their neighborhood, claiming violation of the Equal Protection Clause because the location was selected on the basis of their race. The circuit court vacated the provision of the remedial order that directed the construction of new public housing units in predominantly white Dallas neighborhoods.[186] The court applied strict scrutiny after determining that the contested provision constituted a "race-conscious remedial measure."[187] The court then ruled that the order directing new construction of public housing in predominantly white areas was not narrowly tailored to remedy past

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180. *E.g.*, Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203, 1207 (6th Cir. 1987); Burney v. Hous. Auth. of Beaver, 551 F. Supp. 746, 758 (W.D. Penn. 1982).

181. *E.g.*, United States v. Starrett City Assocs., 840 F.2d 1096, 1100-01 (2d Cir. 1988); United States v. Charlottesville Redevelopment & Hous. Auth., 718 F. Supp. 461 (W.D. Va. 1989).

182. Walker v. Mesquite, 169 F.3d 973, 975 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000). *Walker* was a response to the historical discrimination against minorities by the Dallas Housing Authority. *Id*.

183. *Id*. at 975-76.

184. *Id*. at 977. "Predominantly white area" was defined as "less than 37% Hispanic, black or other minority." *Id*. at 977-78.

185. The court gave a brief defense of its grant of standing to the white homeowners. *Id.* at 978-81. While being selected on the basis of race served as a concrete injury, the court went further to hold that living near public housing itself is a sufficient injury for standing. *Id*.

186. *Id*. at 975-76.

187. *Id*. at 982.

discrimination.[188] It would, however, allow for non-race-based solutions directing development of subsidized housing in, for example, low-poverty areas.[189] The housing was eventually constructed in areas which were very similar to the initial planned sites.[190]

IV. TAX CREDITS, HOUSING POLICY, AND SEGREGATION

A. Federal Housing Policy Before the Tax Credit

When the Fair Housing Act was passed—and when federal courts and HUD initially interpreted it—almost all federal housing subsidies for construction were distributed by HUD or the Department of Agriculture.[191] Though the federal government has long funded the construction of low-income housing with direct subsidies,[192] construction peaked in the late 1960s and early 1970s.[193] In 1973, President Nixon issued a moratorium on virtually all large scale, federally subsidized public housing projects.[194] Public housing construction declined dramatically over the next few years, as only those projects in the pipeline prior to the moratorium were completed.[195] The primary low-income housing program from 1974 to 1983 was Project-based Section 8, under which HUD provided assistance to public housing authorities and private owners for twenty to forty years after construction or substantial rehabilitation of low-

188. *Id*. at 983 ("First, Section 8 housing vouchers have not been given a fair try to prove their potential to desegregate. Second, other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing."). The court approved the use of a site-selection criterion that all new sites be in areas where the poverty rate does not exceed 13%, even while noting that it had been suggested that this criterion would essentially restrict new construction to predominantly white areas. *Id*. at 985 & n.31.

189. *Id*. at 985.

190. The agencies proceeded to build the public housing based on nonracial data but were again challenged by the white homeowners, who argued this time that the projects were "tainted" by the past order to build in white areas. *See generally* Walker v. HUD, 326 F. Supp. 2d 780, 786 (N.D. Tex. 2004). The Fifth Circuit did not entertain their challenge. Walker v. City of Mesquite, 402 F.3d 532 (5th Cir. 2005) (holding decision to build was not based on racial discrimination and not traceable to prior decision made with impermissible racial data).

191. Chester Hartman, *Housing Policies Under the Reagan Administration*, *in* CRITICAL PERSPECTIVES ON HOUSING 362, 362-64 (Rachel G. Bratt et al. eds., 1986).

192. *See, e.g.*, U.S. Housing Act of 1937, ch. 896, 50 Stat. 888 (1937) (early example of direct federal low-income housing subsidies).

193. BARRY G. JACOBS ET AL., GUIDE TO FEDERAL HOUSING PROGRAMS 20-21 (2d ed. 1986).

194. *Id*. at 21.

195. Hartman, *supra* note 191, at 364.

income rental units.[196] During the nine years it was in effect, Project-based Section 8 produced over 750,000 new or substantially renovated subsidized housing units, an average of about 83,000 per year, many of which still function as low-income housing today.[197] HUD was required to collect race data for all public housing and Section 8 programs.[198]

B. How the Tax Credit Works

Responding to increased demand for low-income housing and a series of HUD scandals,[199] Congress almost entirely replaced direct subsidies for housing with the Low-Income Housing Tax Credit ("LIHTC") program in 1986, administered by the Internal Revenue Service at the Department of the Treasury.[200] The tax credit program allows owners of residential rental property to claim tax credits—usually for ten years—for 30 percent to 70 percent of the present value of new and substantially rehabilitated housing developments.[201] Generally, a project qualifies for the credit only if, for a period of fifteen years, the property owner rents at least 20 percent of the units to households with incomes at or below 50 percent of the area median gross income, or the property owner rents at least 40 percent of the units to households with incomes at or below 60 percent of the area median gross income.[202]

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196. Kevin M. Cremin, *The Transition to Section 8 Housing: Will the Elderly Be Left Behind?*, 18 YALE L. & POL'Y REV. 405, 409 n.23, 411 (2000); NAT'L LOW INCOME HOUSING COALITION, 2004 ADVOCATES GUIDE TO HOUSING AND COMMUNITY DEVELOPMENT POLICY 96 (2004), *available at* http://www.nlihc.org/advocates/index.htm.

197. Cremin, *supra* note 196, at 409 n.23.

198. Roisman, *supra* note 2, at 1044-45.

199. *See supra* notes 149-171 and accompanying text (discussing role of HUD in the *Gautreaux* litigation); *supra* notes 144-148 and accompanying text (discussing role of HUD in housing discrimination in Boston); *see also* Michael Winerip, *H.U.D. Scandal's Lesson: It's a Long Road From Revelation to Resolution*, N.Y. TIMES, July 22, 1990, at 20 (discussing the role of HUD in housing discrimination in New York City).

200. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2095, 2189-2208 (1986); *see* Thomas R. Wechter & Daniel L. Kraus, *The Internal Revenue Code's Housing Program: Section 42*, 44 TAX LAW. 375, 375 (1991). *Compare* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) (arguing that tax incentives are generally inferior to direct subsidies as a means of achieving social goals), *with* Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993) (arguing that tax incentives are more effective than direct expenditures due to tax institutions' high levels of visibility and competitiveness).

201. 26 U.S.C. §§ 42(a), (b) (2005); *see* Roisman, *supra* note 2, at 1014.

202. 26 U.S.C. § 42(g)(1) (2005).

1. Program Administration

Implementation of the LIHTC program requires substantial state and/or local government oversight, and the credits must be "allocated pursuant to a qualified allocation plan of the housing credit agency which is approved by the governmental unit . . . of which such agency is a part."[203] Frequently, this agency is a state housing agency or a local government housing authority created by state law. The qualified allocation plan ["QAP"] must be submitted to HUD for review as part of a state consolidated plan covering all Section 8 and public housing that receives federal funds.[204]

Because tax credits only partially fund a development, the program also requires the participation of local developers to finance the construction of tax-credit developments. Approximately one-third of new projects are completed by local non-profit community development corporations,[205] sometimes several in a single part of a segregated city.[206] These non-profit community development corporations collect the necessary funds and most often partner with private developers to build the actual housing.[207]

2. Qualified Census Tracts

The LIHTC program initially provided a higher tax credit to developers who sited housing developments in "qualified census tracts," ("QCTs"),[208] which are census tracts in which at least 50 percent of the households have incomes of less than 60 percent of the area median income.[209] In 2000, this funding bonus was supplemented by a statutory preference favoring projects in QCTs.[210] A qualified allocation plan is defined as any plan:

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203. *Id.* § 42(m)(1)(A)(i).

204. U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW INCOME HOUSING PROGRAM 55-56 (1997) [hereinafter GAO REPORT].

205. SANDRA NOLDEN ET AL., ABT ASSOCIATES, INC., UPDATING THE LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 1999, EXECUTIVE SUMMARY ii (2002).

206. VIDAL, *supra* note 25, at 38.

207. *Id.* at 67.

208. The concept of QCTs appeared in a statute for the first time in H.R. 2319, a bill to amend the Internal Revenue Act of 1986 and improve the effectiveness of the tax credits. In the Senate, there was no debate on the qualified census tract provision. The Omnibus Budget Reconciliation Act of 1989 added the first QCT provision to the tax credit law. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7108 (g), 103 Stat. 2106, 2314 (1989).

209. 26 U.S.C. § 42(d)(5)(C)(ii)(I) (2005). There was no debate or discussion in either chamber regarding this provision.

210. Consolidated Appropriations Act, Pub. L. No. 106-554, § 132(b), 114 Stat. 2763, 2763A:610 to 2763A:613 (2000) (codified at 26 U.S.C. § 42(m)(1)(B) (2005)).

> (i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,
>
> (ii) which also gives preference in allocating housing credit dollar amounts *among selected* projects to—. . .
>
> (III) *projects which are located in qualified census tracts . . . and the development of which contributes to a concerted community revitalization plan.*[211]

As with the initial statutory incentive, the adoption of the preference was not specifically debated, but simply incorporated as an amendment in a large budget bill.[212]

C. Tax Credit Data

Since its inception in 1987, the LIHTC program "has been the principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households,"[213] accounting for 40 to 50 percent of the federal commitment to construction of low-income or affordable housing.[214] In 2004, the estimated total number of LIHTC units (1.3 million) had surpassed the combined product of all forms of public housing construction that had been subsidized by the federal government and subject to federal siting requirements.[215] The tax credit program amounts to $5 billion per year in federal tax expenditures. It is matched by hundreds of millions in state and local tax-exempt revenue bonds and philanthropy,[216] and leveraged by

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211. 26 U.S.C. § 42(m)(1)(B) (2005) (emphasis added).

212. The QCT preference was never discussed in recorded debates in Congress. No mention of it appears in any legislative debate, in any committee report, or in any newspaper article at the time.

213. SANDRA NOLDEN ET AL., ABT ASSOC., INC., UPDATING THE LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2000, at 2 (2002) [hereinafter ABT 2000 REPORT].

214. SANDRA NOLDEN ET AL., ABT ASSOCS., INC., UPDATING THE LOW INCOME HOUSING TAX CREDIT DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2001 (2003), *available at* http://www.huduser.org/Datasets/lihtc/report9501.pdf [hereinafter ABT 2001 REPORT]; DAVID A. SMITH ET AL., RECAPITALIZATION ADVISORS, INC., THE LOW-INCOME HOUSING TAX CREDIT EFFECTIVENESS AND EFFICIENCY 3 (2002). This does not include the federal commitment for voucher-based housing programs.

215. Khadduri, *supra* note 2, at 1. The LIHTC now produces on average about 90,000 units a year, outpacing the average number of new units brought into construction per year under previous programs. *Id.*

216. LIHTCs: Supporting Affordable Housing Nationwide, http://www.nefinc.org/LIHTC/LIHTChome.htm (last visited Nov. 20, 2005). The developers or sponsors of projects are then responsible for seeking out investors or a tax credit syndication fund (e.g., National Equity Fund, Inc., a large non-profit syndicator of affordable housing). Since its inception in 1987, National Equity has invested $3.8 billion in housing projects. National Equity Fund, Inc., An Investment Overview, http://www.nefinc.org/Investors/ExecutiveSummary.htm (last visited Nov. 20, 2005). In 2001, the organization invested $361 million in equity for projects across the country, and in

significant private investment.[217] Since 1987, the "vast majority" of LIHTC developments have been low-income units.[218]

In contrast to previous housing policy,[219] the federal government has never collected racial impact data for the placement of LIHTC units.[220] Since 1994, however, HUD has contracted with Abt Associates, Inc., to build a database containing information on the number and location of units, as well the characteristics of the applicant or user of the unit.[221] A few states have also studied the relationship between siting and concentration of poor and minority tenants.[222]

1. National Placement Data

In the early years of LIHTC developments, credits were often combined with other federal subsidies to existing projects, meaning that virtually all early LIHTC units were built in high-poverty areas.[223] After the early years of the program, during which units were more likely to be placed in high poverty areas, the figure dropped to about 60 percent.[224] Today, the concentration of tax credit projects in high poverty neighborhoods is most apparent in family units: two-thirds are placed in neighborhoods of more than 10 percent poverty.[225] Evidence also shows that community development corporations are much more likely than private investors to site housing in areas with high minority concentrations and areas of concentrated poverty.[226]

2003 it invested $102 million in projects in the Midwest. Midwest Regional Contacts and Project Information, http://www.nefinc.org/Developers/MidwestTeam.htm (last visited Nov. 20, 2005).

217. *See* OFFICE OF TAX EXEMPT BONDS, TAX-EXEMPT GOVERNMENTAL BONDS: COMPLIANCE GUIDE 2-8 (2003), *available at* http://www.novoco.com/IRS_Regulations/GovBond_Pub4079.pdf (discussing the basic framework of tax-exempt government bonds). Two examples of these subsidies are state and local tax-exempt bonds and Section 515 loans from the Rural Housing Service (RHS). ABT 2000 REPORT, *supra* note 213, at 12-13.

218. ABT 2001 REPORT, *supra* note 214, at 10.

219. *See* Roisman, *supra* note 2, at 1044-45 (describing the reporting requirements under Section 8 and other programs).

220. *See* Roisman, *supra* note 2, at 1012 (stating that the Treasury, an administrator of the LIHTC, "lack[s] information regarding the extent of discrimination or segregation in the program"). This differs if the LIHTC units are mixed with funds from HUD or the Department of Agriculture, which then explicitly requires that racial data is collected. *Id.* at 1038.

221. *See* ABT ASSOCS. INC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT: FINAL REPORT 1-4, 1-5 (1996) [hereinafter ABT 1996 REPORT].

222. *See infra* Part IV.C.2 (discussing local placement data).

223. Khadduri, *supra* note 2, at 6.

224. *Id.*

225. *Id.* at 5.

226. ABT ASSOCS., INC., ASSESSMENT OF THE ECONOMIC AND SOCIAL CHARACTERISTICS OF LIHTC RESIDENTS AND NEIGHBORHOODS: FINAL REPORT, 4:16-4:18 (2000) [hereinafter ABT SOCIAL ASSESSMENT]. By definition, CDCs are often small and lack the resources to work beyond

The national distribution of LIHTC units in inner-city, suburban and non-metropolitan areas is similar to the distribution of rental units generally.[227] LIHTC units, however, are more likely than other rental units to be located in census tracts where more than 60 percent of households would qualify to live in a tax credit unit.[228] Tax credit units are also more likely to be located in high-poverty areas, and in largely minority or rental occupied tracts with large proportions of female-headed households.[229] National data also indicates that the placement of housing in urban, suburban, or rural areas has a significant effect on the racial and economic makeup of the site: city locations are associated with higher poverty and minority concentration.[230]

Although LIHTC units are not found in as deeply segregated neighborhoods as other forms of assisted housing, recent scholarship finds that LIHTC neighborhoods nationally contain disproportionate shares of black and Latino residents and are places with increasing populations of blacks and Latinos.[231] Analysis also shows that of the 43 percent of units in neighborhoods with relatively low poverty, 25 percent of the LIHTC family units with more than two bedrooms were in census tracts with more than 20 percent minority residents.[232] Given that racial transition begins in schools, resegregation of neighborhoods is quite possible if low-income minority families are concentrated there. It is possible, if not likely, that units made

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the narrow confines of a city neighborhood, much less participate in the necessary, strenuous efforts to enforce fair housing in hostile suburbs. Moreover, affluent communities have little need for CDCs.

227. ABT 2001 REPORT, *supra* note 214, at 23. Forty-eight percent of LIHTC units placed in service from 1995 through 2000 are in central cities, 38% are in suburbs, and 14% are in non-metro areas. *Id*. Among rental units in general, 45.5% are in central cities, 39% are in suburbs, and 15.5% are in non-metro areas. *Id*. Another recent study of LIHTC units shows that 58% of such units are in central cities, and 42% are "in the suburbs,"—but there is no data distinguishing between stressed and affluent communities in this analysis. *Id.* at 29-35. The characteristics of a community (whether in a city or suburb) have profound consequences for the opportunities of people living there. *See* ORFIELD, *supra* note 46, at 28-49 (classifying different communities on factors including concentrations of jobs, school composition, and tax base).

228. ABT 2000 REPORT, *supra* note 213, at 29.

229. *Id*.

230. ABT SOCIAL ASSESSMENT, *supra* note 226, at 4-4. Thirty-one percent of LIHTC units in central city locations are in neighborhoods of concentrated poverty compared with only 4.7% in the suburbs and 9.9% in non-metro areas. *Id.* Over half of all units in central city locations are in neighborhoods with high minority concentrations compared with 28% in suburbs and 14.4% in non-metro areas. *Id.* at 4-24.

231. LANCE FREEMAN, CTR. ON URBAN AND METRO. POLICY, SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW-INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S 6-8 (2004), *available at* http://www.brookings.edu/urban/pubs/20040405_Freemand.pdf.

232. Khadduri, *supra* note 2, at 8 ex. 5.

available in white neighborhoods only went to white, low-income tenants.[233] We simply cannot say, because the state housing agency kept no racial or socioeconomic data, the basic minimal requirement of the FHA.

Other data, although not collected specifically for the LIHTC, shows a relationship between site placement and racial composition. Without measures to overcome housing market discrimination, the placement of low-income units in the suburbs often causes segregation. In New Jersey, where the *Mount Laurel* litigation led to the construction of a significant number of low-income units in the suburbs, few blacks or Latinos live in units built in white areas.[234] In other HUD programs, non-whites have found it far harder than whites to use vouchers in white areas, even where racial data is kept and could be used to support civil rights claims.[235]

2. Local Placement Data

Scholarship on metropolitan or statewide levels shows that different parts of the country deploy LIHTC units differently. The Midwest and the Northeast, the most fragmented regions governmentally,[236] have the highest likelihood of segregative placement, whereas the South and West have a much less fragmented pattern of local control and a less segregative pattern.[237] Many parts

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233. This likelihood is borne out by other programs which failed to consider race. *See* NAOMI BAILIN WISH & STEPHEN EISDORFER, THE IMPACT OF *MT. LAUREL* INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS 68-76 (1996) (analyzing data collected by the New Jersey Affordable Housing Management Service). In the MTO experiments, race was not considered and many of the families who moved to low-income neighborhoods remained in extremely racially concentrated neighborhoods. U.S. DEP'T OF HOUS. AND URBAN DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: INTERIM IMPACTS EVALUATION viii (2003).

234. WISH & EISDORFER, *supra* note 233, at 68-76.

235. *Strengths and Weaknesses of the Housing Voucher Program: Hearing Before the Subcomm. On Housing and Community Opportunity of the H. Comm. On Financial Services*, 108th Cong. (2003) (statement of Margery Austin Turner, Director, Metropolitan Housing and Communities Policy Center, The Urban Institute), *available at* http://www.urban.org/url.cfm?ID=900635; Emily Rosenbaum et al., *New Places, New Faces: An Analysis of Neighborhoods and Social Ties Among MTO Movers in Chicago, in* CHOOSING A BETTER LIFE?: EVALUATING THE MOVING OPPORTUNITY SOCIAL EXPERIMENT 275, 285-86 (John Goering & Judith D. Feins eds., 2003).

236. ORFIELD, *supra* note 46, at 131.

237. Khadduri, *supra* note 2, at 8-9. Other commentators have noted that much of the litigation and problem areas surrounding the tax credit come from New Jersey, Connecticut, and Massachusetts. *See* Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197, 202 (Xavier de Souza Briggs ed., 2005) (discussing housing trends based on the results of the first national study of the LIHTC by Abt Associates).

of the country, particularly the Southeast, suggest at least isolated examples of much less economically segregative placement. Nonetheless, even this placement could be far short of what is necessary to affirmatively further fair housing.

Individual studies from several states in the Northeast show a relationship between LIHTC site placements and racial concentration. In Massachusetts, advocacy groups have documented the presence of widespread segregation of white residents from black and Hispanic residents in metropolitan areas and the difficulty that poor, minority families face in moving to more integrated communities with better housing.[238] In Connecticut, the pattern is similar.[239] In New Jersey, LIHTC family units are found more often in New Jersey's large and distressed cities. Nearly 60 percent of LIHTC family units in New Jersey are located in large central cities, and 21 percent are located in distressed suburban areas with less than 3 percent of units located in the state's affluent municipalities.[240]

Ironically, New Jersey tends to allocate most of its federal affordable housing funds to school districts that the federal government considers to be failing. New Jersey cities with high concentrations of LIHTC units also have a disproportionate share of schools in need of improvement to attain No Child Left Behind standards. For example, Newark, where most of the schools do not meet federal NCLB standards, has 21.3 percent of the LIHTC family units. Sixteen of the twenty-five schools in northern New Jersey counties with the highest concentration of students in poverty also have the highest allocation of tax credits.[241] Qualified census tracts in New Jersey have higher poverty rates and a considerably higher concentration of minorities than other tracts.[242]

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238. Letter from Judith Liben et al., Mass. Law Reform Inst., to Jane Gumble & Catherine Racer, Dep't of Hous. and Cmty. Dev. 3-4 (Jan. 27, 2004), http://www.prrac.org/pdf/MA2004 LawReform.pdf.

239. ABT 2001 REPORT, *supra* note 214, at 60, 63.

240. Amicus Brief on Behalf of the Institute of Race & Poverty and the Kirwan Institute for the Study of Race and Ethnicity at 33-35, *In re* Adoption of the 2002 Low Income Hous. Tax Credit Qualified Allocation Plan, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2002) (dismissed) [hereinafter IRP Amicus Brief].

241. Myron Orfield & Thomas Luce, NEW JERSEY METROPATTERNS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY IN NEW JERSEY 22 (2003), *available at* http://www.ameregis.com/ maps/region_maps/NJ%20Metropatterns%20complete%2003_24_03.pdf.

242. E-mail from Eric Myott, Staff Member, Institute on Race and Poverty, to Myron Orfield, Director, Institute on Race and Poverty (June 24, 2004, 10:08:55 CST) (on file with author). As of 2004, there are 285 QCTs in New Jersey. *Id.* QCTs have a tract poverty rate average of 28.82% compared to 6.18% for the rest of New Jersey tracts. *Id.* Only 28 QCTs have populations of less than 30 percent black and Hispanic and only 11 are located more than a mile away from tracts with 30 percent or more black and Hispanic populations. *Id.* Most QCTs with low black/Hispanic populations are located outside metropolitan areas. *Id.*

V. CASE STUDY: APPLYING FAIR HOUSING TO TAX CREDITS IN NEW JERSEY

A. Overview

In 2002 and 2003, the New Jersey Housing and Mortgage Finance Agency ("HMFA") proposed qualified allocation plans which critics argued would funnel tax credits into primarily segregated city neighborhoods.[243] The Agency's previous allocations had concentrated LIHTC units in New Jersey's large and distressed cities.[244] Allocations were high for segregated areas like Newark, Plainfield, and Camden,[245] which was recently found to be the most dangerous city in the country.[246] In a striking parallel to the *Gautreaux* case, Camden officials are implementing a vast redevelopment plan that will destroy thousands of existing affordable housing units around the central business district and use LIHTC credits to rebuild housing a few miles away for a portion of those displaced.[247] Cities where projects received a high number of tax credits typically had low tax bases, declining employment opportunities, and segregated schools.[248]

B. The Spectrum of Parties and Positions

1. Regionalists: Fair Share Housing Center

Fair Share Housing Center ("Fair Share") is a non-profit community development corporation that builds low-income housing

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243. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 5-6, 9 (N.J. Super. Ct. App. Div. 2004); *see* Brief of Appellant, *In re* Adoption of the 2002 Low Income Housing Tax Credit Allocation Plan, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2003) (dismissed) [hereinafter Appellants' Brief] (HMFA regulations "guaranteed that three-quarters of tax credit funding would be used to construct housing in racially segregated neighborhood with racially-segregated schools").

244. Appellants' Brief, *supra* note 243, at 2.

245. *Id.* at 9.

246. *Id.*; Press Release, Morgan Quinto Press, *City Crime Rankings* Names Newton, Massachusetts as America's Safest City, NJ Ranks as Most Dangerous (Nov. 22, 2004), http://www.morganquinto.com/safecity.htm.

247. Jill P. Capuzzo, *Camden's Billion-Dollar Gamble*, N.Y. TIMES, June 27, 2004, at 14NJ. This vast effort has spawned a race to the bottom as frightened inner-ring suburbs of Camden are planning the demolition of existing units of affordable housing to prevent a rapidly rolling pattern of resegregation and decline. HOWARD GILLETTE, CAMDEN (forthcoming) (Ch. 10 manuscript at 30-32, on file with author). The plan enjoys the support of prominent CDC leader Jeremy Nowak and many of the active developers in the CDC community are involved. *Id.*

248. IRP Amicus Brief, *supra* note 240, at 33-41; *In re 2003*, 848 A.2d at 5, 10.

in the cities and suburbs of New Jersey. Frustrated that state allocation of tax credits disproportionately favors central cities, Fair Share, the Camden County and Southern Burlington County NAACPs,[249] and the Camden City Taxpayers Association challenged the HMFA's method for allocating credits as set out in its qualified allocation plans.[250] Fair Share sought to include in the record data obtained through the New Jersey Public Records Act that showed that the LIHTC funding supported segregation in housing for families, but the motion was denied on procedural grounds.[251] Because of the lack of complete data, particularly any data regarding the tenants, the core of the plaintiffs' arguments was based on their claim that by allocating tax credits without collecting the residents' racial data, HMFA violated its duty to affirmatively further fair housing under Title VIII.

Specifically, the plaintiffs argued that the FHA, an executive order, and case law supported applying the duty to promote fair housing to the IRS[252] and that the duty applied to the HMFA via FHA regulations.[253] Because the agency did not consider the segregative impact of its allocation, Fair Share argued that the regulations should be set aside.[254] It countered the argument that the HMFA was merely following the QCT preference by noting that the HMFA ignored both other preferences of the same statute and the additional requirement that placements in QCTs include "a concerted community revitalization plan."[255] The plaintiffs further argued that the HMFA's plan violated its Title VIII duty through intentional discrimination or, alternately, disparate impact discrimination.[256] Although the plaintiffs urged that the regulation be reversed, an alternative allocation method was never fully spelled out; the brief, however,

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249. The NAACP chapters, as well as counsel Peter O'Connor, brought the landmark Mt. Laurel cases, in which the New Jersey Supreme Court found that suburban exclusionary zoning violated the General Welfare Clause of the New Jersey Constitution. S. Burlington County NAACP v. Twp of Mt. Laurel, 336 A.2d 713, 713-15, 725, 730 (N.J. 1975); S. Burlington County NAACP v. Twp of Mt. Laurel, 456 A.2d 390, 390, 407 (N.J. 1983). *See generally* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995) (discussing the Mt. Laurel litigation).

250. *In re 2003,* 848 A.2d at 5, 10. Though the 2002 QAP was the initial focus of the litigation, the parties eventually agreed to base the challenge on the 2003 QAP, which is the focus of the court's decision. *Id*. at 6.

251. Appellants' Brief, *supra* note 243, at 16.

252. *Id.* at 28-37; *see supra* Part III.C.3 (discussing applicable regulations and *Shannon*).

253. Appellants' Brief, *supra* note 243, at 37-42; *see supra* Part III.C.3 (discussing applicable regulations).

254. Appellants' Brief, *supra* note 243, at 50. The appellants also argued that the agency violated state constitutional provisions regarding education, *id*. at 50-56, and general welfare, *id*. at 56-64.

255. *Id.* at 42; 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2005).

256. Appellants' Brief, *supra* note 243, at 64-72.

strongly suggested that HUD siting rules should govern the placement of credits.[257]

Fair Share, though isolated by the community development corporation movement and city leaders, enjoyed strong support from some activists and politicians. Pennsauken's black mayor, Rick Taylor, who worked hard to keep his suburb from experiencing rapid racial change, supported Fair Share's position.[258] Daryl Armstrong, a black minister and leader of the New Jersey Regional Equity Coalition, announced his support, basing it on his own experience growing up in a segregated neighborhood and the desire for an integrated society.[259] Fair Share was also supported by amici from the Lawyer's Committee for Civil Rights Under Law[260] and two other institutes which study race and poverty.[261] In their brief, the institutes argued that the HMFA must take into account race in allocating credits,[262] disputed the claim that LIHTC allocations revitalize poor communities,[263] and set out the harms of concentrated poverty and racial isolation.[264]

2. Localist Community Development Perspective: The HMFA and LISC

The defendant Housing and Mortgage Finance Agency, a part of the state's Department of Community Affairs,[265] took a hard-line

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257. *Id*.

258. GILLETTE, *supra* note 247, at 30-32. Pennsauken is one of few New Jersey areas which is racially mixed. *See* Susan Warner, *Visions of Another Trendy Enclave*, N.Y. TIMES, Sep. 26, 2004, at 1.

259. Daryl Armstrong, Address at the South Jersey Regional Equity Summit, St. Anthony of Padua Roman Catholic Church, Hightstown, N.J. (June 21, 2004) (personally attended by author).

260. *See generally* Brief in Support of Lawyers' Committee for Civil Rights Under Law's Motion for Leave to Appear as Amicus Curiae and on the Merits, *In re* Adoption of the 2002 Low Income Housing Tax Credit Allocation Plan, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2003) (dismissed).

261. *See generally* IRP Amicus Brief, *supra* note 240 (noting the involvement of two other research institutes).

262. IRP Amicus Brief, *supra* note 240, at 4-9. The brief argued that the Supreme Court's recent decision in *Grutter v. Bollinger*, 539 U.S. 306, provides several reasons that a race-conscious QAP would survive strict scrutiny. *Id*. at 13-15.

263. *Id*. at 33-39.

264. *Id*. at 20-27.

265. The head of the DCA, Susan Bass Levin, defended the QAP to the press. Bill Duhart, *Lawsuit Holding Up Housing*, COURIER-POST (Cherry Hill, N.J.), Nov. 17, 2003, at 1G. As with the plaintiffs, the individuals on the state's side had connections with the Mt. Laurel litigation. Notably, one of the toughest and most successful housing battles fought by Peter O'Connor and Fair Share was in the suburbs of Cherry Hill, where Levin was mayor. *See* Fair Share Hous. Ctr., Inc. v. Twp. of Cherry Hill, 802 A.2d 512 (2002). Both Levin and former Governor Jim

position against Fair Share's challenge. It argued both that its QAP struck an appropriate balance between urban and suburban affordable housing and that Title VIII imposed no obligations regarding racial and economic segregation. HMFA argued that it should not be bound by HUD siting requirements because no federal agency has expressly required that the tax credit program be so bound and because it had no direct control of the siting of projects.[266] The Agency also argued that it did not need to comply with the FHA's affirmative duty because doing so would conflict with its duty to promote urban revitalization and that a plan which took into account race would violate Supreme Court case law on race-based remedies.[267] Finally, it contended that fair housing goals were met in the 2003 QAP through a restructuring of its funding cycles which abolished the city-suburb distinction and adopted measures favoring mixed-income housing.[268]

The HMFA's position was supported by central city politicians, bureaucrats, and developers. Local Initiatives Support Corporation ("LISC"),[269]a huge community development intermediary which assists communities in developing affordable spaces,[270]filed an amicus brief. In the brief, LISC argued that the creation of affordable housing in urban neighborhoods is crucial to revitalizing those communities.[271]

McGreevey, as mayor of Woodbridge, fought the construction of low income housing in their municipalities. Allan Malach, *The Betrayal of Mount Laurel*, SHELTERFORCE ONLINE, Mar./Apr. 2004, http://www.nhi.org/online/issues/134/mtlaurel.html. A 2001 report showed that Woodbridge and Cherry Hill each should have produced a fair share of over 1,300 units each and had not produced any. *Id*.

266. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 14 (N.J. Super. Ct. App. Div. 2004); Brief and Appendix of Respondent New Jersey Housing and Mortgage Finance Authority at 16, *In re* 2002 Low Income Housing Tax Credit Qualified Allocation Plan, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2003) (dismissed) [hereinafter Brief of Respondent].

267. Brief of Respondent, *supra* note 266, at 27, 36-37. It distinguished previous cases, like *Shannon* and *Otero*, largely by arguing that "times have changed significantly." *Id.* at 41. While this last point was not strongly asserted, it was strategically very threatening for fair housing groups that a Democratic administration would assert this type of claim, which has been more closely associated with colorblind ideological conservatives. In the context of a federal judiciary increasingly adverse to race conscious claims, the Democratic administration of New Jersey was providing cover to a decision which could gut the Fair Housing Act. The harshness of this position by the state spurned civil rights amici from all over the nation.

268. *See In re 2003*, 848 A.2d at 9-10.

269. *See* Amicus Curiae Brief on Behalf of Local Initiatives Support Corporation, *In re* Adoption of the 2002 Low Income Hous. Tax Credit Qualified Allocation Plan, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2003) (dismissed) [hereinafter Local Initiatives Amicus Brief].

270. LOC. INITIATIVES SUPPORT CORP., 2003 ANNUAL REPORT, *available at* http://www.lisc.org/whatsnew/documents/ 2003ar_webversion.pdf. Since 1980, LISC claims to have spent almost $13 billion in these efforts and to have produced nearly 150,000 affordable homes. *Id.*

271. Local Initiatives Amicus Brief, *supra* note 269, at 13-14; *see* Jeremy Nowak, President and CEO, The Reinvestment Fund, Urban Redevelopment Testimony, 35 N.J. Reg. 3298(b) app.

After a decade of construction of affordable housing in Newark, LISC argued that crime decreased, building permits increased, and housing prices rose.[272] The LISC brief cites case studies of four cities, finding that affordable housing opportunities are associated with increases in home prices and in some cases, increased commercial activity and a decline in crime.[273]

The LISC brief did not address the racial effects of the HMFA's policies or effects on educational opportunities and did not provide specific data on job creation in New Jersey.[274]

3. Middle Ground: The New Jersey Institute for Social Justice

The New Jersey Institute for Social Justice headed a group of organizations with conflicted loyalties; they advocate civil rights but also depend on status quo programs. The Institute argued that, while federal and state civil rights laws do apply to the LIHTC, most low-income housing should still be built in poor neighborhoods. The Institute's position acknowledged both the dire problem of segregation and the importance and effectiveness of community revitalization.[275] Citing many of the same cases as the Fair Share plaintiffs, the amicus brief stated that "an unbroken string of court decisions have held that the Fair Housing Act's 'affirmatively furthering' requirement applies to state and local agencies using federal funds,"[276] and thus, it applied to the HMFA.[277] The brief argued that racial integration should be "one major criterion" in determining a QAP but that the QCT preference should also be a factor. The brief further contended that although suburban sites should be high on the priority list, urban sites should retain the majority of tax credits.[278] Implicit in the Institute's position is the argument that integration has been difficult, if not impossible, to accomplish, and thus societal change should be slow and incremental. The Institute for Social Justice brief may be a testament

VII (Jun. 14, 2003) [hereinafter Nowak Testimony] ("Subsidy allocation can lead market rate developments, if done in a careful manner.").

272. Local Initiatives Amicus Brief, *supra* note 269, at 19-20.

273. *Id.* at 14-16.

274. In fact, many of the cities receiving the highest LIHTC allocations had double digit losses in private sector jobs, during a period of strong growth. IRP Amicus Brief, *supra* note 240, at 35.

275. Brief in Support of New Jersey Institute for Social Justice's Motion to Appear as Amici Curiae and on the Merits at 1-2, *In re* Adoption of the 2002 Low Income Hous. Tax Credit, No. A-10-02T2 (N.J. Super Ct. App. Div. 2003) (dismissed) [hereinafter N.J. Inst. For Social Justice Brief].

276. *Id.* at 21-23.

277. *Id.* at 23-25.

278. *Id.* at 31-33.

to the difficult position that many established community development practitioners have with changing a status quo upon which their organizations depend.

C. The Decision of the Appellate Court

In *In re 2003*, the appellate court affirmed the legality of the HMFA's qualified allocation plan.[279] The court ruled that, although the Agency had a duty to administer the tax credit program in a manner that affirmatively furthers the purposes of Title VIII, the duty had to be defined as congruent with other provisions of federal and state housing law.[280] Specifically, the court held that integration was, at most, a "desirable by-product" of the HMFA's statutory mission to provide housing and redevelopment and that the federal statutory preference for funding qualified census tracts required the agency to focus on non-racial criteria.[281] With this notion of the Agency's duty, the court rejected the claim that the QAP violated HMFA's duty to affirmatively further fair housing under Title VIII.[282] The court held that the plan appropriately reconciled the state and federal statutory directive to give priority to projects located in high-poverty, community revitalization areas with the Title VIII duty.[283] The balancing approach used in the *In re 2003* decision most closely resembles the one proposed by the New Jersey Institute for Social Justice amicus brief, albeit with greater weight given to the QCT preference.

After upholding use of the QAP, the court noted in dicta that if the HMFA had structured its allocation plan so as to foster integration by allocating tax credits to developments in predominantly white communities, it might subject itself to claims that this race-based selection criteria violated the Equal Protection Clause.[284] The court suggested that central-city mayors or urban-area developers might argue that race-based selection criteria favoring suburban

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279. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

280. *Id*.

281. *Id*. at 25-26.

282. *Id*. at 9; 42 U.S.C. § 3608(d) (2005).

283. *In re 2003*, 848 A.2d at 19-22. The court also ruled that the QAP did not violate Title VIII by having a substantial discriminatory effect, and that it did not violate the state or federal equal protection clauses, the Mount Laurel doctrine, or the state Law Against Discrimination. *Id*. at 25-26.

284. *Id.* at 17-18 (citing Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999)).

development violated the Equal Protection Clause by discriminating against racial minorities.[285]

VI. RECONCILING FAIR HOUSING AND THE LOW INCOME HOUSING TAX CREDIT

The *In Re 2003* court reiterated what is clear from legislative history, case law, and administrative materials: the duty to affirmatively further integrated housing applies to all federal housing programs,[286] including the LIHTC.[287] Although agencies administering the program are bound by the duty,[288] substantial disagreement remains as to the scope of that duty and its importance in relation to other statutory commands. When another priority carries the weight of a statutory or regulatory enactment, an agency could understandably construe the nature of the Title VIII duty narrowly or engage in its own balancing test. The special importance and history of civil rights law require that the fair housing duty be considered before all others and that the regulations be applied broadly to cover the LIHTC program.

A. The Fair Housing Duty Must Be Accorded Priority over the QCT Preference

1. Special Rules for Interpretation of Civil Rights Statutes Require Prioritizing the Title VIII Duty

Courts generally construe remedial statutes broadly, so as to give effect to their purposes.[289] The Supreme Court held in *Trafficante v. Metropolitan Life Insurance Co.* that the language of Title VIII

285. *In re 2003*, 848 A.2d at 18.

286. Local Initiatives Amicus Brief, *supra* note 269, at 20; *see* Albany Apartments Tenants Assoc. v. Veneman, No. Civ. 01-1976, 2003 WL 1571576 at *10-11 (D. Minn. Mar. 11, 2003) (Department of Agriculture program); Jones v. Office of the Comptroller of the Currency, 983 F.Supp. 197, 204 (D.D.C 1997) (Office of Comptroller of the Currency program).

287. *In re 2003*, 848 A.2d at 21-22.

288. Clearly, the IRS is an executive agency administering a program relating to housing, particularly within the parenthetical language in the statute applying the duty to federal agencies having supervisory authority of financial institutions. 42 U.S.C. § 3608(d) (2005). Housing finance agencies, as distributors of mortgage funds and home building funds are also covered under this statute. *See generally* Otero v. New York City Hous. Auth., 484 F.2d 1122 (1973); 26 C.F.R. § 1.42-9(a) (2005).

289. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

should be construed broadly and inclusively.[290] The Court, citing the testimony of one of the FHA's authors, Walter Mondale, noted "the reach of [the Act] was to replace the ghettos 'by truly integrated and balanced living patterns.'"[291] The Court went on to hold that vitality could be given to this policy "only by a generous construction" of the Act's provision establishing private citizens' standing to sue for enforcement of the Act.[292] Conversely, courts have held that exceptions to remedial statutes, and the FHA in particular, should be construed narrowly.[293] Minimally, this broad construction requires that the Title VIII duty be accorded great weight. Given the immense segregative impact of locating housing in poor neighborhoods, a reading consistent with *Trafficante* would require that the duty to further integration be considered before any other.

2. Supremacy Clause Jurisprudence Requires Prioritizing the Title VIII Duty over the QCT Preference

The claim that agencies administering the tax credit program can weigh the state duty to revitalize against other duties, as the court did in *In Re 2003*, is invalid under the Supremacy Clause of the U.S. Constitution. Federal law is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[294] State courts "are obligated by the Supremacy Clause to protect federally guaranteed civil rights as zealously as would a federal court."[295] To the extent that there might be any conflict between an agency's mission under state law and its duties under Title VIII, reviewing courts should give priority to the Title VIII mandate.

A state government may not exempt one of its agencies from the mandates of federal law simply by defining the agency's missions

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292. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972). The Supreme Court and lower appellate courts apply the same canon in other civil rights statutes. *See* Chisom v. Roemer, 501 U.S. 380 (1991) (discussing the Voting Rights Act of 1965 and explaining *Allen v. State Board of Elections*, 393 U.S. 544 (1969)); South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (same); Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003) (discussing the Americans with Disabilities Act).

291. *Trafficante*, 409 U.S. at 211.

292. *Id.* at 212; *see* Hous. Opportunities Made Equal v. Cincinnati Enquirer, 943 F.2d 644, 646 (6th Cir. 1991) (holding the FHA to be a remedial statute that should be construed broadly to effectuate its purpose).

293. *See* Fair Hous. Advocates Ass'n v. City of Richmond Heights, 209 F.3d 626, 635 (6th Cir. 2000) (holding that exemptions under the Fair Housing Act should be construed narrowly to effectuate the purpose of the statute).

294. U.S. CONST. art. VI, cl. 2.

295. Rachel v. State of Georgia, 342 F.2d 336, 342 (5th Cir. 1965), *aff'd,* 384 U.S. 780 (1966).

in a way that conflicts with the requirements of federal law.[296] In *In Re 2003*, the Appellate Division erred in holding that the New Jersey legislature, in defining the mission of HMFA, either reduced or eliminated the Agency's obligations under Title VIII to administer federally funded housing programs in a matter that affirmatively furthers the purposes of the FHA.

In *Youakim v. Miller*, the Seventh Circuit held that to the extent that state law excluded children in the foster care of relatives from receipt of funds, the state statutes were contrary to the federal Social Security Act ("SSA") and must be struck down under the Supremacy Clause.[297] In this case, the plaintiffs challenged the Illinois state statutory scheme for the administration of the federally funded AFDC-FC program, which provided aid to children in foster care, as contrary to the SSA.[298] The court expressly rejected the state's claim that the Illinois legislature's definitions should govern the state's distribution of AFDC-FC funds: "The [state agency] can hardly rely upon a definition . . . which directly conflicts with the federal statutory definition as a way of upsetting the district court's determination of a violation of the Supremacy Clause."[299] As in *Youakim*, plaintiffs like Fair Share claim that state governments are administering a federally funded program in a way that conflicts with applicable federal law; the result should be the same.

3. The Legislative History and Language of each Statute Supports Prioritizing the FHA Duty over the QCT Preference

The language of the LIHTC statute itself supports prioritizing the Title VIII duty. A plain reading of the statute shows the QCT preference applies to already selected projects—that is, projects selected subject to the duty to affirmatively further fair housing. Many LIHTC projects involve Section 8 voucher tenants and other funds allocated by HUD, which are subject to regulations prohibiting segregative siting.[300] The structure of the LIHTC statute, whatever its secondary preferences for QCTs, must wholly accord with the Title VIII duty.

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296. Under the Supremacy Clause, "states may not enact laws or regulations which are contrary to federal law." Youakim v. Miller, 562 F.2d 483, 494 (7th Cir. 1977), *aff'd* 440 U.S. 125 (1979).

297. *Id.* at 495.

298. *Id.* at 484-86, 494.

299. *Id.* at 488.

300. U.S. DEPT. OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE, *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

The mandatory language used by Congress in writing the Title VIII duty is also stronger than the mere preference of allocation to project QCTs, especially when the statute gives apparently equal preference to projects serving the poorest tenants and projects lasting the longest.[301] The QCT statute itself provides little guidance on how housing credit agencies should weigh these factors in a qualified allocation plan, and the regulations are also silent on the issue.[302] A federal district court recently discussed the lack of guidance provided by the QCT statute, characterizing the language as too "vague and amorphous to create judicially enforceable rights under §1983."[303] Title VIII, however, proclaims loud and clear the requirement to affirmatively further fair housing.

In contrast to the clear intent to create a duty to affirmatively further integrated housing choices, as evidenced by the legislative debate,[304] Congress's adoption of the qualified census preference was enacted without debate or discussion. It is hard to believe that Congress would exempt the single-largest federal source of new construction from a very important part of the Fair Housing Act without at least some discussion. If legislative history is considered determinative at all in resolving statutory conflicts, the silent congressional record in enacting the QCT preference must be read as subordinating the preference to the fair housing duty. This is particularly true in light of the congressional intent to end government complicity in creating urban ghettos.

4. The HUD Siting Regulations Show the Preeminence of the FHA Duty

The HUD siting regulations are not discretionary agency interpretations, but restatements of the clear holdings of the federal courts interpreting the duty to "affirmatively further fair housing." The requirements for public housing and Section 8 siting were derived from *Shannon*, which itself involved neither program but rather a now discontinued HUD subsidy to private developers called section 236.[305] *Shannon* and its progeny require federal agencies, and state grantees of those agencies involved in housing, to use their leverage to support

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301. *See* 26 U.S.C. § 42 (m)(1)(B)(ii)(I) (2005) (giving equal weight in allocating housing credit dollars to tenants' income and the duration of the project).

302. *See* 26 C.F.R. § 1.42-17(a)(2) (2005) (reserving a section of the Code of Federal Regulations for delineating specific criteria).

303. DeHarder Inv. Corp. v. Indiana Hous. Fin. Auth., 909 F.Supp. 606, 615 (S.D. Ind. 1995).

304. *See supra* Part III.B. (describing legislative history of duty to affirmatively further).

305. *See supra* Part III.C.1 (examining the background and impact of *Shannon*).

an integrated housing pattern.[306] The court applied regulations which by their own terms applied to Section 8 and public housing, while the housing in *Shannon* was neither.[307] If this basic finding was valid regarding the government's largest low-income housing subsidy in 1970, it should apply to the government's largest subsidy for the production and rehabilitation of assisted housing today.

The regulations' explicit prohibitions reinforce the Title VIII duty by severely limiting the siting of public housing in high minority and resegregating neighborhoods. The exception to the minority concentration prohibition for areas with "sufficient, comparable opportunities"[308] does not undermine the priority of integration. The regulation puts the burden of proving that areas in the regional market free of discrimination exist on the developer proposing the low income site in an area of concentration of the regional housing market. *Shannon* has very strong race-specific language and bans locating new low-income housing in racially mixed areas. In this light, "sufficient comparable opportunities" cannot mean the comparable choice to live only in other segregated or resegregating neighborhoods; rather it must provide the choice to live in white or stably integrated areas. *Comparable opportunities* must mean opportunities *comparable to whites*. This implies a freedom of choice in the housing market such that minority families can choose housing they can afford in neighborhoods they desire without fear of steering. Batteries of housing discrimination studies show that pervasive steering, discrimination in buying, selling, showing, and mortgage lending are present throughout the United States.[309] Thus, this exception, consistent with the FHA and its command to affirmatively further fair housing, will be very difficult to satisfy in virtually all major regions.[310]

The "overriding need" exception also does not diminish the power of the duty to integrate. The regulation itself states that "'overriding need' may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination [makes]. . . sites outside areas of

306. *See supra* Part III.C.1 (discussing the effect of *Shannon* on federal housing grants).

307. *See* Shannon v. HUD, 436 F.2d 809, 821-23 (3d Cir. 1970) (weighing factors applicable to Section 8 and public housing when considering the legitimacy of a HUD project).

308. 24 C.F.R. § 941.202 (2005).

309. *See supra* Part II.A (listing recent analyses of housing discrimination and resegregation affecting federal housing policy).

310. Margery Austin Turner et al., *Discrimination in Metropolitan Housing Markets*, URBAN INST., *available at* http://www.urban.org/url.cfm?ID=410821.

minority concentration unavailable."[311] Again, the burden is on the proposer of the site to prove that these terms are satisfied. The determination of an overriding need must be made in light of real evidence, such as recent HUD-sponsored, but independent, studies. These studies showed that many of the most severely ghettoized cities are in weak market regions in which the regional market is adequately meeting the need for affordable housing.[312] To the extent the exception is given a less than rigorous regional evaluation, it exceeds HUD's regulatory power as circumscribed by the FHA. Although locating more affordable housing in racially segregated areas may be permitted under some circumstances, Title VIII's direction to promote integration is not easily overcome.[313]

5. Case Law Affirms Prioritizing the Title VIII Duty

A federal district court interpreting a similar preference statute recently held that the Title VIII duty should be considered first. The court found that the Title VIII duty trumped a federal statute allowing a local public housing agency to create local resident preference for public housing.[314] In reading these two statutes together, the court found that the preference applied only after the broad duty to affirmatively further fair housing was carried out. As in the case of the QCT preference, the court noted that nothing in the statute or legislative history[315] shows that Congress intended to elevate the preferences of local residents over fair housing concerns:

> If anything the regulation suggests a hierarchy of congressional mandates, with civil rights law taking precedence. Only if they are met are the residency preferences permissible. Indeed to ignore the civil rights impact of residential preferences is to . . . give effect to an individual judge's view that one goal of the statute, concern for local needs, is somehow more important than another, concern for fair housing.[316]

Following this logic, the preference would be valid in QCTs that are part of a concerted community revitalization plan and in

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311. 24 C.F.R. § 941.202 (2005); *see supra* Part III.B-C.

312. *See* Khadduri, *supra* note 2, at 9 (referencing residential building statistics for high poverty communities).

313. The Second Circuit in *Otero* addressed that issue as follows, noting the duty to integrate "is not to be put aside whenever racial minorities are willing to accept segregated housing." Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134-35 (2d Cir. 1973).

314. Langlois v. Abington Housing Auth., 234 F.Supp. 2d 33, 67 (D. Mass. 2002). Plaintiff, a low income woman of color living outside a predominantly white low poverty area challenged a statute which allowed the public housing agency for the white area to create a local resident preference. *Id* at 37.

315. In contrast to the LIHTC, in *Langlois* there was a legislative record supporting the statute allowing local authorities to make preferences. *Id.* at 68.

316. *Id*.

neighborhoods that are not racially segregated or in danger of resegregation.

If the Title VIII duty is predominant and the qualified census tract preference is secondary, then the two statutes can be reconciled. If a state agency is faced with two projects in non-segregated areas, one in a QCT and one not, then the project in the QCT should be given preference.

B. Recommendations for a Concerted Revitalization Plan Which Complies with Title VIII

The qualified census tract statute specifically mentions "community revitalization" twice but does not define it.[317] In light of the relative lack of guidance on the QCT provision and the lack of a statutory or regulatory definition, agencies should use the available evidence to determine its meaning. To give effect to the QCT statutory requirement of a "concerted community revitalization plan," while recognizing the supremacy of the FHA, housing agencies must adopt a strategy to place credits in only those QCTs that satisfy both. As the authors of a recent HUD literature review recently noted, however, using housing production subsidies (i.e. tax credits) as a revitalization strategy in deeply distressed neighborhoods "will simply fail."[318] Accordingly, this Section outlines essential features of a concerted revitalization plan which would permit housing agencies to place credits in the QCTs where they can succeed while meeting the requirements of Title VIII. Following this argument, the number of placements in QCTs would drop, shifting instead to stable or affluent areas of the region. Because the proposed remedy for giving guidance to the QCT provision involves race, a brief consideration of the *Walker* opinion, noted above, is warranted.[319]

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317. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2005) (requiring the HMFA to give preference to qualified census tracts, so long as the development "contributes to a concerted community revitalization plan"); 26 U.S.C. § 42(m)(1)(C)(iii) (2005) (identifying community revitalization as one aspect of a project characteristic that must be used as selection criteria); *see also* supra Part VI.A.3 (discussion of the QCT statute's provision of little guidance for allocating its own preferences).

318. JILL KHADDURI ET AL., ABT ASSOC., TARGETING HOUSING PRODUCTION SUBSIDIES 90 (2003).

319. *See supra* notes 182-188 and accompanying text (discussing *Walker*).

1. A Community Revitalization Plan Should Further Long-term Metropolitan Integration

As discussed above, the legislative history of the FHA and its interpretation by courts and regulatory agencies makes clear that siting housing in racially concentrated or resegregating areas is generally prohibited. These prohibitions should be read as an affirmative obligation to support a long-term, sustainable pattern of integration. Sustainable integration requires that the government must not only avoid building in segregated neighborhoods but also must avoid building in neighborhoods that are in the process of resegregation.[320] The cycle of segregation and resegregation in American cities and suburbs shows that integration must be lasting to make it worth the cataclysmic struggles that produced the FHA, its subsequent regulations, and fair housing case law.

Case law interpreting the "affirmatively further" duty provides helpful guidelines to prevent resegregation. Several of the *Shannon* factors relate directly to patterns of resegregation.[321] *Shannon*'s emphasis on the racial composition of schools is particularly significant. Sociologists and Congress, through the Kerner Commission, know that building low income housing in neighborhoods with segregated or resegregating schools will not support stably integrated neighborhoods.[322] Federal and state agencies should target new units in school districts—particularly elementary school areas—that have the highest and most rapidly growing white enrollment. Such targeting is likely to produce the most stable schools and hence promote neighborhood integration, as stably integrated schools are an indication and an interdependent part of a stably-integrated neighborhood.[323] Conversely, placing family units in suburbs that are already resegregating is likely to leave children in racially and socially isolated, opportunity-poor schools within a few years.[324]

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320. This includes most of the "at-risk suburbs" in the United States. *See* ORFIELD, *supra* note 46, at 33-42 (describing characteristics of at-risk communities).

321. Although many of the factors are concerned with the internal composition of housing projects, it is clear that the *Shannon* court was also concerned with the problem of resegregation. *See supra* Part III.C.1 (examining *Shannon*'s discussion of resegregation).

322. *See supra* Part II.B (describing studies on the effect of school segregation on residential segregation); *see also supra* Part III.A (summarizing the findings of the Kerner Commission).

323. Schools are a consistently reliable indicator of neighborhood health and can predict decline and resegregation in a neighborhood. *See* ORFIELD, *supra* note 46, at 9-15 (examining the relevance of schools in assessing a community's health).

324. The experience of the MTO project clearly shows this is the case as do dozens of underinclusive busing plans over a fifty year period. *See supra* note 43 (discussing how integrated housing could prevent forced busing).

The *Shannon* court's factoring of the location of higher-income housing and the effect of zoning restrictions on racial opportunity suggests that affluent, stable, residentially restrictive neighborhoods and cities should be targets of affordable housing activity. This targeting can produce stable and balanced living patterns while requiring exclusive, opportunity-rich suburbs to take on their fair share of the regional housing need. In the United States, the most expensive housing markets and most new jobs are created in the whitest suburbs, ensuring a high proportion of white residents will always remain.[325] Aiming tax credits at the places to which people with the most residential choices are attracted is a good strategy for integration, as it cuts off their avoidance. Racial fairness must ultimately involve constraining the privilege of whites to simply opt out.

2. A Community Revitalization Plan Should Take into Account Opportunity Structures

A concerted revitalization plan should embody the principles of the "opportunity-based housing" approach to community development.[326] Central to this approach is the insight that residents of metropolitan regions are situated within a complex, interconnected web of opportunity structures—or lack thereof—that significantly shape their quality of life. Opportunity structures, such as the availability of good schools and proximity to good jobs, are the vehicles for racial and economic fairness for all residents of a region and are tied to metropolitan space; proximity to these structures is strongly correlated with an ability to access them.[327] Characteristics of school population, tax base, growth, jobs, and available land all provide relevant data that can be analyzed to provide indicators of community health.[328] Federal case law and a demographic understanding of

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325. ORFIELD, *supra* note 46, at 44-46. Clearly a half century of experience shows that while high end housing does not ensure stable integration, many of the most successful cities with stable integration have been suburbs like Oak Park near Chicago, Shaker Heights outside of Cleveland, and Southfield Michigan. *See generally* W. DENNIS KEATING, THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS (1994).

326. *See* john a. powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. 188, 188 (2003). powell states creating opportunity-based housing requires the active participation of communities of color, who often resist regionalism for fear of being weakened politically and culturally. *Id.* at 203. Metropolitan governments should advise communities of color that regional opportunity-based housing strategies do not have to disperse their voice, but instead offer them a choice in previously inaccessible housing and job markets. *Id*.

327. *Id*. at 191.

328. *See, e.g.*, ORFIELD, *supra* note 46, at 31-46 (using cluster analysis of factors to assess city and neighborhood health).

metropolitan regions and their opportunity structures can further provide governments with guidelines for a community revitalization program.

The *Gautreaux* program provides a definition of what revitalization might mean in the context of opportunity structures.[329] The units located in the whitest areas produced significant changes in the lives of the movers. In its Moving to Opportunity ("MTO") and HOPE VI projects, HUD demolished many large central city housing projects and attempted to duplicate the success of the *Gautreaux* experience by scattering the residents in less poor areas. However, most often these areas, while less poor than the project areas, were in rapidly resegregating places with segregated schools. In these cases, tenants who moved to less segregated areas showed improvement in health but not in real economic opportunity; individuals in revitalizing areas were not any closer to jobs in the city than they had been before, and they remained just as far from (and just as unaware of) new suburban jobs as before.[330]

The *Gautreaux* consent decree, however, neglects a key way of expanding opportunity. Although the consent decree's criteria for placements in "revitalizing areas" included many opportunity-related factors, including increased development, access to transportation, shopping, and nearness to "attractive features,"[331] it did not include schools. In light of recent research,[332] the *Gautreaux* factors could form a good framework for identifying a revitalizing part of the city, but it is unlikely that the neighborhood-based schools would be racially and socially integrated. Magnet schools, drawing children from all over the city and the suburbs, could create opportunities for neighborhood children in middle income schools that would not be like schools that are not segregated by existing housing patterns.

The non-racial requirements of the HUD siting regulation further show the importance of access to fair housing. Requiring comparable services and avoiding low-income neighborhoods underscore the importance of race and desegregation. Studies show that poor segregated areas virtually never receive comparable services to middle-class areas.[333] Moreover, in a fragmented, competitive metropolitan area, even in the absence of racism, fiscal competition theory suggests that the city must favor certain high tax-paying

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329. Gautreaux v. Landrieu, 523 F.Supp. 665, 669-72 (N.D. Ill. 1981).

330. Goering, *supra* note 90, at 24.

331. Gautreaux v. Landrieu, 523 F. Supp. 665, 671 (N.D. Ill. 1981).

332. *E.g.*, KHADDURI, *supra* note 318 and accompanying text.

333. ORFIELD, *supra* note 46, at 23-25, 37-38.

citizens who can leave.[334] The burden is on those who propose this sort of exception to show how to overcome deeply interrelated, fundamental problems.

The HUD regulations also prohibit sites that are detrimental to family life or have urban blight, as typified by poor housing stock and "other undesirable elements," unless there is a "concerted program" to fix the problem.[335] Any "concerted program" that further concentrates poor minorities would likely lead landlords to neglect housing maintenance, as they typically do in areas of high minority concentration. Poor, segregated neighborhoods are associated with high probabilities of teen pregnancy and school violence, and low high school graduation rates, none of which are conducive to a high quality of family life.[336] Health quality in these neighborhoods is much worse because of stress, toxins, lack of green spaces, parent working hours, and unsafe streets.[337] Finally, the opportunity-based approach is borne out by the prohibition on siting in areas which require excessive travel time to work. Given that the vast majority of new entry-level jobs are in developing white suburbs[338] with very small amounts of affordable housing, this site criterion strongly militates in favor of suburban locations.

At-risk communities and large cities should be placed low on state and federal opportunity indices. They both offer significant employment, but fewer educational opportunities because of extremely high poverty and segregation rates in their schools.[339] Both of these types of communities have lower than average tax bases and are losing ground against their more affluent suburbs.[340] Services, because of decreasing fiscal capacity, are also hard to finance.[341] New housing production subsidies will only have a negative impact on already impoverished neighborhoods.[342]

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334. *See* James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 13-16 (1971) (arguing that rational cities will cater to the upper and middle-class in order to attract and retain tax-paying citizens).

335. 24 C.F.R. § 941.202 (2005).

336. *See supra* Part II.C (noting large disparities in crime and graduation rates between segregated and upper-middle class neighborhoods).

337. *See* Goering, *supra* note 90, at 196-97 (discussing the health effects and stress in MTO movers).

338. ORFIELD, *supra* note 46, at 33.

339. *See id.* at 34 (using typology to show differences between suburban and urban areas).

340. *Id.* at 168-69.

341. *See id.* at 30-31 (associating areas with low tax bases with diminished public services).

342. *See* ABT LITERATURE REVIEW, *supra* note 44, at 47 (arguing for caution in implementing new production subsidies in financially depressed neighborhoods).

We know from the experience of *Gautreaux* and the Moving To Opportunity demonstrations that movers had the best experiences in job-rich, affluent communities.[343] These places are less likely to experience fiscal inability to handle the needs that poor residents have. Most are presently taxing below average metropolitan rates.[344] Because they have the fiscal resources to provide necessary services, they are less likely to experience increasing tax rates that could contribute to residential instability. Residents in job-rich, low-poverty communities are much more likely to work, and working residents are more likely to be accepted as a viable part of the community. State and federal authorities should place these communities first on their opportunity indices.

3. A Community Revitalization Plan Must Consider Stably Integrated and Gentrifying Neighborhoods

In addition to preventing resegregation, the allocation of tax credits should maintain affordable housing and racial integration in neighborhoods of central cities and older suburbs that are resegregating in the opposite direction, to all white. In doing so, state and metropolitan governments should be conscious of the harmful dynamic that often occurs in such neighborhoods when young white professionals and older households without children coexist with poor, segregated neighborhood schools. Shallow subsidies—up to, for example, half the cost of a new unit—for maintaining existing housing are appropriate to prevent resegregation. Shallow subsidies should only be carefully used in market areas where they will provide life opportunities and do not contribute to resegregation. Likewise, building new units in areas of weak market demand where existing units are habitable and would be abandoned if new ones were built should be avoided. Municipal or regional governments should hold land for affordable housing developments in gentrifying areas to later use for reinvestment. If deep subsidies are necessary to preserve units, they should be used only in areas where opportunity exists as well.

C. The Political Consequences of a Tax Credit Policy Consistent with

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343. *See* Shannon v. HUD, 436 F.2d 809, 822 (1970) (factoring in location of upper and middle-class housing); S. Burlington County N.A.A.C.P. v. Mount Laurel, 456 A.2d 390, 440 (1983) (favoring "[f]ormulas that accord substantial weight to employment opportunities in the municipalities, *especially new employment accompanied by substantial ratables*" (emphasis added)).

344. ORFIELD, *supra* note 46, at 33.

Title VIII

Although tax credit allocations consistent with the Title VIII have the potential to foster and maintain integrated communities and schools, they would do so at the expense of most community development corporations, which depend on the credits to maintain housing in their poor communities. If this Article's recommendations were adopted, it is likely that the structure of many community development corporations would need to change. The targeting of tax credits on affluent areas should shift resources in such a way that community development organizations and low-income housing providers would be forced to focus on a metropolitan playing field. Rather than just "doing deals," organizations like LISC could use their resources and their centrality to the community development movement to provide advice to fewer, better-staffed regional community development corporations on how to operate on a regional playing field.

The gap left by tax credit funds leaving segregated areas could be filled by investment in areas other than housing. These neighborhoods need capital, but they do not need to further concentrate poverty or deepen segregation. A revitalization plan should foster multi-racial, mixed-income neighborhoods, with racially and socially integrated schools. Affirmative action programs that benefit minority contractors should be preserved and expanded to both do this work and to do work in other areas.

D. Possible Constitutional Challenges under Walker

The *In Re 2003* court's suggestion that racial classifications in fair housing remedies might be unconstitutional—based largely on the Fifth Circuit *Walker* case[345]—would likely invalidate the plan proposed here, as well as the remedies suggested in *Shannon* and approved in the Supreme Court's decision in *Gautreaux*.[346] If adopted by courts in other jurisdictions, *Walker* would hinder the implementation of the race-conscious remedies best suited to further

345. Walker v. Mesquite, 169 F.3d 973, 975 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

346. *See* Michelle Wilde Anderson, Comment, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CALIF. L. REV. 841, 869 (arguing that review of *Walker* would require reconsidering the central holding of *Gautreaux*); *cf.* Thomas Peter Abt, Comment, Walker v. City of Mesquite *and the Threat to Meaningful Desegregation Remedies*, 7 GEO. J. POVERTY & POL'Y 123, 143 (2000) (arguing that the *Walker* court should have applied *Gautreaux* and other precedent to uphold the plan as narrowly tailored).

residential integration. This is particularly true with the tax credit program, which specifically involves new construction of subsidized housing. Plans using non-racial preferences, such as siting housing in low-poverty areas, would be considerably less effective than those acknowledging the importance of race-consciousness. Using income as a proxy for race ignores the devastating impact that resegregation can have on neighborhoods.[347]

It is not clear, however, that *Walker* will be duplicated in other jurisdictions. The constitutional validity of selecting neighborhoods based on racial composition is arguably less settled than the use of quotas in public housing, for example, which are clearly racial classifications.[348] Tax credit properties can also differ significantly from traditional public housing, distinguishing a lawsuit in the LIHTC context from the facts of *Walker*.[349] Finally, the decision in *Walker* may also be a reflection of the fact that the Fifth Circuit is outside the mainstream—and often in direct conflict with the Supreme Court—on issues involving affirmative action and racial classifications.[350]

VII. CONCLUSION

In the aftermath of the mixed result in New Jersey, advocates will likely continue to press this issue until a court applies a consistent interpretation of Title VIII. *In re 2003* clearly illustrates the tension between the duty to affirmatively further fair housing and the siting preferences in the LIHTC statute. The court's finding that the duty applies to the tax credit program now requires state agencies to keep racial data on the tenants and the placement of LIHTC units. The evidence cited above suggests this data will show a racially

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347. *See supra* Part II.B-C (discussing the resegregation of urban neighborhoods and the harm that it has caused).

348. *See* United States v. Starett City Ass'n, 840 F.2d 1096, 1100-01 (2d Cir. 1988) (finding that race-based quotas for admission to public housing violated the Fair Housing Act).

349. Standing in particular may be a problem. The court found that living near public housing was a sufficient injury for standing. *See supra* note 185. In light of the fact that LIHTC units can be mixed-income units where some residents pay market rent, it would be harder for homeowners to claim standing based on proximity to a LIHTC unit.

350. The Fifth Circuit's division from mainstream jurisprudence on such issues was recently demonstrated when that court's decision in *Hopwood v. Texas*, an affirmative action case, was overruled by the U.S. Supreme Court in *Grutter v. Bollinger*. Grutter v. Bollinger, 539 U.S. 306, 322 (2003) (overruling in part Hopwood v. Texas, 78 F.3d 932 (1996)). The Court in *Bollinger* noted a split among the circuits as to whether diversity could be a compelling state interest that justifies the use of race in university admissions. *Id*. It overruled *Hopwood*, concluding that diversity could serve as a compelling state interest. *Id*. at 325.

segregated pattern, which in some instances will be extreme. Once that data is revealed, it may be hard for courts to countenance the existing practices.

Without a policy change, the rolling pattern of suburban resegregation caused, in part, by building government-supported low-income housing in segregated or resegregating neighborhoods will continue to deeply hurt hundreds of communities. These communities could be strong and vital if our housing markets were fair and if the government affirmatively furthered fair housing. This disinvestment will not only destroy the wealth building of middle-class black and Latino households, but will reinforce the white prejudice that creates this pattern in the first place. Crucial to the goals of ending racial bias and supporting racial opportunity is the knowledge that we can know and understand those of another race who today live in two different worlds and experience two very different Americas.

The Civil Rights Act of 1968, which includes Title VIII, is one of the most hallowed accomplishments of American law and shows Congress's clear objective to integrate American society. Yet as history has shown, without persistent advocacy, even the clearest legislative pronouncements will not enforce themselves. Advocates need to pursue other remedies to further an integrated society. This involves using the federal FHA and state statutes and constitutions, together with a coherent multi-front legislative strategy. This strategy must involve long-term metropolitan integration, principles of opportunity-based housing, and the stabilization of integrated and gentrifying neighborhoods. Housing must be viewed as a clear path toward racial and economic opportunity that holds a real hope for revitalizing cities and older suburbs.