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## A PLACE TO CALL HOME? AFFORDABLE HOUSING ISSUES IN AMERICA

### ARTICLES

#### AFFIRMATIVELY FURTHERING FAIR HOUSING IN REGIONAL HOUSING MARKETS: THE BALTIMORE PUBLIC HOUSING DESEGREGATION LITIGATION

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\* William F. Harvey Professor of Law, Indiana University School of Law—Indianapolis. This Article is dedicated to the memory of the Honorable J. Skelly Wright, a truly great judge and human being. I had the honor of serving as the J. Skelly Wright Fellow at Yale Law School during the Fall semester of 2006.

I am grateful to the Indiana University School of Law—Indianapolis for a Summer 2006 Fellowship that supported work on this Article; to librarians Theresa Cullen at Yale and Richard Humphrey at Indiana for their aid far “above and beyond” the call of duty; to Michael M. Daniel, Esq., for providing pertinent documents and inspiration; to Abigail Turner, Esq., for suggesting that I write about the Baltimore case; to Benjamin Yousey-Hindes and Jessica Chen of Yale Law School and Stephen LeClere of Indiana University School of Law for research assistance; to the editors of the *Wake Forest Law Review* for meticulous editing; and to participants in faculty workshops at Yale and at Widener University School of Law—Wilmington, Delaware.

I deem it appropriate to note that although I have had no official connection with the *Thompson* case, in 2001, I supplied a declaration in support of an application by plaintiffs for attorneys’ fees, *see Thompson v. U.S. Dep’t of*

“We cannot be satisfied as long as the Negro’s basic mobility is from a smaller ghetto to a larger one.”

Martin Luther King, Jr., *I Have A Dream*, Address to the March on Washington for Jobs and Freedom (Aug. 28, 1963).

“In making these regional efforts, HUD did not overlook the current residents of Baltimore public housing. . . . [P]ublic housing residents are encouraged to participate in fair housing month activities; one year they were even provided with transportation to attend the free fair housing month conference.”

Federal Defendants’ Post-Trial Brief at 21, *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (No. MJG 95-309).

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#### INTRODUCTION

While millions of words have been written about the public school desegregation cases and the campaigns that led up to and

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Hous. & Urban Dev., No. Civ.A MGJ95309, 2001 WL 1636517, at \*7 (D. Md. Dec. 12, 2001), and I have discussed the case with plaintiffs’ counsel at various times.

followed *Brown v. Board of Education*,<sup>1</sup> relatively little has been written about a similar set of cases: those involving desegregation of public housing. Indeed, racial segregation in housing has been “curiously invisible as a public issue in America.”<sup>2</sup>

The public housing desegregation litigation built on the legal doctrine established in the school desegregation cases and shared the social goal of integration. Like the school cases, the housing litigation involved a deliberate campaign that was largely lawyer-driven; the housing lawsuits generally were brought and were coordinated very loosely by lawyers engaged in public interest work but not closely connected to traditional civil rights organizations.<sup>3</sup> This Article provides an overview of and introduction to the housing desegregation litigation and considers in some detail the most recent of those cases, *Thompson v. United States Department of Housing and Urban Development*,<sup>4</sup> involving Baltimore, Maryland. Part I describes the background of public housing segregation, the principal lawsuits brought to address it, and the nature of the coordination among advocates and their supporters. Part II reviews some results of the litigation. Part III discusses the Baltimore suit.

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1. The central case, of course, is *Brown v. Board of Education*, 347 U.S. 483 (1954). Much has been written about *Brown*, the litigation that led up to it, and the litigation that followed it. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (rev. 2004); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (rev. 2004).

2. Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 310, 323 (Xavier de Souza Briggs ed., 2005) [hereinafter *THE GEOGRAPHY OF OPPORTUNITY*]. Professor Briggs is referring to housing issues in general; his point is particularly true with respect to housing segregation.

3. Compare ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006), and Elizabeth Julian & Michael M. Daniel, *Separate and Unequal—The Root and Branch of Public Housing Segregation*, 23 *CLEARINGHOUSE REV.* 666 (1989), and Florence Wagman Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 *CLEARINGHOUSE REV.* 312 (1990), with GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983) (describing the NAACP's campaign to end school segregation), and TUSHNET, *supra* note 1.

4. 348 F. Supp. 2d 398 (D. Md. 2005), *enforced*, No. MJG-95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006).

## I. THE HISTORY OF PUBLIC HOUSING DESEGREGATION LITIGATION

Although the federal government had a brief involvement with financing the production of housing for defense workers during World War I,<sup>5</sup> its serious engagement with housing began with the Great Depression in 1929.<sup>6</sup> In the early 1930s, the federal government became a major actor in the housing market.<sup>7</sup> It provided aid both for homeownership, through the Home Owners Loan Corporation (“HOLC”) and the Federal Housing Administration (“FHA”), and for multifamily rental housing, through the Public Works Administration (“PWA”) and then the U.S. Housing Act public housing rental program.<sup>8</sup> These programs were supplemented in 1944 by the Veterans Administration’s homeownership program, patterned on that of the FHA.<sup>9</sup>

All of these activities, like almost all other government programs, were operated on the basis of de jure racial segregation and pervasive racial discrimination.<sup>10</sup> Federal housing assistance was not only racially separate, but also, save for a brief moment during the early New Deal, racially unequal, with far more and far

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5. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 191-95* (1985); Eric J. Karolak, “No Idea of Doing Anything Wonderful”: *The Labor-Crisis Origins of National Housing Policy and the Reconstruction of the Working-Class Community, 1917-1919*, in *FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA* 60 (John F. Bauman et al. eds., 2000) [hereinafter *TENEMENTS*].

6. See JACKSON, *supra* note 5, at 195-245; GAIL RADFORD, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* 199 (1996).

7. JACKSON, *supra* note 5, at 195-225.

8. *Id.*

9. Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States’ Housing Programs for Veterans and the “Public Scandal” of Veterans’ Homelessness*, 38 *IND. L. REV.* 103, 119-34 (2005).

10. See CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* (1955); Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, in *TENEMENTS*, *supra* note 5, at 206, 208-10; JACKSON, *supra* note 5, at 208-10; DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); *BUILDING THE AMERICAN CITY: REPORT OF THE NAT’L COMM’N ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES*, H.R. DOC. NO. 91-34, at 12 (1968) (Federal officials “made little effort to resist the pressure” for segregated neighborhoods. “They closed their eyes to the massive federally supported buildup of largely white suburbia in the period following World War II. . . . It may fairly be charged that . . . Federal funds were so used for several decades that their effects were to intensify racial and economic stratification of America’s urban areas.”).

better housing assistance for whites than for people of color.<sup>11</sup> The homeownership assistance was not available for racially integrated neighborhoods,<sup>12</sup> and by far the bulk of homeownership assistance was provided for white people—“less than 2 percent of the housing financed with federal mortgage assistance from 1946 to 1959 was available to Negroes.”<sup>13</sup>

Racial segregation in general, and in publicly-assisted housing programs in particular, was condemned by progressive forces during the 1940s. Gunnar Myrdal’s landmark study, *An American Dilemma*, showed that government policies, specifically those of the FHA and the public housing agency, the U.S. Housing Authority, had, “on the whole, served as devices to strengthen and widen rather than to mitigate residential segregation.”<sup>14</sup> Anticipating immense demand for housing at war’s end, Myrdal and his colleagues wrote that:

[t]o be maximally useful this housing boom should be planned in advance. And it would be prudent not to overlook segregation and the abominable housing conditions for Negroes. Gross inequality in this field is not only a matter for democratic American conscience, but it is also expensive in the end.<sup>15</sup>

Also, in its 1947 report, *To Secure These Rights*, President Truman’s Committee on Civil Rights recommended, inter alia, the “[p]rohibition of discrimination and segregation . . . in all public or publicly supported . . . housing projects.”<sup>16</sup> When the U.S. Department of Justice filed an *amicus curiae* brief in the restrictive

11. See Hirsch, *supra* note 10, at 210; RADFORD, *supra* note 6, at 189-91, 197-98.

12. See, e.g., NAT’L ADVISORY COMM’N ON CIVIL DISORDERS (KERNER COMM’N) REPORT 260 (1968) [hereinafter KERNER REPORT] (“Until 1949, FHA official policy was to refuse to insure any unsegregated housing. It was not until the issuance of Executive Order 11063 in 1962 that the Agency required nondiscrimination pledges from loan applicants.”).

13. MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965, at 221 (1975).

14. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 625 (1944). Myrdal and his colleagues wrote that the FHA “in effect, extends credit to Negroes only if they build or buy in Negro neighborhoods and to whites only if they build in white areas which are under covenant not to rent or sell to Negroes . . . . The effect has probably been to bring about an extension of such ‘protection’ to areas and groups of white people as were earlier without it.” *Id.*

15. *Id.* at 627.

16. THE PRESIDENT’S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 171 (1947).

covenant cases, *Shelley v. Kraemer*<sup>17</sup> and *Hurd v. Hodge*<sup>18</sup>—the first time that the United States had participated as *amicus curiae* in “a case to which it was not a party and in which its sole purpose was the vindication of rights guaranteed by the Fifth and Fourteenth Amendments”<sup>19</sup>—it argued that “enforcement of racial restrictive covenants is contrary to the public policy of the United States.”<sup>20</sup>

Despite these recommendations, racial discrimination and segregation continued in the federal housing programs and were exacerbated in the federal urban renewal and interstate highway programs.<sup>21</sup> The perceived importance of racial segregation to the homeownership programs was shown by the FHA’s reaction to the Supreme Court’s 1948 decisions in *Shelley v. Kraemer* and *Hurd v. Hodge*, invalidating judicial enforcement of racially restrictive covenants. While the “FHA grudgingly agreed . . . only after Presidential intervention,” to refuse assistance to developments that recorded racially restrictive covenants after February 15, 1950,<sup>22</sup> the FHA allowed discrimination and segregation imposed by other means. “FHA continued to deny housing insurance to Negroes except in Negro neighborhoods and commitments in such areas were rare.”<sup>23</sup>

Indeed, the centrality of racial segregation to the federal public housing program was illuminated in 1949 when opponents of public housing attempted to defeat Title III of the 1949 housing legislation by proposing an amendment that would have prohibited racial

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17. 334 U.S. 1 (1948).

18. 334 U.S. 24 (1948).

19. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 91 (2000) (quoting Solicitor General Philip Perlman); see also CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 168-74 (1959) (discussing the President’s Committee on Civil Rights’ recommendation of intervention and the Department of Justice’s decision to participate in the case).

20. TOM C. CLARK & PHILIP B. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS 68 (1948).

21. See MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL (1964); Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing*, in TENEMENTS, *supra* note 5, at 226.

22. GELFAND, *supra* note 13, at 221; Hirsch, *supra* note 10, at 212.

23. ABRAMS, *supra* note 10, at 232; see also Hirsch, *supra* note 10, at 213 (reporting that “a high agency official” stated in 1951 that “it was not the purpose of these Rules to forbid segregation or to deny the benefits of the National Housing Act to persons who might be unwilling to disregard race, color, or creed in the selection of their purchasers or tenants”). Both Presidents Truman and Eisenhower rejected requests that the FHA bar aid to segregated housing. See GELFAND, *supra* note 13, at 221, 426 n.64.

segregation in public housing.<sup>24</sup> Anticipating that a ban on racial segregation would destroy the program, liberal proponents of public housing voted against the ban, allowing racial segregation because they considered that essential to save the public housing program.<sup>25</sup> Ironically, this endorsement of racial segregation was provided in connection with the 1949 Housing Act that established the national housing goal of “a decent home and a suitable living environment for every American family . . . .”<sup>26</sup>

The urban renewal program created by the 1949 Act became infamous as a program of “Negro removal.”<sup>27</sup> “Southern and border cities demolished integrated slums for reuse by whites only, while Northern communities built new housing well beyond the financial means of most blacks. The USCCR [U.S. Commission on Civil Rights] concluded in 1959 that urban renewal was ‘accentuating or creating clear-cut racial separation.’”<sup>28</sup>

In the 1940s and 1950s, as the National Association for the Advancement of Colored People (“NAACP”) battled to end school segregation, it also challenged segregation in other areas, including housing. As Mark V. Tushnet wrote:

[T]he attack on school segregation was only part of a much broader effort. The NAACP was never committed to destroying school segregation because it was central to the system of racial subordination. Rather, school segregation was just one of many targets, and it became an increasingly attractive one as precedents dealing with schools accumulated precisely because the NAACP had been litigating school cases for nonstrategic reasons. But destroying any of the various targets would help undermine the system that the NAACP wanted to eliminate.<sup>29</sup>

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24. Arnold R. Hirsch, *Searching for a “Sound Negro Policy”: A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUS. POL’Y DEBATE 393, 400 (2000).

25. *Id.* at 400-01. This liberal rejection of a ban on segregation was led by Senator Paul Douglas of Illinois, “the conscience of the Senate.” *Id.* The leading non-conservative defender of the ban was Vito Marcantonio, Socialist member of the House of Representatives. Julian & Daniel, *supra* note 3, at 669.

26. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (codified at 42 U.S.C. § 1441 (2006)).

27. GELFAND, *supra* note 13, at 212.

28. CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS* 69 (2006).

29. TUSHNET, *supra* note 1, at 145; see also Robert L. Carter, *Mark Tushnet: The NAACP’s Legal Strategy Against Segregated Education, 1925-1950*, 86 MICH. L. REV. 1083, 1095 (1988) (reviewing TUSHNET, *supra*, and stating that while “the strategy was to attack segregation in education, . . . the real agenda

During this time, however, the NAACP's legal staff made little headway against discrimination and segregation in publicly-assisted housing programs. This was true both before and after the Supreme Court's rulings in *Brown v. Board of Education*<sup>30</sup> and other cases which made clear that *Brown's* prohibition of government-imposed racial segregation applied not only to education, but also to other activities, including housing.<sup>31</sup> The NAACP's housing work included continued attention to racial zoning and restrictive covenants and challenges to racial discrimination both by private developers who received significant government financial assistance and in the public housing program.<sup>32</sup> The cases against private developers

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was the removal of the basic barrier to full and equal citizenship rights for blacks in this country").

30. 347 U.S. 483 (1954).

31. Perhaps the most significant of those decisions was *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam), which ended the Montgomery Bus Boycott with a summary affirmance of the three judge district court's holding that state action requiring racial segregation in intrastate transportation violated the Equal Protection Clause. See Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1049 (1989) (explaining that in 1956, the "scope [of *Brown*] was uncertain," since the Supreme Court's language in *Brown* explicitly said only that "in the field of public education the doctrine of 'separate but equal' has no place," thus leaving "open the possibility that *de jure* segregation might still 'have a place' in fields other than education."). "The Court's summary disposition of *Gayle*," Professor Kennedy writes, "represented the continuation of a strategy the Justices informally formulated immediately after *Brown*: policing *Brown's* enforcement and enlarging its ambit in as low-key and uncontroversial a manner as possible." *Id.* at 1051-52; see also Hirsch, *supra* note 24, at 423-25 (discussing different views within the Housing and Home Finance Agency ("HHFA") with regard to the impact of *Brown* on housing and redevelopment programs).

32. See JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 81 (1994) (reporting that at the end of 1951, the NAACP Legal Department was handling five housing cases—"against segregated public housing projects in Detroit and Schenectady; against Birmingham, Alabama's racial zoning ordinance; one against Levittown, on Long Island, New York, which openly refused to sell to blacks"); see also Carter, *supra* note 29, at 1087 n.14 (identifying the following as NAACP housing cases: two involving restrictive covenants, the racial zoning case in Birmingham, a Levittown case in Pennsylvania (*Johnson v. Levitt & Sons, Inc.*, 131 F. Supp. 114 (E.D. Pa. 1955)), a challenge to racial discrimination and segregation in the government-assisted development of Stuyvesant Town in New York City (*Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541 (N.Y. 1949)), and two public housing cases (*Detroit Hous. Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955) and *Heyward v. Pub. Hous. Admin.*, 135 F. Supp. 217 (E.D. Ga. 1955)).



were unsuccessful, but were followed by the enactment of state laws that barred racial discrimination in publicly-assisted housing; the NAACP, however, was not the active party in pursuing housing cases under those state laws.<sup>33</sup>

With respect to public housing, *Banks v. Housing Authority of San Francisco*<sup>34</sup> “essentially banned segregation in public housing across the nation, at least in theory,”<sup>35</sup> but the theory had little impact on practice. In 1955, the NAACP secured a Sixth Circuit decision invalidating discrimination and segregation in public housing in Detroit.<sup>36</sup> An effort to achieve the same result in Savannah, Georgia, was unsuccessful because all but one of the original plaintiffs withdrew from the litigation, leaving only a plaintiff who was held to lack standing even by Judges Richard Rives, John R. Brown, and John Minor Wisdom.<sup>37</sup> The NAACP’s

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The Levittown, Pennsylvania, case cited by Judge Carter seems to be the one Professor Greenberg identifies as a New York case; he cites the Pennsylvania case cited also by Judge Carter. See GREENBERG, *supra*, at 551 n.207.

33. See, e.g., *Levitt & Sons, Inc. v. Div. Against Discrimination*, 158 A.2d 177 (N.J. 1960), *appeal dismissed*, 363 U.S. 418 (1963) (applying a New Jersey law against discrimination in publicly-assisted housing to FHA-financed housing); *N.Y. State Comm’n. Against Discrimination v. Pelham Hall Apartments, Inc.*, 170 N.Y.S.2d 750 (N.Y. Sup. Ct. 1958) (applying New York law against discrimination in publicly-assisted housing to multiple dwelling financed with federal loan); see also MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* 286 (2003) (“New York State had passed antidiscrimination laws years before Congress had, but they were not . . . reversing the spread of residential segregation.”); GREENBERG, *supra* note 32, at 435 (stating that under New York’s fair housing law, “[c]ases were difficult to prove, not many blacks used the law; and the State Commission Against Discrimination hardly enforced it”).

34. 260 P.2d 668 (Cal. Dist. Ct. App. 1953), *cert. denied*, 347 U.S. 974 (1954).

35. BONASTIA, *supra* note 28, at 69.

36. *Detroit Hous. Comm’n. v. Lewis*, 226 F.2d 180 (6th Cir. 1955).

37. *Cohen v. Pub. Hous. Admin.*, 257 F.2d 73 (5th Cir. 1958). Discussions of public housing litigation sometimes cite earlier decisions in this case, which had been captioned *Heyward v. Public Housing Administration*. See *Heyward v. Pub. Hous. Admin.*, 135 F. Supp. 217 (S.D. Ga. 1955); *Heyward v. Pub. Hous. Admin.*, 238 F.2d 689 (5th Cir. 1956); *Heyward v. Pub. Hous. Admin.*, 154 F. Supp. 589 (S.D. Ga. 1957).

Judges Rives, Brown, and Wisdom were heroes of the civil rights movement. See, e.g., JACK BASS, *UNLIKELY HEROES* 23-55 (1981) (discussing these three judges who, with Chief Judge Elbert Tuttle, “hastened the South’s full reunion with the rest of the country”).

other litigation with regard to publicly-assisted housing seems not to have produced significant results.<sup>38</sup>

The racial discrimination and segregation in the federal housing programs continued well into the 1960s, despite the promulgation of President Kennedy's 1962 Executive Order<sup>39</sup> and the enactment of the 1964 Civil Rights Act.<sup>40</sup> (Indeed, there is some evidence that the Supreme Court's decision in *Brown* led to the use of federal programs to intensify housing segregation in some communities in order to avoid the school integration that might accompany housing integration.)<sup>41</sup> Thereafter, it appears that neither the NAACP nor

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38. See GREENBERG, *supra* note 32, at 175 (stating that in the early 1950s, after the NAACP unsuccessfully sought "a ruling that would require the [federal] Public Housing Authority to desegregate nationally, Connie [Constance Baker] Motley pursued public housing cases across the country," and that in 1953 the Legal Department of the NAACP urged an attack on segregation in housing as well as other areas); see also *id.* at 207 (reporting that in 1955, "Connie Motley's housing docket could have kept a small law firm busy"); *id.* at 551 n.207 (stating that Ms. Motley "had cases in St. Louis, Camden, Savannah, Birmingham, Benton Harbor (Mich.), Detroit, and Columbus" as well as Levittown, Pennsylvania). In her memoir, Judge Motley does not discuss housing cases at all. See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* (1998).

39. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963); see also BONASTIA, *supra* note 28, at 74 ("In theory, the order covered all public housing projects and all properties that were purchased using FHA or VA insurance, but federal officials were reluctant to compel local compliance, and FHA essentially refused to apply the new requirements to its portfolio of loans. As of March 1964, the Public Housing Authority reported that of the 3,289 projects it helped to fund, 2,370 (72 percent) were entirely segregated by race. Tellingly, it was not until 1980 that HUD issued the final regulations to implement the requirements of the order.").

40. See 42 U.S.C. § 2000d (2006); *Young v. Pierce*, 628 F. Supp. 1037, 1045 (E.D. Tex. 1985); *Young v. Pierce*, 640 F. Supp. 1476 (E.D. Tex. 1986) (supplemental opinion), *rev'd on other grounds*, 822 F.2d 1368 (5th Cir. 1987); Hirsch, *supra* note 10, at 219 (stating that after the ruling in *Brown*, the Housing and Home Finance Agency "embarked on a course of increasing the quantity and improving the quality of black-occupied housing while issuing no challenge to segregation").

41. Hirsch, *supra* note 24, at 429 (reporting allegations that the policies of the HHFA were "conceived to counteract the effect of the United States Supreme Court's decision calling for public school integration" and that numerous southern communities were using the urban renewal program "to foster school segregation 'by moving minority families out of presently integrated neighborhoods'"). School desegregation was a cause of white flight to the suburbs because "school desegregation made it harder to avoid contact with minority groups and economically disadvantaged persons merely by living in a middle-class or higher-income neighborhood; families believed they had to relocate outside the central-city school district altogether to avoid the threats,

the NAACP Legal Defense Fund (“LDF”) litigated publicly-assisted housing cases until the 1970s.<sup>42</sup>

The breakthrough housing desegregation litigation was brought in 1966, in Chicago, by volunteer lawyers for the American Civil Liberties Union (“ACLU”).<sup>43</sup> They filed two suits: one against the Chicago Housing Authority,<sup>44</sup> and the other against the Department of Housing and Urban Development (“HUD”).<sup>45</sup> The first named plaintiff in these two class actions was an African-American public housing resident and activist named Dorothy Gautreaux, and the *Gautreaux* litigation, which recently marked its 40th anniversary, continues in active litigation to this date.<sup>46</sup>

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real or perceived, that school integration posed to their children.” Paul A. Jargowsky, *Sprawl, Concentration of Poverty, and Urban Inequality*, in *URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES* 39, 41 (Gregory D. Squires ed., 2002).

42. GREENBERG, *supra* note 32, at 435 (“Connie Motley’s early cases established that blacks had to be admitted to white public housing projects. In 1967 we got a court order against evicting a black family from an Atlanta public housing project. In 1969 Jim Nabrit III won a case in the Supreme Court holding that public housing tenants had the right to a fair hearing before eviction.”). The Supreme Court decision referenced presumably is *Thorpe v. Durham Housing Authority*, 393 U.S. 268 (1969).

Since the focus of this Article is on post-1964 public housing desegregation litigation that resulted in reported decisions, this account of the NAACP’s activities in earlier years relies only on secondary sources. I hope that an historian will research and write about what the NAACP’s papers and other primary sources reveal about housing advocacy, as Risa Lauren Goluboff has done with respect to the NAACP’s work on labor litigation. See Risa Lauren Goluboff, “*Let Economic Equality Take Care of Itself: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*,” 52 *UCLA L. REV.* 1393 (2005). With respect to the problems with reliance on written documents only, however, see Carter, *supra* note 29, at 1083-84 (noting that “there is no record of oral staff discussions, debates, or determinations,” and “the written record does not provide a full picture of the events and decisions . . . about which Tushnet writes”).

There were other cases brought by counsel other than the NAACP or LDF. See, e.g., *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969).

43. For a discussion of the litigation, see ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006); ALEXANDER POLIKOFF, *HOUSING THE POOR: THE CASE FOR HEROISM* 147-58 (1978).

44. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

45. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

46. *Gautreaux v. Chi. Hous. Auth.*, 475 F.3d 845 (7th Cir. 2007); see also Leonard Rubinowitz, *Imagining Gautreaux*, *Foreword* to 1 *NW. J. OF L. & SOC. POL’Y* (2006), available at [http://www.law.northwestern.edu/journals/njls/v1/n1/Imagining\\_Gautreaux.pdf](http://www.law.northwestern.edu/journals/njls/v1/n1/Imagining_Gautreaux.pdf).

After *Gautreaux*, several significant public housing desegregation lawsuits were brought by Elizabeth K. Julian and Michael M. Daniel, two lawyers in Dallas who started out with legal services and then went into private practice. Julian and Daniel filed suits in Texarkana, Arkansas,<sup>47</sup> in East Texas,<sup>48</sup> and in Dallas.<sup>49</sup> The East Texas suit, filed against HUD for intentional racial segregation in thirty-six counties in East Texas and tried before U.S. District Judge William Wayne Justice, produced a substantial record of HUD's complicity in racial discrimination and segregation, and led to significant improvements in the national administration of the public housing program.<sup>50</sup>

At about the same time as Julian and Daniel filed the East Texas suit in 1980, the Department of Justice filed its only suit challenging both public school and housing segregation.<sup>51</sup> This suit, against Yonkers, New York, was brought in the waning days of the Carter administration, and then was carried on by the local NAACP, which intervened in the suit and was represented by Michael Sussman, who had resigned from the Reagan Department of Justice to continue aggressive work on the *Yonkers* suit.<sup>52</sup>

In the late 1980s and early 1990s, several more public housing desegregation cases were filed. (Daniel, joined by Laura Beshara, filed similar suits in Commerce and Galveston, Texas.)<sup>53</sup> Some,

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47. *Clients' Council v. Pierce*, 778 F.2d 518, 519 (8th Cir. 1985), *vacated as moot*, 785 F.2d 1387 (1986).

48. *Young v. Pierce*, 628 F. Supp. 1037, 1040 (E.D. Tex. 1985); *see* Daniel & Beshara, P.C., <http://danielbesharalawfirm.com> (last visited Apr. 18, 2007).

49. *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 734 F. Supp. 1231, 1232 (N.D. Tex. 1989), *rev'd in part and vacated in part*, *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 912 F.2d 819, 820 (5th Cir. 1990). This case was tried before Judge Jerry Buchmeyer. *See* Elizabeth K. Julian, *Walker v. United States Department of Housing & Urban Development: A Case History* (unpublished manuscript, on file with author); *see also* Daniel & Beshara, P.C., <http://danielbesharalawfirm.com> (last visited Apr. 18, 2007).

50. *Young*, 628 F. Supp. at 1051; *see also* FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 340-55 (1991); Roberta Achtenberg, *Keynote Address*, 143 U. PA. L. REV. 1191, 1195 (1995) (stating that in 1993 HUD began to settle the "legitimate, provable lawsuits for violating the civil rights of residents of public housing").

51. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

52. *See* PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 231-60 (2003) (discussing *Yonkers*); *see also* LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* 11, 58 (1999).

53. NAACP, *City of Commerce Branch v. Hous. Auth. of Commerce*, No. 3:88-CV-0154-R, 1998 U.S. Dist. LEXIS 8961 (N.D. Tex. June 8, 1998); *Ethridge v. Galveston Hous. Auth.*, No. G-96-404 (S.D. Tex. 1997), *available at*

including the author, wrote articles<sup>54</sup> and conducted training<sup>55</sup> to promote the filing of such lawsuits, which were brought in Buffalo, New York (*Comer*);<sup>56</sup> Omaha, Nebraska (*Hawkins*);<sup>57</sup> Minneapolis, Minnesota (*Hollman*);<sup>58</sup> New Haven, Connecticut (*Christian Community Action*);<sup>59</sup> Allegheny County (Pittsburgh), Pennsylvania (*Sanders*);<sup>60</sup> and elsewhere.<sup>61</sup> Most of these cases were brought by lawyers who worked for or recently had left legal services programs: *Comer* by Michael Hanley and Ellen Yacknin of Greater Upstate Law Project,<sup>62</sup> and Barbra Kavanaugh and Dennis McGrath of

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<http://danielbesharalawfirm.com/othercases.aspx>.

54. See, e.g., Julian & Daniel, *supra* note 3, at 666; Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335 (1993); Roisman & Tegeler, *supra* note 3, at 312.

55. See, e.g., Materials for 1991 Loose Ass'n of Legal Services Housing Advocates & Clients ("LALSHAC") Conference, April 21-23, 1991, at vii (describing plenary session on Civil Rights and Low-Income Housing and a workshop on mobility programs and equalization); Materials on Housing Issues, Nat'l Legal Aid & Defender Ass'n ("NLADA") Substantive Law Conference, July 1992, Agenda (describing session on "Remedies for Segregation and Discrimination in Public and Other Government-Assisted Housing"); Materials on Housing Issues, NLADA Substantive Law Conference, Aug. 1993, Agenda, at 6 (describing session on "Remedies for Segregation and Discrimination in Public and Other Government-Assisted Housing"); materials for 1994 LALSHAC meeting, at 6 (describing session on "fair housing mobility issues"). These materials (and others of a similar nature) are on file with the author.

56. *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994).

57. See Settlement Agreement, *Hawkins v. Cisneros*, No. 90-0-55 (D. Neb. Jan. 21, 1994).

58. See Stipulation and Amended Consent Decree (Amendment No. 3), *Hollman v. Cisneros*, No. 4-92-712 (D. Minn. May 13, 1998).

59. See Settlement Agreement, *Christian Cmty. Action, Inc. v. Cisneros*, No. 3:91cv00296 (D. Conn. July 1995).

60. See *Sanders v. U.S. Dep't of Hous. & Urban Dev.*, 872 F. Supp. 216 (W.D. Pa. 1994) (including the text of the approved consent decree resolving the civil rights class action).

61. See, e.g., Timothy L. Thompson, *The Hollman Case: Challenging Racial Segregation in Federal Housing Programs*, 36 CLEARINGHOUSE REV. 240, 240 n.4 (2002). For a list of desegregation lawsuits in which HUD was a party, see Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 171, 194-96 (1999), available at <http://www.huduser.org/periodicals/cityscape/vol4num3/roisman.pdf>. This list was compiled in 1999. I am aware of only one such suit filed after 1999: *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710 (N.D. Ill. 2003).

62. The Greater Upstate Law Project now is the Empire Justice Center. See Empire Justice Center, *The History of the Empire Justice Center*, <http://www.empirejustice.org/content.asp?ContentId=554> (last visited Mar. 10,

Neighborhood Legal Services of Buffalo, later joined by LDF; *Hawkins* by Mary Clarkson, an alumna of Legal Aid of Nebraska; *Hollman* by Timothy Thompson of Minneapolis Legal Aid Society; *Christian Community Action* by Shelley White of New Haven Legal Assistance; *Sanders* by Thomas Henderson of the Lawyers Committee for Civil Rights Under Law and Donald Driscoll of the Neighborhood Legal Services Association of Pittsburgh. In most of these lawsuits, HUD was a defendant, and HUD and the U.S. Department of Justice, through the Civil Division, vigorously defended the cases. The most recent of these cases was *Thompson v. United States Department of Housing and Urban Development*,<sup>63</sup> filed in 1995 to challenge the intentional racial segregation of public housing in Baltimore, Maryland. This case is discussed in Part III.<sup>64</sup>

In 1992, Bill Clinton was elected President of the United States, and Henry G. Cisneros became Secretary of HUD.<sup>65</sup> HUD settled many of these cases by, inter alia, providing funding for housing mobility that would enable residents to escape the segregated developments in which they lived. During the Clinton Administration, in 1996, HUD reached a partial settlement in *Thompson*,<sup>66</sup> but much of the case was left to be litigated by a new administration.<sup>67</sup>

## II. THE FRUITS OF THE LITIGATION: HOUSING MOBILITY

What made the *Gautreaux* litigation important—and led others to emulate it—was not so much its liability holdings as its remedial phase. The liability of the Chicago Housing Authority (“CHA”) was established in 1969: the evidence of intentional racial discrimination and segregation was overwhelming, and CHA did not appeal the district court’s liability holding.<sup>68</sup> The district court initially exonerated HUD from liability, but the Seventh Circuit held that HUD had violated the Fifth Amendment, rejecting HUD’s defense that it had been forced to acquiesce in segregated public housing in order to secure any public housing at all.<sup>69</sup> The district court ruled

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2007). The list of counsel in these cases is illustrative, not exhaustive.

63. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).

64. *See infra* Part III.

65. *See* Biography of Henry G. Cisneros, <http://govinfo.library.unt.edu/npr/library/status/bios/cisneros.htm> (last visited Apr. 17, 2007).

66. *See Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 220 F.3d 241, 243, 244 (4th Cir. 2000) (describing the 1996 consent decree).

67. *See generally id.*

68. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 909 (N.D. Ill. 1969).

69. *Gautreaux v. Romney*, 448 F.2d 731, 733, 737 (7th Cir. 1971).

that HUD could not be required to extend its remedial actions outside the city of Chicago, but the Seventh Circuit reversed, holding that interdistrict, metropolitan relief could be ordered.<sup>70</sup> The Supreme Court affirmed.<sup>71</sup>

After the Supreme Court upheld the propriety of a remedial order that affected HUD's conduct in the suburbs of Chicago, the parties entered into a settlement that, inter alia, had HUD provide Section 8 certificates and vouchers for African-American public housing residents and applicants from Chicago to use in city and suburban areas with less than thirty percent African-American populations.<sup>72</sup> This program, called the Gautreaux Housing Mobility Program ("GHMP"), began in 1976 and enabled 7100 African-American families to move to less racially-impacted neighborhoods.<sup>73</sup> These families have been studied over the decades by sociologists from Northwestern University, led by Professor James Rosenbaum.<sup>74</sup>

The *Gautreaux* studies have shown dramatic improvement in the educational performance of the children who moved to predominantly white, suburban neighborhoods. These children "were more likely to be (1) in school, (2) in college-track classes, (3) in four-year colleges, (4) employed, and (5) employed in jobs with benefits and better pay."<sup>75</sup> Moreover, "adults who moved to the suburbs had higher employment rates than adults moving to city areas, although the wages they earned and the number of hours they worked did not differ significantly from the city dwellers."<sup>76</sup> "In addition, suburban movers experienced greater safety and freedom from fear of crime than they did in the inner city."<sup>77</sup> The researchers

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70. *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 932, 938-39 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976).

71. *Gautreaux*, 425 U.S. at 306.

72. *Gautreaux v. Landrieu*, 523 F. Supp. 665, 668-69 (N.D. Ill. 1981) (also including text of the consent decree settling the claims against HUD at 672-82), *aff'd sub nom. Gautreaux v. Pierce*, 690 F.2d 616 (7th Cir. 1982).

73. James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUS. POL'Y DEBATE 231, 232, 232-33 (1995).

74. John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 2, at 127, 133.

75. James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1553 (1993).

76. 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., 2003).

77. LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS*

also found that the adults, as well as the children, “can acquire new social competencies when they move to very different social environments, and it is quite possible that these competencies have a powerful impact on the next generation.”<sup>78</sup> In sum, as John Goering concluded, “[t]he policy message from the *Gautreaux* research seems clear: Changes not observed in any other domestic urban policy initiative had occurred in the lives of poor children apparently because they had moved to less economically and racially isolated neighborhoods.”<sup>79</sup>

The encouraging results of the GHMP led to the inclusion of mobility remedies in virtually all the other public housing desegregation lawsuits.<sup>80</sup> The GHMP also was the basis for Congress’ creation of a demonstration program, Moving to Opportunity (“MTO”), which enabled public housing residents to move out of high-poverty neighborhoods into lower-poverty neighborhoods.<sup>81</sup> It is important to note that “instead of the *Gautreaux* program’s racial focus, MTO uses poverty to define eligibility and places of origin and destination.”<sup>82</sup> During the Clinton Administration, HUD also implemented mobility principles by creating a Regional Opportunity Counseling (“ROC”) program and incorporating mobility into other programs.<sup>83</sup> Some public housing

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AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 190 (2000).

78. James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 2, at 150, 155.

79. Goering, *supra* note 74, at 134.

80. RUBINOWITZ & ROSENBAUM, *supra* note 77, at 176 (“Lawyers representing plaintiffs in public housing desegregation litigation modeled on the *Gautreaux* case were an especially receptive audience since they too sought to develop beneficial remedial initiatives.”).

*Gautreaux* and subsequent lawsuits also produced “equalization” remedies that improved conditions in existing public housing, but these remedies are not the focus of this Article. See Roisman, *supra* note 61, at 172; John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487 (1993); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233 (1995).

81. RUBINOWITZ & ROSENBAUM, *supra* note 77, at 176-77; see also Goering, *supra* note 76, at 39-44 (describing the influence of the GHMP and *Gautreaux*’s counsel, Alexander Polikoff, on the creation of the MTO program).

82. RUBINOWITZ & ROSENBAUM, *supra* note 77, at 177; see also Goering, *supra* note 76, at 42.

83. RUBINOWITZ & ROSENBAUM, *supra* note 77, at 177 (discussing ROC and the Vacancy Consolidation Program); see also HOUSING MOBILITY: PROMISE OR ILLUSION? (Alexander Polikoff ed., 1995) (Report of the First National Conference on Housing Mobility as an Anti-Poverty Strategy).



authorities also “initiated mobility programs without litigation or special HUD funding.”<sup>84</sup>

Studies of these mobility programs have shown a variety of important benefits for the families who were enabled to move and for the community at large. The benefits involve not only education and employment, but also health, environmental, and economic advantages.<sup>85</sup>

The most “striking” showing of educational benefit from mobility has been produced by the Gautreaux Housing Mobility Program.<sup>86</sup> By contrast, the MTO movers, who generally did not go to racially integrated schools, have not demonstrated educational benefits.<sup>87</sup> The opportunity for minority students, particularly African-Americans, to attend predominantly white schools is an opportunity to secure an effective education. As Xavier Briggs wrote:

After steady decline from the 1950s through the 1980s, black segregation in schools has increased to levels not seen in thirty years. A growing share of black and Hispanic students, particularly in the big-city school systems, attend schools that are virtually all nonwhite, characterized by high student poverty rates, limited school resources, less experienced and credentialed teachers, less educated parents, high student turnover, overcrowded and disorderly classrooms, and a host of

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84. RUBINOWITZ & ROSENBAUM, *supra* note 77, at 177; *see also* HOUSING MOBILITY, *supra* note 83.

85. *See* Margery Austin Turner & Dolores Acevedo-Garcia, *The Benefits of Housing Mobility: A Review of the Research Evidence*, in KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM (Philip Tegeler et al. eds., 2005); *see also* OWEN FISS, *A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM* (2003); SCHUCK, *supra* note 52, at 227-31 (discussing *Gautreaux*). Turner and Acevedo-Garcia note that MTO data “suggests that moving to a lower-poverty environment is indeed improving the behavior of teenaged girls, but not boys,” possibly because “black and Hispanic boys moving to integrated or predominantly white neighborhoods are . . . being arrested more due to racial profiling” or “girls and boys respond differently to the initial loneliness and fears of relocation.” Turner & Acevedo-Garcia, *supra*, at 17.

86. Turner & Acevedo-Garcia, *supra* note 85, at 16. For a discussion of other studies showing greater educational achievements in racially integrated schools, *see* Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 508-10 (1995); *supra* text accompanying note 75.

87. Turner & Acevedo-Garcia, *supra* note 85, at 16 (hypothesizing that this is the case “possibly because so few children are attending significantly better schools, or because it may be too soon to see benefits”).

health and other problems.<sup>88</sup>

Mobility leads to improved employment opportunities for a variety of reasons. More employment opportunities are in the suburbs, so that moves to the suburbs make jobs more accessible.<sup>89</sup> This advantages not only the families who move, but also employers: being unable to attract the low-wage workers who often are minorities limits the workforce available to employers and discourages employers from moving to or even remaining in areas that do so restrict their housing.<sup>90</sup> Also, moving from the inner cities offers an opportunity to escape the “place discrimination” practiced by employers, who refuse to hire people whose homes are in “ghetto” neighborhoods.<sup>91</sup>

Significant improvements in health have been observed in families who move to predominantly white suburbs. Mobility has been shown to improve mental health<sup>92</sup> and to reduce the incidence of asthma and other respiratory diseases, heart disease,<sup>93</sup> and

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88. Xavier de Souza Briggs, *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 2, at 17, 32.

89. *See id.* at 34-35; Turner & Acevedo-Garcia, *supra* note 85, at 12.

90. *See* Turner & Acevedo-Garcia, *supra* note 85, at 17 (“Long-term research on Gautreaux families has found significant increases in employment and reductions in welfare reciprocity.”). The MTO studies have not shown “statistically significant employment or earnings effects across the total sample of MTO families or among HOPE VI relocatees,” but MTO families in New York and Los Angeles have experienced significant impacts on employment and earnings. *Id.*

91. *See, e.g.*, Joleen Kirschenman & Kathryn M. Neckerman, “*We’d Love to Hire Them, But . . .*”: *The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS 203, 208-09* (Christopher Jencks & Paul E. Peterson eds., 1991).

92. Studies consistently show that desegregation reduces stress. *See, e.g.*, George E. Peterson & Kale Williams, *Housing Mobility: What Has It Accomplished and What is Its Promise?*, in *HOUSING MOBILITY*, *supra* note 83, at 12.

93. *See* Turner & Acevedo-Garcia, *supra* note 85, at 9, 12-14, 16 (discussing the health impacts in impacted neighborhoods and the improvements when racial and economic barriers were removed); *see also* Dolores Acevedo-Garcia & Theresa L. Osypuk, *Racial Disparities in Housing and Health*, *POVERTY & RACE*, Jul.-Aug. 2004, at 1-2, 11-13 (explaining why, although improving health has not been an explicit purpose of housing desegregation efforts, “given what is known about the link between neighborhoods, segregation and health, these policies may contribute to better health outcomes”); Briggs, *supra* note 88, at 36 (“[A] growing body of evidence suggests that housing segregation contributes to persistent racial disparities in exposure to crime and violence, physical and mental health status and health-related behaviors (disease, trauma, and other stressors, poor diet and exercise habits), and a variety of environmental health hazards, including pollution.”); Richard Rothstein & Tamara Wilder, *The*

contagious diseases (like tuberculosis), which do not stay confined to areas of minority concentration.<sup>94</sup>

Racial discrimination and segregation are principal causes of urban sprawl, as white people move further and further from cities and inner-ring suburbs in order to escape living with people of color.<sup>95</sup> The sprawl imposes substantial costs in increased traffic congestion and stress, new highway construction, destruction of farmland, air pollution (exacerbating respiratory illness and promoting climate change), dangers to biodiversity, and other social ills.<sup>96</sup>

Mobility also has significant economic benefits for the country as a whole. Poverty imposes hardships not only on the people who are poor, but also on those who have to face and address the consequences of that poverty. Residential desegregation is “a promising anti-poverty strategy for the larger community.”<sup>97</sup> Residential racial and ethnic discrimination and segregation strongly contribute to economic inequality, which itself is the source of great harm to the community in general.<sup>98</sup>

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*Contribution of Black-White Health Differences to the Academic Achievement Gap*, POVERTY & RACE, Sept.-Oct. 2005, at 3-7.

94. See, e.g., Lawrence O. Gostin, *The Resurgent Tuberculosis Epidemic in the Era of AIDS: Reflections on Public Health, Law, and Society*, 54 MD. L. REV. 1, 36-45 (1995) (reviewing the roles of poverty, race, and other societal factors in the development and spread of tuberculosis); Roderick Wallace & Deborah Wallace, *The Coming Crisis of Public Health in the Suburbs*, 71 MILBANK Q. 543 (1993); Roderick Wallace & Deborah Wallace, *Contagious Urban Decay and the Collapse of Public Health*, HEALTH/PAC BULL., Summer 1991, at 13.

95. See Xavier de Souza Briggs, *Introduction to THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 2, at 8; Briggs, *supra* note 88, at 17, 19-20; Jargowsky, *supra* note 41, at 41-42, 59 (“[A]s Park . . . argued . . . urban environments are shaped by the attempts of successful and mobile groups of persons to translate social distances between themselves and lower status groups into physical distances that protect them from the real and perceived threats posed by the lower status groups.”); JACKSON, *supra* note 5, at 206-18 (detailing the impact of FHA and VA policies of racial discrimination and segregation on the destruction of the cities and the flight to the suburbs).

96. See Briggs, *supra* note 88, at 21-29; David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES 23 (Gregory D. Squires ed., 2002); Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 107 (1998).

97. Peterson & Williams, *supra* note 92, at 21.

98. See Briggs, *supra* note 95, at 3 (“A growing body of empirical evidence indicates that racial segregation is not merely correlated with unequal social and economic outcomes but also specifically contributes to worsening inequality in metropolitan areas, which drive the nation’s and the world’s economy.”).

Although few would admit it, many white, Anglo people believe that they benefit from residential segregation because the segregation keeps crime, drugs, and violence in minority neighborhoods.<sup>99</sup> In reality, however, residential segregation is a *cause* of crime, drug abuse, and violence.<sup>100</sup> Crime, drugs, and violence do not stay confined to particular locations; they “spill over into neighboring areas, eroding their stability and threatening other, more removed areas in turn.”<sup>101</sup> Thus, reducing residential segregation reduces the extent of crime, drug abuse, and violence, thereby enhancing mental and physical health.<sup>102</sup>

When segregation inhibits minorities from increasing their incomes, it reduces taxable income for entire communities and adds to “the demand on public purses.”<sup>103</sup> The abandonment of sites that should be prime locations for commercial or industrial development

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With respect to the damage caused by economic inequality, see also Jargowsky, *supra* note 41, at 67-68; Roisman, *supra* note 96, at 91-96.

99. See Briggs, *supra* note 88, at 20 (“As sociologist Camille Charles notes . . . white Americans strongly associate these problems [crime and poor school quality] with increased minority presence in a community, particularly with the presence of blacks.”); Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 2, at 45, 66-72.

100. See, e.g., ELLIOTT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 144-79 (1985); ELLIOTT CURRIE, *RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE* 77-147 (1993) (discussing the link between drug abuse and deprivation, and finding “drugs and inequality . . . closely and multiply linked”); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 *AM. SOC. REV.* 114, 117-23 (1982) (finding that economic inequity generally increases rates of criminal violence); see also ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 200 (1968) (“It is when a system of cultural values extols . . . certain *common* success-goals for the population at large while the social structure rigorously restricts or completely closes access to approved modes of reaching these goals for a considerable part of the same population, that deviant behavior ensues on a large scale.”); MILTON S. EISENHOWER FOUND., *TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY: A THIRTY YEAR UPDATE OF THE COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 65 (1999), available at <http://www.eisenhowerfoundation.org/docs/justice.pdf> (stating that violent crime is exacerbated by a “vast and shameful inequality in income, wealth, and opportunity”).

101. Henry Cisneros, *Sharing Responsibility for Inner City Problems*, *WORLD RESOURCES: A GUIDE TO THE GLOBAL ENVIRONMENT*, 1996-97, at 13.

102. Turner & Acevedo-Garcia, *supra* note 85, at 12 (noting that exposure to crime causes anxiety, emotional trauma, and stress, which “may increase susceptibility to developing health conditions such as asthma”).

103. LEADERSHIP COUNCIL FOR METRO. OPEN CMTYS., *THE COSTS OF HOUSING DISCRIMINATION AND SEGREGATION: AN INTERDISCIPLINARY SOCIAL SCIENCE STATEMENT* 4 (1987).

imposes significant economic costs on the community and on individual white Anglos. When safety and schooling concerns make certain neighborhoods unattractive, “the aggregate cost . . . for white workers is very high and is the cumulative sum of daily commuting costs, multiple car ownership, more expensive housing and isolation from the rich variety of cultural and recreational opportunities found in a great urban center.”<sup>104</sup> White Anglos have complained that residential racial segregation causes them to “[miss] business and professional advantages which would have accrued if they had lived with members of minority groups,” and that such segregation causes them “embarrassment and economic damage in social, business, and professional activities.”<sup>105</sup> “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>106</sup> “[R]esearch suggests that by tolerating racial discrimination in and around their communities, Americans have been paying a far higher price for their prejudices than they ever would have dreamed.”<sup>107</sup>

### III. THE BALTIMORE LITIGATION: HEREIN OF THE ORIGINAL MEANING OF “AFFIRMATIVELY FURTHER”

As discussed in Part I, *Thompson v. United States Department of Housing and Urban Development*,<sup>108</sup> filed in 1995, is the most recent of the public housing desegregation cases.<sup>109</sup> The suit originally was brought by Barbara Samuels and Susan Goering of the American Civil Liberties Union Foundation of Maryland. They were joined as co-counsel for plaintiffs by the law firms Brown, Goldstein & Levy, Jenner & Block, and Morgan, Lewis & Bockius, and by the NAACP Legal Defense Fund.<sup>110</sup> Plaintiffs, a class of African-American residents of public housing in the city of

104. *Id.* at 5.

105. *See, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972) (holding that such claims may be the basis for standing to sue under the Fair Housing Act).

106. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

107. Neal R. Peirce, *State of the States: The Economic Drag of Discrimination*, 24 NAT’L J. 770 (1992).

108. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).

109. *See supra* notes 63-64 and accompanying text.

110. *Thompson*, 348 F. Supp. 2d at 404; Plaintiffs’ Post-Trial Brief, *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2006) (No. MJG-95-309).

Baltimore, sued both local and federal defendants, the former being the housing authority, mayor, and city council of Baltimore, and the latter being HUD and its predecessor agencies.<sup>111</sup> In 1996, the parties agreed to a partial consent decree.<sup>112</sup>

In January of 2005, District Judge Marvin Garbis entered an opinion absolving the local defendants of any liability but holding that HUD had violated § 3608(e)(5) of the 1968 Civil Rights Act, which directs that the Secretary of Housing and Urban Development shall “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.”<sup>113</sup> Specifically, Judge Garbis held that HUD had violated its statutory duty “affirmatively to further” fair housing because HUD had failed adequately to consider regional approaches to ameliorating racial segregation in public housing.<sup>114</sup> In this opinion, which occupies 120 pages of the Federal Supplement Second, Judge Garbis directed that further proceedings be conducted with respect to remedy.<sup>115</sup> He said that this remedial phase also would consider whether HUD had violated constitutional as well as statutory duties.<sup>116</sup> To the claims against HUD, he applied a six-year statute of limitation, requiring a showing of an actionable wrong committed after January 31, 1989 (the “Open Period”).<sup>117</sup>

HUD then moved for summary judgment. Judge Garbis denied that motion but said that he would allow HUD to renew during the remedial proceedings its argument that it was not liable for violating the statutory duty “affirmatively to further” fair housing.<sup>118</sup> Ten days of “remedial phase” hearings were held in March and April of 2006, and the parties filed pre- and post-trial briefs and then presented their positions orally.<sup>119</sup>

During the supplemental proceedings, four issues were addressed: (1) should the court reconsider its holding that HUD had

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111. *Thompson*, 348 F. Supp. 2d at 411.

112. *Id.* at 424-25; *see also* *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 220 F.3d 241, 244 (4th Cir. 2000) (describing the consent decree).

113. Fair Housing Act, 42 U.S.C. § 3608(e)(5) (2006).

114. *Thompson*, 348 F. Supp. 2d at 451, 458-65.

115. *Id.* at 451.

116. *Id.*

117. *Id.* at 407.

118. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, No. MJG-95-309, 2006 U.S. Dist. LEXIS 9416, at \*45 (D. Md. Jan. 10, 2006).

119. *See* Matthew Dolan, *Public Housing Case Argued: Remedy for Possible Bias Sought During Federal Court Session*, BALTIMORE SUN, July 12, 2006, at 2B.

violated § 3608(e)(5); (2) had HUD violated the Fifth Amendment; (3) if liability were established, should the court grant any injunctive relief; and (4) if the court were to grant injunctive relief, what should that be?<sup>120</sup> This Article considers only the first issue, discussing the nature and extent of the statutory duty affirmatively to further the policies of Title VIII. It does not address the constitutional issue or the remedial issues (whether and to what extent the court can and should order injunctive relief). Part III.A, below, describes the statutory duty aspect of the decision in some detail and indicates the bases on which HUD challenges it. Part III.B discusses the legal background of this aspect of the decision. Part III.C assesses HUD's challenge against that legal background.

A. *The Details of the "Affirmatively Further" Holding of the January 2005 Decision and HUD's Challenge to It*

In his January 2005 opinion, Judge Garbis reviewed the long record of racial segregation in Baltimore, "the largest municipality in Maryland, a former slave state," which had a history of de jure racial segregation.<sup>121</sup> He noted that "in 1954 there was, to a large extent, a recognizable 'ghetto' within which lived essentially no Whites and virtually all of the Black residents of Baltimore City," while, "to the limited extent that there were Black residents of the counties in the Baltimore Region, the racial segregation there was, if different at all, even more pronounced."<sup>122</sup> "[U]ntil 1954," he wrote, Baltimore City had "two separate school systems and . . . for all practical purposes, two separate downtowns."<sup>123</sup> In the "White" downtown, Blacks "were typically made less than welcome and were unable to utilize eating facilities or theaters."<sup>124</sup> Outside a public swimming pool was a sign, prominently posted, which read: "NO JEWS, DOGS OR COLOREDS ALLOWED."<sup>125</sup>

Judge Garbis said that it was "undisputed that prior to the 1954 *Brown I* decision Federal and City administrations had intentionally discriminated against African-American residents of public housing due to their race."<sup>126</sup> He found that, after 1954, the local defendants

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120. See *Thompson*, 2006 U.S. Dist. LEXIS 9416.

121. *Thompson*, 348 F. Supp. 2d at 405, 459.

122. *Id.* at 405.

123. *Id.*

124. *Id.* (footnote omitted).

125. *Id.*; see also *id.* at 459 ("Through 1954, Baltimore City was a majority White, de jure racially segregated city. Racial segregation permeated virtually every aspect of city life—schools, housing, restaurants, stores, recreation, et cetera.").

126. *Id.* at 408; see also *id.* at 443. The court said that its "Summary of

had acted appropriately to desegregate public housing in Baltimore City.<sup>127</sup> With respect to HUD, however, he found that “[i]n regard to public housing, to the extent that there have been desegregative steps” taken by HUD, “these efforts have consisted overwhelmingly in placing African-American low-income housing residents in public housing units located in Baltimore City.”<sup>128</sup>

Noting “HUD’s long-term practice of focusing its efforts on Baltimore City,”<sup>129</sup> Judge Garbis held that HUD had violated its statutory duty under § 3608(e)(5) “affirmatively to further the policies” of Title VIII.<sup>130</sup> Following past case law, he held that the “policies” of Title VIII include “the dual goals of preventing the increase of segregation in housing and attaining open, integrated residential housing patterns.”<sup>131</sup> He found that, since Baltimore is a majority Black city,<sup>132</sup> “[i]t is simply inadequate to try to solve the problem by redistributing the population of Baltimore City within the city limits.”<sup>133</sup>

The court held that “during the Open Period, HUD failed adequately to consider policy options whereby low-income African-American families from Baltimore City might be afforded housing

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Decision,” from pages 408 through 410, “is not a part of the decision itself.” *Id.* at 407 n.8. Most of the quoted statements, however, also appear in the portion of the opinion that is “the decision itself,” Sections II-V and, “to the extent of evidentiary rulings, in Section I.C.” *Id.*

127. *Id.* at 459.

128. *Id.*

129. *Id.*

130. *Id.* at 452 n.108.

131. *Id.* at 458.

132. *Id.* at 408 (noting that in 2000, “the population of Baltimore City was 64 percent African-American, while the population of the rest of the Baltimore Region was 15 percent Black”); *see also id.* at 446-47 (noting that demographic change, with 92 percent of Baltimore City public housing residents Black as of December 31, 1991, “has made it essential[ly] futile to seek to effect meaningful internal desegregation of public housing unless a regional approach—including public housing outside of the city limits—is taken.”). In providing the 92 percent figure, Judge Garbis stated: “The fact that Baltimore public housing communities and Baltimore’s low-income public-housing-eligible population have become disproportionately African-American is clearly cause for concern. This warrants political action at multiple levels of government to address racial disparities. But Plaintiffs do not allege that Defendants unconstitutionally affected this demographic development . . . .” *Id.* at 446 n.98. I think that plaintiffs do allege that defendants unconstitutionally affected this demographic development. This probably will be clarified in the decision on the constitutional claims

133. *Id.* at 459.



opportunities beyond the City limits.”<sup>134</sup> “Indeed,” the court wrote, HUD “may have worsened the racially discriminatory situation by making no more than token efforts to take a regional, rather than merely a city limited, approach to the siting of housing for members of the Plaintiff class.”<sup>135</sup>

The court focused particularly on HUD’s role with respect to the Section 8 and conventional public housing programs. It noted that “[a]lthough Section 8 voucher-holders have the opportunity to pursue housing wherever they cho[ose], in 2002 about 56% of the MSA’s Section 8 voucher-holders resided in Baltimore City.”<sup>136</sup> The court also noted that “more than 67 percent . . . of the City’s Section 8 voucher holders live in census tracts that are 70 to 100 percent Black.”<sup>137</sup> The court said that “[t]he majority use within the city limits may be explained by noting that HUD considers the Baltimore metropolitan area to have a tight housing market that makes it very difficult, even for families with vouchers, to secure housing.”<sup>138</sup>

With respect to public housing, however, the court said that “[d]uring the 1990s, 89% of public housing units developed with HUD’s support in the Baltimore Region were in Baltimore City. In sharp contrast, none at all was sited in contiguous Baltimore County.”<sup>139</sup> The court found that

some 86 percent of all hard-scape public housing units sited in Baltimore City during the 1990s were [sited] in Census tracts with African-American percentages above the citywide average in 1990. . . . [I]n 2002, 98 percent of Baltimore’s family tenants in public housing developments were African-American, and

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134. *Id.* at 443.

135. *Id.*

136. *Id.* at 459-60; *see also id.* at 460 (discussing HUD evidence about “the Baltimore metropolitan area” and its “tight housing market”). The court followed the parties in using statistics for the Baltimore Metropolitan Statistical Area (“MSA”), which includes Queen Anne’s County in addition to Baltimore City and Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties. *Id.* at 458. The court excluded Queen Anne’s County from the “Region” that HUD should have considered, for “Queen Anne’s County is across the Bay Bridge and is neither similar to, nor realistically connected to Baltimore City in the context of racial relations.” *Id.* at 458 & n.116. Nonetheless, the court said that the “relatively small population of Queen Anne’s County” made it appropriate to use statistics for the full Baltimore MSA as a proxy for the region without Queen Anne’s County. *Id.* at 458 n.116; *see also* Appendix.

137. *Id.* at 460.

138. *Id.*

139. *Id.*

each public housing development was at least 91 percent African-American.<sup>140</sup>

The court found that the statistical evidence demonstrated that HUD had “failed to achieve significant desegregation in Baltimore City,” and that HUD had failed, “over time, to take seriously its minimal Title VIII obligation to consider alternative courses of action in light of their impact on open housing.”<sup>141</sup> The court defined the “Baltimore Region” as “Baltimore City [and] Anne Arundel, Baltimore, Carroll, Harford and Howard Counties”<sup>142</sup> and defined “regionalization” as “policies whereby the effects of past segregation in Baltimore City public housing may be ameliorated by providing housing opportunities to the Plaintiff class beyond the boundaries of Baltimore City.”<sup>143</sup>

Stating that “Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region including Anne Arundel, Baltimore, Carroll, Harford and Howard Counties,”<sup>144</sup> the court held that HUD’s duty “affirmatively to further” the goal of attaining “open, integrated residential housing” patterns required that HUD at least “consider regionally-oriented desegregation and integration policies,” particularly since “Baltimore City is virtually surrounded by Baltimore County and there is public transportation between the two.”<sup>145</sup> The court found “an approach of regionalization to be integral to desegregation in the Baltimore Region and that regionalization was an important

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140. *Id.* at 461.

141. *Id.* (quoting NAACP, Boston Chapter v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 157 (1st Cir. 1987)). In addition to holding that HUD had violated the statute by not adequately considering regionalization, the court made specific reference to conventional public housing, stating that “[i]t was manifestly within the jurisdictional authority of HUD to site public housing . . . outside the boundaries of Baltimore City.” *Id.* at 462. In fact, such siting of conventional public housing could not be accomplished by HUD alone; such siting would require action by a local housing authority, possibly by HABC with a cooperation agreement with another entity. *See, e.g., Sanders v. U.S. Dep’t of Hous. & Urban Dev.*, 872 F. Supp. 216 (W.D. Pa. 1994), where HUD deemed a suburban county an appropriate body with which a housing authority could enter into a cooperation agreement. HUD also has the option of taking over a public housing authority and exercising its authority. *See, e.g., Achtenberg, supra* note 50, at 1195 (stating that HUD “took over public housing in the town of Vidor[, Texas,] because the local public housing authority had failed to end racial discrimination there”).

142. *Thompson*, 348 F. Supp. 2d at 458; *see supra* note 136; *see also infra* map appendix.

143. *Thompson*, 348 F. Supp. 2d. at 408.

144. *Id.*

145. *Id.* at 459, 462.

alternative course of action available to Federal Defendants.”<sup>146</sup> The court said that “[t]hrough regionalization, HUD had the practical power and leverage to accomplish desegregation through a course of action that Local Defendants could not implement on their own, given their own jurisdictional limitations.”<sup>147</sup> The court found “that HUD must take an approach to its obligation to promote fair housing that adequately considers the entire Baltimore Region.”<sup>148</sup>

Throughout the proceedings, including in its post-trial brief after the remedial phase, HUD’s argument with respect to the statutory “affirmatively further” duty was that HUD had satisfied it, that HUD “has done a tremendous amount with its limited resources to further the cause of fair housing throughout the Baltimore area.”<sup>149</sup> Pages three through twenty-five of HUD’s post-trial brief, for example, are devoted to supporting the argument that “HUD ACTED ON A REGIONAL BASIS TO AFFIRMATIVELY FURTHER FAIR HOUSING TO THE EXTENT REQUIRED BY STATUTE.”<sup>150</sup>

In its post-trial *reply* brief in *Thompson*, however, HUD takes another tack, arguing that § 3608(e)(5) does not require HUD to address regional rather than national or local desegregation or to focus on racial as opposed to other forms of segregation.<sup>151</sup> Emphasizing the undisputed principle that HUD possesses broad discretion as to how to carry out its “affirmatively further” duty,<sup>152</sup> in the post-trial reply brief HUD argues that

146. *Id.* at 461-62.

147. *Id.* at 462; *see also id.* at 408 (“It is with respect to HUD, and its failure adequately to consider a regional approach to desegregation of public housing, that the Court finds liability. . . . In light of HUD’s statutory duties and the fact that its jurisdiction and ability to exert practical leverage extend throughout the Baltimore Region, it was, and continues to be unreasonable for the agency not to consider housing programs that include the placement of a more than insubstantial portion of the Plaintiff class in non-impacted areas outside the Baltimore City limits.”).

148. *Id.* at 458. The court begins this sentence with “The Court finds . . . .”

149. Federal Defendants’ Post-Trial Brief at 1, *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2006) (No. MJG-95-309); *see also id.* at 2 (“HUD took every bit as much action as it should have to meet whatever regional obligation it might have had to affirmatively further fair housing.”); *id.* at 5 (“HUD clearly has given a considerable amount of focused attention to matters encompassed within the concept of regional fair housing.”).

150. *Id.* at 3.

151. Post-Trial Reply Brief of Federal Defendants at 4, *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (No. MJG-95-309).

152. *NAACP, Boston Chapter v. U.S. Dep’t of Hous. & Urban Dev.*, 817 F.2d 149, 157 (1st Cir. 1987); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d

because the only textual reference to the territorial reach of the statute mentions the policy of providing fair housing ‘throughout the United States,’ 42 U.S.C. § 3601; and because Title VIII relates to a wide variety of types of fair housing . . . no requirement that HUD focus on any particular region or type of discrimination should be read into Title VIII.<sup>153</sup>

Part III.C, below, assesses this argument against the legal background of the statutory language, which is discussed in Part III.B, which follows.

*B. The Legal Background of the “Affirmatively Further” Holding of the January 2005 Decision*

This Part considers both the legislative history of the “affirmatively further” language and the case law interpreting and applying it.

*1. The Legislative History of the “Affirmatively Further” Language*

The 1968 Civil Rights Act contains two “affirmatively further” provisions.<sup>154</sup> Section 3608(e)(5) requires the Secretary of HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively further the policies of this title”<sup>155</sup> and Section 3608(d) imposes an almost identically-worded obligation on other federal departments and agencies.<sup>156</sup>

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809, 819 (3d Cir. 1970).

153. Post-Trial Reply Brief of Federal Defendants at 4, *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (No. MJG-95-309).

154. 42 U.S.C. §§ 3608(d), (e)(5) (2006).

155. 42 U.S.C. § 3608(e)(5). Before the Fair Housing Amendments Act of 1988, this section was 3608(d)(5), and is so referred to in pre-1988 judicial decisions and other material.

156. 42 U.S.C. § 3608(d) directs that

[a]ll 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 Secretary [of HUD] to further such purposes.

Before the Fair Housing Amendments Act of 1988, this section was 3608(c), and is so referred to in pre-1988 judicial decisions and other material.

Section 3608(e)(5)’s reference to “policies of this title” and § 3608(d)’s reference to “purposes of this subchapter” have been interpreted as meaning the same thing. *See*, in addition to the cases discussed in this Article which consider § 3608(e)(5), *Jones v. Office of the Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997) and *Jorman v. Veterans Admin.*, 579 F.

The “affirmatively further” principle predated by at least two years the enactment of the statute in 1968.<sup>157</sup> The Administration’s omnibus civil rights bill, introduced on May 2, 1966, as H.R. 14765, contained, in Title IV, Section 408(e), the direction that “The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.”<sup>158</sup>

In 1967, the Administration’s omnibus civil rights bill, introduced on February 20, 1967, contained a provision virtually identical to § 3608(d): “All 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 this title and shall cooperate with the Secretary [of HUD] to further such purposes.”<sup>159</sup> In 1967, in the first session of the 90th Congress, this legislation “went nowhere.”<sup>160</sup> The House of Representatives did, however, pass a bill to increase federal protection for civil rights workers, H.R. 2516.<sup>161</sup>

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Supp. 1407, 1416 (N.D. Ill. 1984) (interpreting § 3608(d) by using decisions interpreting § 3608(e)(5)).

157. See *infra* note 158 and accompanying text.

158. H.R. 14765, 89th Cong. (2d Sess. 1966). This provision survived as § 409(e) in the amended legislation that was reported from the Committee on the Judiciary to the Committee of the Whole House on the State of the Union on June 30, 1966. H.R. REP. NO. 89-1678 (1966). The House of Representatives passed the bill, but a filibuster prevented Senate action. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 261-62 (1990).

This provision may have been based on President Kennedy’s 1962 Executive Order, which directed all executive departments and agencies “insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, religion . . . or national origin” with respect to various categories of housing, and directed “all other executive departments and agencies to use their good offices and to take other appropriate action permitted by law . . . to promote the abandonment of discriminatory practices with respect to residential property . . . heretofore provided with Federal financial assistance.” Exec. Order No. 11,063, 27 F.R. 11,527 (Nov. 20, 1962).

159. S. 1026, 90th Cong. § 409(d) (1st Sess. 1967). This provision differed from § 3608(d) only in that it omitted the parenthetical phrase “(including any Federal agency having regulatory or supervisory authority over financial institutions)” and used the words “this title” instead of “this subchapter.” The same bill was introduced in the House of Representatives as H.R. 5700.

160. GRAHAM, *supra* note 158, at 267.

161. *Id.* at 268, 270.

The story of how this led to the enactment of the Fair Housing Act of 1968 is a complicated and fascinating one, but for our purposes here the central point is that the “affirmatively further” language of the 1966 and 1967 bills was retained in the compromise legislation that was passed by the Senate and the House and then signed into law by President Johnson.<sup>162</sup>

On December 15, 1967, Senate Majority Leader Mike Mansfield placed on the Senate’s agenda of pending business H.R. 2516, the House-passed bill providing protection for civil rights workers.<sup>163</sup> On February 6, 1968, Senators Mondale and Brooke “proposed a major open housing amendment” to H.R. 2516.<sup>164</sup> An attempt at cloture failed, but by a narrow vote.<sup>165</sup> Senate Majority Leader Dirksen, Republican of Illinois, then proposed another amendment.<sup>166</sup> “On March 4 the Senate voted cloture.”<sup>167</sup> On March 11, 1968, the Senate passed the bill, as amended by Senator Dirksen.<sup>168</sup>

The bill approved by the Senate was very different from that which had been passed by the House. The Senate-passed bill then went to the House of Representatives, where

there was danger that the House, which had become increasingly more conservative in complexion, would not pass the Senate bill. In that case, the measure would go to conference, where its fate was far from certain. The House Rules Committee, on March 19, voted to delay action on the bill and scheduled a further vote on April 9.<sup>169</sup>

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162. *See infra* notes 163-75 and accompanying text.

163. GRAHAM, *supra* note 158, at 270. This bill had been approved by the Senate Judiciary Committee on an 8-7 vote. *Id.* at 268, 270.

164. *Id.* at 270. Their “amendment was in fact identical to the Administration’s open housing bill of 1967, S. 1358, except for its new ‘Mrs. Murphy’ exemption for owner-occupied dwellings that housed up to four families.” *Id.* Senator Mondale had been the sponsor of S. 1358 in the first session of the 90th Congress and later asked Senator Edward Brooke to co-sponsor it with him. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 150 (1969).

165. GRAHAM, *supra* note 158, at 271.

166. *Id.*

167. *Id.*

168. *Id.*

169. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART II, at 1629, 1631 (Bernard Schwartz ed., 1970) [hereinafter STATUTORY HISTORY OF THE UNITED STATES]. Some members of the Senate had explicitly urged the House to change the bill; *see, e.g., id.* at 1761-62 (Senator Byrd of West Virginia expressing “the fervent hope that the House . . . will further amend the bill”); *id.* at 1766 (Senator Dirksen saying, “It remains for the House of Representatives to impress its will upon this measure.”).

The Rules Committee then rescheduled its consideration for March 28, and began on that date to hear testimony from members of the House.<sup>170</sup> “The hearings continued until April 4th, and by that time fears had increased that the Senate’s civil rights bill might die in the Rules Committee.”<sup>171</sup>

The assassination of Dr. King on April 4 and the riots that followed in many cities “completely altered the situation. His death and the disorders that followed led to irresistible pressure for speedy passage of the Senate-voted bill.”<sup>172</sup>

On April 8th, shaken by the disorders in Washington, the Committee concluded its hearings; on April 9th it ordered reported to the House H.R. Res. 1100 providing for agreement to the Senate amendments to H.R. 2516 with no additional amendments by the House allowed. April 10th, with National Guard troops called up to meet riot conditions in Washington still in the basement of the Capitol, the House debated fair housing.<sup>173</sup>

The House accepted the Senate’s bill, and President Johnson signed the bill into law the next day.<sup>174</sup> Bernard Schwartz observes:

[I]t is striking that House opponents of the bill had virtually ensured passage of the Senate-passed bill by their delaying tactics. Their strategy had been to delay House action as long as possible, perhaps until the planned start of Dr. Martin Luther King’s “poor people’s march.” Their hope had been that the march would so irritate many House members that they would vote against the bill. Instead, the delay meant that the Rules Committee and the House had to vote under the impetus of Dr. King’s murder. . . . Had the vote not occurred under the shadow of the King assassination, the outcome might well have been different.<sup>175</sup>

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170. Dubofsky, *supra* note 164, at 160.

171. *Id.*; see also DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL, JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS 695-700* (1990) (discussing the proceedings in the House); *STATUTORY HISTORY OF THE UNITED STATES*, *supra* note 169, at 1769-70 (After the Senate had passed the bill, Senator Mondale noted that “many caution that prospects for House passage this year are not bright. I know that prospects were dim for Senate passage even 2 weeks ago . . .”).

172. *STATUTORY HISTORY OF THE UNITED STATES*, *supra* note 169, at 1631.

173. Dubofsky, *supra* note 164, at 160.

174. *Id.*

175. *STATUTORY HISTORY OF THE UNITED STATES*, *supra* note 169, at 1632. Senator Hart, who had been praised by Senate Majority Leader Mike Mansfield as an architect of this success, said that “There was no great groundswell of influential support for fair housing. Clergymen were not packing the corridors

2. *Judicial Interpretation and Application of the “Affirmatively Further” Language*

Five judicial decisions have been particularly influential in interpreting the statutory “affirmatively further” language. This group consists of two Supreme Court rulings—*Trafficante v. Metropolitan Life Ins. Co.*<sup>176</sup> and *Hills v. Gautreaux*<sup>177</sup>—and three court of appeals decisions—those of the Third Circuit in *Shannon v. HUD*<sup>178</sup> in 1970, the Second Circuit in *Otero v. New York City Hous. Auth.*<sup>179</sup> in 1973, and the First Circuit in *NAACP, Boston Chapter v. HUD*<sup>180</sup> in 1987.

In *Trafficante*,<sup>181</sup> decided in 1972, the Supreme Court upheld the standing of both white and black tenants to sue under the Fair Housing Act to redress “the loss of important benefits from interracial associations.”<sup>182</sup> The Court held that the 1968 Act protected “not only those against whom a discrimination is directed but also those whose complaint [concerns] . . . ‘the very quality of their daily lives.’”<sup>183</sup> The Court endorsed the plaintiffs’ right to secure relief because

(1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being “stigmatized” as residents of a “white ghetto.”<sup>184</sup>

The Court said that the victim of discriminatory housing practices is not only “the person on the landlord’s blacklist . . . it is, as Senator Javits said in supporting the bill, ‘the whole community.’”<sup>185</sup> And the

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outside the Chamber. Civil rights leaders across the Nation had not zeroed in on this issue with mighty unanimity.” *Id.* at 1767-68; *see also* Bruce Ackerman, Holmes Lectures at Harvard Law School (Oct. 3-5, 2006), in HARV. L. REV. WORKING PAPER 2006, at 35-40, *available at* <http://www.yale.edu/isps/seminars/politheo/ackerman.pdf> (discussing the impact on civil rights of the assassin’s bullet).

176. 409 U.S. 205 (1972).

177. 425 U.S. 284 (1976).

178. 436 F.2d 809 (3d Cir. 1970).

179. 484 F.2d 1122 (2d Cir. 1973).

180. 817 F.2d 149 (1st Cir. 1987).

181. *Trafficante*, 409 U.S. at 205.

182. *Id.* at 210.

183. *Id.* at 211.

184. *Id.* at 208.

185. *Id.* at 211.



Court repeated the explanation of Senator Mondale, a drafter of the legislation, that “the reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns.’”<sup>186</sup> Thus, in *Trafficante*, the Supreme Court clearly indicated that the purposes of the 1968 Act were both to foster integration and to counter discrimination.

Four years later, in *Gautreaux*,<sup>187</sup> the Supreme Court answered the question whether HUD could be required to remedy public housing segregation in the city of Chicago by providing housing opportunities in the suburbs of Chicago. The Court held that

it is entirely appropriate . . . to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs. Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents’ housing options is the Chicago housing market, not the Chicago city limits.<sup>188</sup>

In *Gautreaux*, HUD had been held liable for intentional racial discrimination with respect to public housing in Chicago.<sup>189</sup> To remedy that conduct, the Seventh Circuit held that it would be permissible—indeed, essential—for the district court to enter an order granting “interdistrict” or “metropolitan” relief.<sup>190</sup> The Court of Appeals said that “[w]hite flight’ and ‘black concentration’ [are] the most serious domestic problem facing America today.”<sup>191</sup> It quoted then-HUD Secretary Romney’s statement that “the impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. . . . To solve problems of the ‘real city’, only metropolitan-wide solutions will do.”<sup>192</sup>

The Supreme Court affirmed the Court of Appeals, distinguishing this case from *Milliken v. Bradley*,<sup>193</sup> in which it had rejected an interdistrict remedy for school segregation. In *Gautreaux*, unlike *Milliken*, the Court said, “a metropolitan area remedy involving HUD need not displace the rights and powers

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186. *Id.*

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

188. *Id.* at 299.

189. *Gautreaux v. Romney*, 448 F.2d 731, 732 (7th Cir. 1971).

190. *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974).

191. *Id.* at 938.

192. *Id.* at 937 (emphasis deleted).

193. 418 U.S. 717, 718 (1974).

accorded suburban governmental entities under federal or state law.”<sup>194</sup> The Court added

that HUD recognizes this reality is evident in its administration of federal housing assistance programs through “housing market areas” encompassing “the geographic area ‘within which all dwelling units . . .’ are in competition with one another as alternatives for the users of housing.” The housing market area “usually extends beyond the city limits” and in the larger markets “may extend into several adjoining counties.” An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD’s expert determination of the area relevant to the respondents’ housing opportunities . . . .<sup>195</sup>

The Supreme Court said that “[a]n order directing HUD to use its discretion . . . to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy.”<sup>196</sup> The Court cited § 3608(d)(5) as a basis for HUD’s adoption of project selection criteria that give priority to housing opportunities for minorities in areas other than those in which many minorities already live.<sup>197</sup>

In *Shannon v. HUD*,<sup>198</sup> in 1970, the Third Circuit reviewed the “progression in the thinking of Congress” with respect to HUD’s civil rights obligations.<sup>199</sup> The court said that under the 1949 Housing Act, the Secretary “could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation.”<sup>200</sup> Under the 1964 Civil Rights Act, “he was directed . . . to look at the effects of local planning action and to prevent discrimination in housing resulting from such action.”<sup>201</sup> By the 1968 Act, “he was directed to act affirmatively to achieve fair housing. . . . [B]y 1964 . . . a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.”<sup>202</sup>

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194. *Hills v. Gautreaux*, 425 U.S. 284, 298 n.13 (1976).

195. *Id.* at 299-300.

196. *Id.* at 301.

197. *Id.* at 302.

198. 436 F.2d 809 (3d Cir. 1970).

199. *Id.* at 816.

200. *Id.*

201. *Id.* at 816 (emphasis added).

202. *Id.* (emphasis added). The Third Circuit later combined these themes in 1977, when it affirmed a district court statement that in the 1968 act, “in an effort to end segregation . . . Congress enacted § 3608(d)(5), requiring affirmative action . . . to cure this widespread problem.” *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1015 (E.D. Pa. 1976), *aff’d as modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

In *Otero v. New York City Housing Authority*, the Second Circuit recognized that the housing authority was “obligated to take affirmative steps to promote racial integration,” and held that this duty applied even where “promot[ing] racial integration” required disregarding a housing authority regulation that assured minority displaces priority to return to a site.<sup>203</sup> The court held that the authority’s “obligation to act affirmatively to achieve integration in housing” was imposed by both the Constitution and the statute, and noted that “affirmative action to erase the effects of past discrimination and desegregate housing patterns may be ordered.”<sup>204</sup> With respect to the “affirmatively further” requirement, the Second Circuit thus described the duty imposed on the Secretary of HUD “and through him on other agencies administering federally-assisted housing programs”:

Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.<sup>205</sup>

As had the Supreme Court and other courts, the Second Circuit referred specifically to Senator Mondale’s statement “that the proposed law was designed to replace the ghettos ‘by truly integrated and balanced living patterns.’”<sup>206</sup>

The district court in *Otero* had recognized the duty of HUD and the housing authority affirmatively to promote integration, but had held that that duty could not be given effect when doing so would deny housing opportunities to non-white people. The Second Circuit disagreed, holding that “[s]uch a rule of thumb gives too little weight to Congress’ desire to prevent segregated housing patterns and the ills which attend them.”<sup>207</sup> The court of appeals said that housing officials could not be permitted “to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns,” lest the officials become “willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.”<sup>208</sup>

Then-Judge Breyer’s opinion for the First Circuit in *NAACP, Boston Chapter* combined the holdings in *Shannon* and *Trafficante*.

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203. *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973).

204. *Id.* at 1133 (citing, inter alia, *Gautreaux v. Chi. Hous. Auth.* and *Gautreaux v. Romney*).

205. *Id.* at 1134.

206. *Id.*; see also *supra* note 186 and accompanying text.

207. *Id.* at 1134.

208. *Id.*

In *NAACP, Boston Chapter*, the First Circuit expressly rejected the argument that § 3608(e)(5) imposes “only an obligation not to discriminate,” and that an agency violates Title VIII “only when [it] engages in discriminatory conduct or when it funds a grantee who is engaged in such discriminatory conduct with the purpose of furthering the grantee’s discrimination.”<sup>209</sup> Judge Breyer emphasized that Title VIII addressed segregation as well as discrimination, finding in Title VIII “an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>210</sup>

The First Circuit held that § 3608 imposes on HUD, “at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply.”<sup>211</sup> The court held that discriminatory action by HUD included

a failure to “consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area.” And, the need for such consideration itself implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply. If HUD is doing so in any meaningful way, one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing.<sup>212</sup>

The court read the district court’s statements as agreeing “that HUD’s pattern of grant activity in Boston reflects a failure, over time, to take seriously its minimal Title VIII obligation to evaluate alternative courses of action in light of their effect upon open housing.”<sup>213</sup> It ruled that HUD could be held liable for not having “used . . . its immense leverage” under the Urban Development Action Grant program “to provide adequate desegregated housing.”<sup>214</sup>

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209. *NAACP, Boston Chapter v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987) (emphasis removed).

210. *Id.* at 155.

211. *Id.* at 156.

212. *Id.*

213. *Id.* at 157.

214. *Id.* at 156 (quoting *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass.

C. HUD's Attack on the "Affirmatively Further" Holding of the January 2005 Decision

As indicated above, HUD responded to the "affirmatively further" aspect of the court's decision not only by claiming that HUD had done all it should to promote racial desegregation regionally, but also by challenging the holding that the statute required it "affirmatively to further" desegregated housing on a regional basis or with respect to racial segregation in particular. HUD argued that it could be required "affirmatively to further" fair housing (if at all) only on a national or local basis, not on a regional basis, and that it could not be required to focus on racial discrimination as opposed to the other kinds of discrimination prohibited by Title VIII—discrimination on the bases of color, national origin, religion, sex, familial status, or handicap.<sup>215</sup> This Part shows that HUD's argument lacks grounding in both the established case law with respect to "affirmatively furthering" and the history of that statutory language. This Part shows also that rejection of HUD's argument is essential to achieve the purposes of the Fair Housing Act.

1. Regionalism, Race, and the Case Law

HUD's new argument, that it cannot be required to act on a regional basis to remedy racial segregation, directly contradicts the Supreme Court's holding in *Hills v. Gautreaux*.<sup>216</sup> In that case, just after the Supreme Court had rejected interdistrict relief for racial segregation in the public schools of Detroit,<sup>217</sup> the Seventh Circuit held that, for racial segregation in public housing, "a remedy extending beyond the city limits was both 'necessary and equitable,'" in part because, as the parties and the expert witnesses agreed, "the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work."<sup>218</sup>

The Supreme Court affirmed the Seventh Circuit, holding interdistrict relief appropriate because

[t]he relevant geographic area for purposes of the respondents'

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1983)).

215. See *supra* text accompanying notes 149-53 (discussing Federal Defendants' Post-Trial Brief, *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2006) (No. 95-309)).

216. *Hills v. Gautreaux*, 425 U.S. 284, 305-06 (1976) (holding that metropolitan-wide relief was acceptable).

217. *Milliken v. Bradley*, 418 U.S. 717, 750-51 (1974).

218. *Gautreaux*, 425 U.S. at 292 (quoting *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 936-37 (7th Cir. 1974)).

housing options is the Chicago housing market, not the Chicago city limits. That HUD recognizes this reality is evident in its administration of federal housing assistance programs through “housing market areas” encompassing the geographic area “within which all dwelling units . . .” are in competition with one another as alternatives for the users of housing. . . . The housing market area “usually extends beyond the city limits and in the larger markets may extend into several adjoining counties.” . . . An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD’s expert determination of the area relevant to the respondents’ housing opportunities . . . .<sup>219</sup>

HUD continues to recognize, today, that housing market areas “encompass . . . the geographic area ‘within which all dwelling units’” are in competition with one another as alternatives for the users of housing . . . and “usually extends beyond the city limits” and in the larger markets “may extend into several adjoining counties.” Indeed, HUD specifically recognizes that the housing market area for Baltimore city includes Baltimore County (which surrounds the city) and Anne Arundel, Carroll, Howard, and Harford counties.<sup>220</sup>

To be sure, *Gautreaux* involved a constitutional violation by HUD as well as a statutory violation of Title VI of the 1964 Civil Rights Act,<sup>221</sup> but the Court’s reliance on HUD’s own definition of housing market areas is as pertinent to statutory as to constitutional claims. Indeed, in *Gautreaux*, the Supreme Court referred to the “affirmatively further” obligation of the statute and noted that one of the steps HUD had taken to “discharge its statutory duty to promote fair housing” was the adoption of project selection criteria designed “to assure that building in minority areas goes forward only after there truly exist housing opportunities for minorities elsewhere’ in the housing market.”<sup>222</sup>

In other cases, HUD’s duty “affirmatively to further” integrated housing has been the basis for requiring HUD to take action in suburbs as well as the city in which the segregated public housing was concentrated.<sup>223</sup> Perhaps most pertinently, in the *Walker*

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219. *Id.* at 299-300.

220. *See, e.g., Thompson*, 348 F. Supp. 2d at 460, 503 (discussing HUD testimony of Shelley Lapkof, using MSA data to define the Baltimore housing market); *see also* Appendix.

221. *Gautreaux*, 425 U.S. at 301.

222. *Id.* at 302.

223. *See supra* notes 56-61 and accompanying text (referencing the metropolitan, interdistrict, suburban relief for racial segregation in public housing that also was provided in the Buffalo, Minneapolis, and Allegheny

litigation in Dallas, HUD *admitted* that it had violated its Section 3608(e)(5) “affirmatively to further” duty by failing to promote integrated housing in the suburbs of Dallas.<sup>224</sup> The district court in *Walker* held that HUD had violated § 3608(e)(5) as well as the Constitution, and wrote that:

HUD’s Title VIII obligation is more, not less, than its constitutional obligation. Congress has charged HUD not only with the obligation to end discrimination and segregation, but also with the duty to ensure that ghettos are replaced by truly integrated and balanced living patterns. HUD’s narrow view of its Title VIII obligations has not been accepted by the courts. . . . HUD does have the Title VIII obligation to replace the ghettos of Dallas’ publicly assisted housing with truly integrated and balanced living patterns free from segregation and inequality.<sup>225</sup>

Just as the case law fully supports the holding that HUD may be required to act regionally to fulfill its duty “affirmatively to further” desegregated housing, the case law also fully supports the court’s ability to order HUD to further racial desegregation as distinguished from segregation on any of the other bases covered by Title VIII—religion, national origin, sex, disability, or familial status.<sup>226</sup> Indeed, every one of the significant cases involving the “affirmatively further” obligation does involve racial segregation, and, specifically, segregation of African-Americans.<sup>227</sup> *Trafficante, Gautreaux, Shannon, Otero, NAACP, Boston Chapter*—every one of them turns on segregation of African-Americans. As discussed below, racial separation—particularly of African-Americans—was

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County (Pittsburgh), Pennsylvania, cases).

224. See Findings of Fact and Conclusions of Law: HUD Motion to Modify Remedial Order Affecting HUD at 3, *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, No. 3:85-CV-1210-R (N.D. Tex. June 12, 1996).

225. *Id.* at 3-4.

226. Title VIII also bars discrimination on the basis of “color,” which for pertinent purposes seems to have the same meaning as “race.” See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 11A-2 (2004). When enacted in 1968, the statute applied only to discrimination on the bases of race, color, religion, and national origin. Sex was added as a protected category in 1974. *Id.* at 11C-1. Disability and familial status were added by the Fair Housing Amendments Act of 1988. 42 U.S.C. § 3602 (2006); SCHWEMM, *supra*, at 11D-2, 11E-1.

227. See *supra* Part III.B.1; see also SCHWEMM, *supra* note 226, at 11A-1 (stating that “Cases involving racial discrimination have accounted for most of the claims brought under the Fair Housing Act,” particularly “in the first two decades of Title VIII before ‘familial status’ and ‘handicap’ were added . . . by the 1988 Fair Housing Amendments Act.”).

the central problem that led to the enactment of Title VIII; it is, therefore, not surprising that the principal litigation under Title VIII has involved race.

2. *Regionalism, Race, and The History of the “Affirmatively Further” Obligation*

Part III.C.1 showed that the case law powerfully and authoritatively establishes that HUD has a duty to act regionally to remedy racial segregation. This Part demonstrates that that duty is firmly rooted in the legislative language, purposes, and history of the 1968 Fair Housing Act.<sup>228</sup> Moreover, it shows that President Nixon and those in his Administration who were charged with implementation of the Fair Housing Act immediately after its enactment explicitly interpreted the Act as requiring HUD to act regionally to remedy racial segregation, particularly of African-Americans.

As we have seen, the “affirmatively further” language goes back at least to the omnibus civil rights bill introduced on May 2, 1966.<sup>229</sup> The legislation always was focused upon “Negroes” (as they then were called)<sup>230</sup> and the problem that Negroes were confined to central cities while employment, educational, and other opportunities were moving to the suburbs; these two issues were “organically linked.”<sup>231</sup> In 1966, subcommittees of both the House and Senate Judiciary Committees “held extensive hearings” into the fair housing provisions of the omnibus civil rights legislation that had been proposed.<sup>232</sup> When House Judiciary Committee Chairman

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228. S. REP. NO. 90-721, at 1837 (1968).

229. See *supra* note 158; H.R. REP. NO. 89-1678, at 12 (1966) (“Sec. 409. The Secretary of Housing and Urban Development shall . . . (e) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.”).

230. The word “Negro” is used constantly throughout the hearings in 1966 and 1967.

231. Arnold R. Hirsch, *Less than Plessy: The Inner City, Suburbs, and State-Sanctioned Residential Segregation in the Age of Brown*, in *THE NEW SUBURBAN HISTORY* 33, 35 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (“[A] political response that contributed heavily to the rapid departure of whites to the relatively vacant suburban fringe and the anchoring of the poorest nonwhites in the central core. The rise of ‘second ghettos’ in the postwar era and the suburban boom were thus organically linked.”).

232. *Fair Housing Act of 1967, Hearings Before the Subcomm. on Housing & Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. (1967) [hereinafter *1967 Senate Hearings*], at 1 (statement of Chairman Sparkman); see also *id.* at 7 (statement of Att’y Gen. Clark referring to “the lengthy hearings last year before committees of both Houses”).



Emanuel Celler opened the House subcommittee hearings on May 4, 1966, the fourth sentence of his statement began: “I see the time has come *for freeing the Negro* from centuries old shackles . . . .”<sup>233</sup> In the June 1966 Senate hearings, Attorney General Katzenbach focused on “the one pervasive problem which silently sabotages efforts toward equality in all [other] . . . areas—enforced housing in segregated ghettos of vast numbers of Negro citizens.”<sup>234</sup> The legislative record is replete with references to the need to desegregate “black core cities and white suburbs.”<sup>235</sup> In the August 1967 Senate hearings, Senator Mondale, a sponsor of the bill, began by saying that this legislation was part of the effort to address “some of the housing problems in American ghettos,” notably the view “that white America intends to continue to force Negro America to live in the rotting cores of the central cities.”<sup>236</sup> He later said:

[I]t seems to me that one of the biggest arguments that we give to the black racists is the existence of ghetto living. Our basic national policy today has been, not officially but in fact, living apart, black cities and white suburbs. “We might talk about helping you in your ghetto, but we are not going to help you get out of it.”<sup>237</sup>

Attorney General Ramsey Clark identified the problem at which the legislation was addressed:

By 1960, the American Negro was 73-percent urban, a higher percentage than for the Nation as a whole.

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*Hearings on Civil Rights Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. (1966) [hereinafter *1966 House Hearings*]; *Hearings on Civil Rights Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. [hereinafter *1966 Senate Hearings*].

233. *1966 House Hearings*, *supra* note 232, at 1 (emphasis added).

234. *1967 Senate Hearings*, *supra* note 232, at 82.

235. *See, e.g., id.* at 85 (statement of Sen. Mondale). The illustrations from the legislative record that follow are illustrative, not exhaustive. The “testimony at these hearings” is relevant “to understand the problem before Congress.” *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964). As with respect to the 1968 Fair Housing Act, the 1964 Civil Rights Act upheld in *McClung* and its companion case, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), had been enacted without reports from either House or Senate or a conference report. There, as here, the Court’s “only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in each house.” *Heart of Atlanta Motel*, 379 U.S. at 246.

236. *1967 Senate Hearings*, *supra* note 232, at 2.

237. *Id.* at 28.

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As our cities have grown, racial segregation has grown within them. Today there are more people living in segregated portions of cities than ever before. New patterns of segregation are now crystalizing. Confined central-core areas become nonwhite, while expanding surrounding suburbs are white.<sup>238</sup>

When HUD Secretary Weaver testified in 1967, he discussed facts showing “that expanding job opportunities are going to be in or near suburbia rather than in the core cities.”<sup>239</sup> He testified that “Housing discrimination deprives hundreds of thousands of nonwhites of employment opportunities in suburban communities which are generally unavailable to them as residential areas,”<sup>240</sup> adding:

Since 80 percent of the nonwhite population in metropolitan areas in 1967 lives in central cities, the handicaps of nonwhite jobseekers are apparent. Unless nonwhites are able to move into suburban communities by the elimination of housing discrimination and the provision of low- and moderate-cost housing in these areas, they are going to be deprived of many jobs, because they will be unable to live in the central city and work in the suburbs because of the high cost of transportation.<sup>241</sup>

Referencing provisions for subsidized housing, he concluded: “Our nonwhite citizens must feel free to find their homes both in our central cities and our suburbs if the enforced racial ghetto is to be eliminated.”<sup>242</sup>

Senator Percy of Illinois discussed the emblematic situation of “a Negro doctor” who was prevented from moving into “homes that are out in the suburbs with the green grass, the trees, and flowers.”<sup>243</sup> Representatives of the National Association of Real Estate Brokers (“NAREB”) said that, “The white population has fled from the central city and has moved to the suburbs. . . . The result of this has been that the multiethnic central city has been surrounded by a lily-white suburban noose.”<sup>244</sup>

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238. *Id.* at 4.

239. *Id.* at 36.

240. *Id.*

241. *Id.* at 36-37.

242. *Id.* at 37-38.

243. *Id.* at 116-17.

244. *Id.* at 184; *see also id.* at 215 (representatives of the National Committee Against Discrimination in Housing, citing Dr. Kenneth Clark’s classic text, *Dark Ghetto*, and noting that “our central cities are fast becoming Negro cities at the same time that our suburbs are becoming white suburbs”);

Housing discrimination and segregation required correction not only for their own sake but also “to attack the roots of de facto school segregation in the North and West.”<sup>245</sup> Testifying in the 1966 Senate hearings, Attorney General Katzenbach said that, “Segregated housing isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation, and transportation services and facilities. It restricts access to training and employment and business opportunities.”<sup>246</sup> “Studies of de facto segregation in American schools indicate the impossible task of providing quality education to minority children

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*compare id.* at 359 (statement of representatives of religious organizations) (“As long as Negroes, Puerto Ricans, Latin Americans, and other minority groups are largely confined to ghettos in our cities, their chances of having better education, better employment, and better social and physical environment for the upbringing of their children are seriously limited.”); *id.* at 359-62 (statement of representatives of religious organizations) (discussing the problem that “Negroes, Puerto Ricans, Latin Americans, and other minority groups are largely confined to ghettos in our cities” while industries “have moved out to suburban areas,” and the “pattern of excluding Negroes and other ethnic minorities from uncounted residential areas across our country” causes a situation where “[m]any thousands of members of minority groups, Negroes particularly, are forced to live in restricted areas . . . .”); *1966 House Hearings, supra* note 232, at 1435 (Roy Wilkins, testifying for the Leadership Conference on Civil Rights, stating that “We find all over the country the pattern of the central city with ever-increasing ghettos surrounded by a ring of completely segregated suburbs” and complaining about the “confinement [of] [“minority group families”] to limited areas.”); *id.* at 549 (Roy Wilkins, testifying for the Leadership Conference on Civil Rights) (“[T]his housing section of the proposed bill is directed at eliminating these [segregated] enclaves . . . .”).

245. GRAHAM, *supra* note 158, at 259; *see, e.g., 1967 Senate Hearings, supra* note 232, at 4 (statement of Att’y Gen. Clark); *id.* at 36 (statement of Secretary Weaver) (“The Civil Rights Commission in its recent report to the President on race and education established conclusively the relationship between poor housing in racial ghettos and the lack of educational opportunities.”). The reference here is to the Civil Rights Commission’s report, *Racial Isolation in the Public Schools*. *See also id.* at 359 (testimony of representatives of religious organizations) (“The Fair Housing Act of 1967 is therefore more than a housing bill. It is part of an educational bill of rights for all of our citizens.”); *1966 House Hearings, supra* note 232, at 1435-36 (statement of Roy Wilkins, testifying for the Leadership Conference on Civil Rights) (“Residential segregation means segregation in schools, playgrounds, health facilities, and all other aspects of our daily lives. It is primarily responsible for the widespread segregation in Northern urban and suburban public schools. It has even impaired the job opportunities opened up by fair employment laws.”); *see also 1966 Senate Hearings, supra* note 232, at 549 (statement of Roy Wilkins).

246. *Id.* at 82-83.

as long as they are restricted to living in the old and congested parts of a city.”<sup>247</sup>

Moreover, the focus on enabling African-Americans to move to the suburbs grew also out of an understanding that the federal government had played a crucial role in inducing whites—and only whites—to move to the suburbs and in encouraging employers to join in those moves.<sup>248</sup> The FHA, VA, urban renewal, and interstate highway programs had been particularly instrumental in creating this racial separation. “By 1964, [FHA and VA] had facilitated the purchase of more than 12 million mostly suburban housing units, almost exclusively for whites.”<sup>249</sup>

[T]he cumulative effect of federal housing policies . . . was to produce a federally sponsored social centrifuge that not only separated black from white but increasingly linked the latter to placement on the economically dynamic fringe as opposed to the crumbling core, to equity-enhancing single-home ownership as opposed to means-tested, multigenerational tenancy, to the receipt of the hidden subsidies of the private market instead of the very public subsidies associated with PHA projects.<sup>250</sup>

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247. Dubofsky, *supra* note 164, at 153 (citing U.S. COMM. ON CIVIL RIGHTS, REPORT ON RACIAL ISOLATION IN THE PUBLIC SCHOOLS 1 & 2 (1967) [hereinafter RACIAL ISOLATION]). Not surprisingly, these comments by Dubofsky echo almost verbatim statements made by Senator Mondale, for whom Dubofsky worked. See 114 CONG. REC. 2, 3421 (1968) (statement of Sen. Mondale) (“Jobs can move to the suburbs, but housing discrimination prevents Negroes from following. . . . De facto segregation in schools is directly traceable to the existing patterns of racially segregated housing. . . . The soundest, long-range way to attack segregated schools is to attack the segregated neighborhood.”).

248. GRAHAM, *supra* note 158, at 259 (“The pervasiveness of racial discrimination in housing was widely conceded, and contemporary scholarship was beginning to document the historic complicity of the federal government in fostering housing segregation . . .”).

249. David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in THE NEW SUBURBAN HISTORY, *supra* note 231, at 11, 17.

250. HIRSCH, *supra* note 231, at 35-36. The policies have very long-term effects. See SCHUCK, *supra* note 52, at 208-09 (“The history of racial prejudice, enforced by both public policy and the practices of private developers, brokers, and housing consumers, surely explains much of today’s segregation. Although racism’s extent and intensity have declined markedly in recent decades, the residential patterns it produced have great staying power. Because people make large investments in their housing and plan to occupy it for many years, the effects of individual, group, and neighborhood choices may persist much longer than the racial attitudes that originally influenced them.”); see also *supra* text at notes 5-28.

This federal responsibility was explicitly recognized in the legislative history. When Attorney General Katzenbach testified before the Senate Subcommittee in 1966, he said that “it is highly relevant that government action—both State and Federal—has contributed so much to existing patterns of housing segregation.”<sup>251</sup> Senator Edward Kennedy, presiding at the subcommittee hearing, specifically asked Roy Wilkins if he believed that “the Federal Government has actually helped and assisted in the continuation of segregation in many of our urban areas?”<sup>252</sup> Mr. Wilkins answered affirmatively.<sup>253</sup>

In 1967, for the Senate Subcommittee on Housing and Urban Affairs, Attorney General Clark submitted the Department of Justice’s brief regarding the Fair Housing Act.<sup>254</sup> The brief emphasized that “denials of equal protection” by the Federal Government as well as the states “were in fact numerous, and their effects in housing are still with us.”<sup>255</sup> It said:

Throughout this period, and even somewhat after the Supreme Court’s 1948 ruling, the Federal Housing Administration actively encouraged the use of racially restrictive covenants, in most cases flatly refusing to grant its mortgage insurance or guarantees unless the covenants were included in the deeds concerned. This Federal discriminatory action had a substantial impact . . . .

The evil that FHA did was of peculiarly enduring character. Thousands of racially segregated neighborhoods were built, millions of people re-assorted on the basis of race, color, or class, the differences built in, in neighborhoods from coast to coast.

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251. *1966 Senate Hearings, supra* note 232, at 87; *see also id.* at 88 (Att’y Gen. Katzenbach referring to the fact that “as late as 1936, the Federal Housing Administration . . . affirmatively recommended such [racial] covenants and warned against ‘inharmonious racial groups.’”). In fact, FHA required racial covenants until 1950 and permitted racial discrimination thereafter, at least until 1962. ABRAMS, *supra* note 10, at 232; GELFAND, *supra* note 13, at 221, 426 n.64; Hirsch, *supra* note 10, at 211-13; JACKSON, *supra* note 5, at 208; *see also 1967 Senate Hearings, supra* note 232, at 10-11 (Dep’t of Justice statement outlining federal segregatory actions with respect to FHA and public housing).

252. *1966 Senate Hearings, supra* note 232, at 551. Senator Kennedy referred to both public housing and the FHA and VA programs as creating segregation. *See id.* at 551-52.

253. *Id.*

254. *1967 Senate Hearings, supra* note 232, at 8.

255. *Id.* at 10 (statement of Att’y Gen. Clark).

At the same time, the Federal and State governments were cooperating to enforce segregation in public housing . . . .

Throughout these years the Federal and State governments were also active in promoting segregation in areas other than housing, such as schools and the armed forces. That activity, too, contributed to housing segregation, because it educated the white public to the myth that any kind of close association with Negroes was debasing and to be avoided.<sup>256</sup>

Similar points were made by the Civil Rights Commission<sup>257</sup> and Senator Robert F. Kennedy. Senator Kennedy spoke of the need to address open housing, quoting the Civil Rights Commission's findings about the inability of Negroes to access suburban housing, and specifically addressed the responsibility of the federal government. He said that

the Federal Government actively aided segregation in housing.<sup>258</sup>

After the Second World War, FHA financing, which made the suburbs within reach of millions of Americans, consistently and vigorously encouraged racial segregation; and consistently delayed and frustrated efforts to build integrated suburban housing.

This explicit Federal policy, which continued for 20 crucial years, has in large measure helped to form the isolated racial pattern of American living patterns today.

Clearly the force which helped to spawn this dilemma must take the lead in helping to solve it.<sup>259</sup>

In those August 1967 hearings on the fair housing legislation, Senator William Proxmire asked Secretary Weaver

about a 'carrot stick' approach using the power that the Federal Government does have to really put the Federal Government behind a policy of dispersion so that it would be

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256. *Id.* at 10-11 (statement of Att'y Gen. Clark) (internal quotation is from ABRAMS, *supra* note 10, at 234-36).

257. *Id.* at 78-79 (testimony on behalf of the Civil Rights Commission).

258. STATUTORY HISTORY OF THE UNITED STATES, *supra* note 169, at 1680.

259. *Id.*

possible for the people who now live in the central areas of some of our cities, much more possible for them, to move into suburban areas where the jobs are.<sup>260</sup>

He asked about a provision that

[n]o Federal program of grants or loans administered by the Department of Housing and Urban Development shall be made available to any jurisdiction within which an adequate amount of decent housing as determined by the Secretary of Housing and Urban Development is not available for low and moderate income persons by reason of restrictions in zoning ordinances or building codes or other factors within the reasonable control of the jurisdiction or the State within which the jurisdiction is located.<sup>261</sup>

In connection with this, Senator Proxmire discussed the fact that in his part of the country “the suburbs . . . tend to be 100-percent white and it is a tough problem for . . . Milwaukee, for example . . . to solve this when they are surrounded by white suburbs which are getting more and more industry. That is where the jobs are.”<sup>262</sup> Senator Proxmire asked also about a “carrot” provision, that “[t]he Federal share of any Federal grant-in-aid shall be increased 10 percent . . . in any jurisdiction where the Secretary of HUD determines it is carrying out a long-term program . . . to achieve this opportunity for low-income housing.”<sup>263</sup>

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260. *1967 Senate Hearings, supra* note 232, at 73.

261. *Id.*

262. *Id.* at 74.

263. *Id.* Senator Proxmire also observed that “these alternatives have not been presented vigorously before the Congress and does [sic] not involve the kind of authority and power the Federal Government has. We are not doing anything but carrying out, it seems to me, the spirit of the 1964 Civil Rights Act and using the programs we have to say that we are not going to put taxpayers’ dollars into areas that are deliberately and directly discriminating.” *Id.*

It is likely that Senator Proxmire’s references were to the fact that in November 1966, a large, inter-agency task force chaired by Stephen Pollack of the Civil Rights Division at the Department of Justice “proposed new *legislation* . . . ‘to condition all federal housing assistance to any local government entity’ on its agreement to construct a ‘reasonable number’ of low income public housing units and to take ‘adequate steps to permit’ the construction of private housing for low-income families.” “Attorney General [Ramsey] Clark, however, recommended against this proposal because he believed that Congress would not enact it.” In addition to this “stick” of conditioning federal housing assistance, the task force also proposed a “carrot”: “financial inducements to suburbs to build low-income housing by paying local governments as an incentive a set dollar amount of aid per low-income family unit . . .” Attorney General Clark rejected both proposals, considering that Congress would not

In 1967, testifying before the Senate Subcommittee, representatives of NAREB recognized that “[t]he Federal Government has had its role in this pattern.”<sup>264</sup> NAREB cited the roles of “federally financed, dual laned, high-speed highways,” as well as the federal housing programs, and reported “that job opportunities for Negroes were lost with the shift of Federal agencies . . . to the . . . suburbs,” concluding:

It is ironic that it is the suburbs where approximately 90 percent of new housing is being constructed and an increasing proportion of whites are settling. . . .

Federal money—through Federal housing programs—has created discriminatory white suburban neighborhoods which have attracted such private and public employers, and thus, in turn has trapped many citizens in the central cities, thereby creating a Watts, a Hough, a Harlem, a Buffalo, and undermining the general welfare.<sup>265</sup>

Representatives of the National Committee Against Discrimination in Housing (“NCDH”) referred to NCDH’s pamphlet, “How the Federal Government Builds Ghettos,” and said “that the ghetto system which has been nurtured both directly and indirectly by Federal power has created racial alienation and tension so explosive that the crisis in our cities now borders on catastrophe.”<sup>266</sup> Representatives of religious organizations testified that:

Federal assistance based on taxes paid by Negro as well as white Americans, by Puerto Rican and Latin Americans as well as by those of Anglo-Saxon background, have helped to make possible the standard of housing occupied by millions of Americans. FHA and Veterans’ Administration insure mortgages. Public facilities were built with Federal assistance, as were highways and hospitals. These and many more types

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enact the stick and that suburban communities would not accept the carrot, since “suburban communities probably do not shun the poor because of costs anyway, but because of the unfortunate tendency of many persons to view the poor as undesirable neighbors.” Of the task force’s housing proposals, Attorney General Clark approved a combination of Title IV of President Johnson’s 1966 housing bill with an administrative rather than judicial mode of enforcement. GRAHAM, *supra* note 158, at 263-65.

264. 1967 *Senate Hearings*, *supra* note 232, at 184.

265. *Id.* at 184-85; *see also id.* at 185 (referring to the “federally assisted suburbs attracting more and more whites”).

266. *Id.* at 214.



of Federal aid help to make suburban communities desirable places to live.

Hundreds of these communities are closed to Negroes who can well afford to buy homes in them. Negro taxpayers are helping to maintain facilities and services in communities where they are systematically excluded. Even Negro members of the Armed Forces and veterans who have placed their lives at their country's command cannot live in the same neighborhood with other men of a different race who were their comrades in arms.<sup>267</sup>

In addition to what was happening in Washington,<sup>268</sup> racial segregation in cities, and the inability of "Negroes" to move to the suburbs, received a great deal of attention in the Summer of 1966, when Dr. Martin Luther King, Jr., the Southern Christian Leadership Conference ("SCLC"), the Congress of Racial Equality ("CORE"), and Chicago's Council of Co-ordinating Organizations ("CCCO") and West Side Organization ("WSO") mounted an open housing campaign there.<sup>269</sup> The marches and demonstrations in the

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267. *Id.* at 362; *see also 1966 House Hearings, supra* note 232, at 1436 (Roy Wilkins, testifying for the Leadership Conference on Civil Rights, said that "Suburbia as it now exists was made possible largely by FHA and VA-insured financing. Its residents are served by facilities constructed with Federal assistance, commute to work over highways and are treated in hospitals built with Federal funds. Their children attend schools receiving the benefits of Federal programs."); *1966 Senate Hearings, supra* note 232, at 550 (essentially similar testimony by Roy Wilkins); *1966 Senate Hearings, supra* note 232, at 555 (Roy Wilkins justifying the proposed legislation because of the need to "stimulate action by the executive branch to make housing desegregation a prime goal of Federal action"); *1966 House Hearings, supra* note 232, at 1437 (essentially similar testimony by Roy Wilkins); *1967 Senate Hearings, supra* note 232, at 362 (statement of representatives of religious organizations) ("Federal aid help[s] to make suburban communities desirable places to live," but "[e]ven Negro members of the Armed Forces and veterans who have placed their lives at their country's command cannot live in the same neighborhood with other men of a different race who were their comrades in arms.").

268. In addition to the House and Senate hearings on civil rights legislation, the Civil Rights Commission's 1966 report, *Racial Isolation in the Public Schools*, had identified housing policies as largely responsible for the division between affluent whites in suburbia and poor Negroes in cities. *See RACIAL ISOLATION, supra* note 247, at 22. The Report said that "Federal housing policy . . . has contributed to racial separation between city and suburb." *Id.*

269. *See TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68*, at 500-22 (2006); *CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET* (David J. Garrow ed. 1989); *DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 491-525* (1986); *JAMES R. RALPH, JR.,*

city evoked violent reactions, most notably in Marquette Park, where more than 4000 whites attacked fair housing advocates, producing “Southern-style hate images, which made front pages everywhere.”<sup>270</sup> Attackers cried “Burn them like Jews!”; a nun, a rabbi, and priests were attacked; automobiles were burned; and Dr. King was struck by a rock.<sup>271</sup>

National and international attention focused on fair housing marches into the suburbs of Chicago, including the “infamous all-white town of Cicero,” which had a long and violent history of exclusion of “Negroes.”<sup>272</sup> In 1951, when a Black veteran attempted to move his family into an apartment in Cicero, “a mob formed, attacked the building, and ultimately burned it down.”<sup>273</sup> The incident “was so extreme that it received national and international attention.”<sup>274</sup> Also in 1951, there was “an attempted bombing of the home of renowned Black chemist Dr. Percy Julian in Oak Park, a Chicago suburb adjoining Cicero.”<sup>275</sup>

When the 1966 fair housing march into Cicero was proposed, “Sheriff Ogilvie declared marching in Cicero ‘awfully close to a suicidal act,’ and Governor Otto Kerner dispatched National Guard units in advance.”<sup>276</sup> When Dr. King decided not to go to Cicero, the march was led by SNCC, CORE, and the WSO. As Taylor Branch recounts:

A column of 250, including fifty white people, crossed the Belt

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NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT (1993); *see also* Denton L. WATSON, LION IN THE LOBBY: CLARENCE MITCHELL, JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS 676 (1990) (stating that “Robert Kennedy encouraged King to organize protests in the Chicago area against residential segregation”).

270. BRANCH, *supra* note 269, at 508.

271. *Id.* at 508-10.

272. GARROW, *supra* note 269, at 501; BRANCH, *supra* note 269, at 514-15 (stating that it was Rev. Jesse Jackson who originally announced the march into Cicero). Marches were conducted in other suburbs as well. *See, e.g., id.* at 520 (discussing marches “in suburban Evergreen Park and Chicago Heights”).

273. Leonard S. Rubinowitz with Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOWARD L.J. 841, 899 (2005) (citing STEPHEN GRANT MEYER, AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 118-19, 136-37, 139-40 (2000)); WATSON, *supra* note 269, at 676-77.

274. Rubinowitz, *supra* note 273, at 899; *see also id.* at 900 (reporting that in the early 1960s, another “all-white . . . suburb” of Chicago gained “extensive public attention” when it condemned land that had been proposed for use as racially integrated housing).

275. *Id.* at 899 n.362; WATSON, *supra* note 269, at 677.

276. BRANCH, *supra* note 269, at 520-21.

Line Railroad into Cicero, engulfed within a protective brigade of two thousand National Guardsmen and five hundred helmeted Cook County officers. Three thousand residents shrieked and hurled rocks with a savagery that earned the anticipated raw headlines—"Guards Bayonet Hecklers in Cicero's Rights March."<sup>277</sup>

Thus, Cicero, Illinois, became a symbol of the central purpose of the fair housing legislation—to enable African-Americans to move to the suburbs. "Cicero in the North," Dr. King told Mike Wallace on CBS in 1966, "symbolizes the same kind of hard core resistance to change as Selma in the South."<sup>278</sup> Dr. King repeated that view in 1967, saying that "Just as we confronted the colossus of Selma in the South, we're going to confront the colossus of Cicero in the North."<sup>279</sup>

The events in Illinois were very much related to the development of federal fair housing legislation. In part, this was because Senate Republican Leader Everett McKinley Dirksen, whose support had been essential for passage of the 1964 Civil Rights Act and would be essential for passage of fair housing legislation, was from Illinois.<sup>280</sup>

When the 1966 civil rights bill went down to defeat in the Senate, the "filibuster focused on the national implications of the open housing section," and "Minority Leader Everett Dirksen of Illinois doomed the bill by rising on his crutches to call the housing provisions 'a package of mischief for the country.'"<sup>281</sup> "The defeat,"

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277. *Id.* at 524 (citing a front page story in the *New York Times* for Sept. 5, 1966).

278. GARROW, *supra* note 269, at 528; *see also* BRANCH, *supra* note 269, at 535 (describing how the Sept. 27, 1966, CBS special, *Black Power, White Backlash*, hosted by Mike Wallace, included not only comments from Dr. King, but also "interviews with Cicero children about what would happen if any Negroes moved in ('they'd be killed')").

279. GARROW, *supra* note 269, at 549.

280. *See* WATSON, *supra* note 269, at 674 (stating that Dirksen was "the leading opponent" of the fair housing legislation in 1966); *id.* at 672 (noting that Dirksen had called the legislation "absolutely unconstitutional."); *id.* at 678 (explaining that Dirksen was "adamantly opposed to the housing title"); *id.* at 679 (stating that Dirksen was "the main roadblock"); *id.* at 680 ("The main stumbling block, the Leadership Conference charged, was Dirksen's 'intransigence and subtle appeals to race prejudice.'"); *id.* at 686, 687 (noting that "[t]he problem remained Dirksen").

281. BRANCH, *supra* note 269, at 530. Clarence Mitchell, lobbyist for the NAACP, regarded the activities as damaging to the prospects of passage of fair housing legislation. Mitchell's biographer says that "Mitchell was not surprised by King's fiasco," and states that "No worse backdrop for the unfolding struggle in the Senate could have been imagined." WATSON, *supra* note 269, at 677.

Taylor Branch writes, "was a stinging referendum on King's open housing campaign in Dirksen's home state."<sup>282</sup>

The concern with enabling African-Americans to move from the cities to the suburbs was reflected also in the report of the Kerner Commission on Civil Disorders, which had been appointed to analyze the causes of the riots in 1965, 1966, and 1967.<sup>283</sup> The Commission "released its report on February 29, 1968 with strong expressions of sympathy for the ghetto protestors, and also with well-timed support for the open housing bill as an essential means of reducing the explosive pressure."<sup>284</sup> The Kerner Commission report was replete with references to the fact that racial discrimination and segregation confined "Negroes" to urban ghettos while whites were leaving for the suburbs.<sup>285</sup> The Commission said that "[t]o continue present policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying areas."<sup>286</sup> The Commission insisted that "[p]rograms must be developed that will permit substantial Negro movement out of the ghettos."<sup>287</sup> The Commission reported that "[d]iscrimination prevents access to many non-slum areas, particularly the suburbs, where good housing exists."<sup>288</sup>

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282. BRANCH, *supra* note 269, at 530. Another measure of the national significance of the Illinois fair housing protest is the fact that in the election in the fall of 1966, Republican Charles Percy defeated Democratic Senator Paul Douglas. "Douglas told [Clarence] Mitchell that King's Chicago demonstrations contributed to his loss, a development that Percy himself had predicted." WATSON, *supra* note 269, at 677; *see also* Branch, *supra* note 269, at 543 (regarding substantial losses to the Republican party, President Johnson said, "I don't think I lost that election. I think the Negroes lost it.").

283. KERNER REPORT, *supra* note 12, at 1.

284. GRAHAM, *supra* note 158, at 272-73. Watson says that this was a preliminary report. The official date of release was March 1, 1968. WATSON, *supra* note 269, at 694.

285. *See, e.g.*, KERNER REPORT, *supra* note 12, at 6 ("As a result, central cities are becoming more heavily Negro while the suburban fringes around them remain almost entirely white."); *id.* at 220 (stating that continuation of present policies "would lead to the permanent establishment of two societies: one predominantly white and located in the suburbs, in smaller cities, and in outlying areas, and one largely Negro located in central cities"); *id.* at 225 ("Within two decades, this division could be so deep that it would be almost impossible to unite: a white society principally located in suburbs, in smaller central cities, and in the peripheral parts of large central cities; and a Negro society largely concentrated within large central cities.").

286. *Id.* at 10.

287. *Id.* at 11.

288. *Id.* at 13; *see also id.* at 259 ("Discrimination prevents access to many

The Commission also made the “fundamental” point: that “[f]ederal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation.”<sup>289</sup> “If this is not done,” the Commission said:

those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization.<sup>290</sup>

The Kerner Commission was very clear about the significance of the movement of jobs to the suburbs. It said:

future jobs are being created primarily in the suburbs, but the chronically unemployed population is increasingly concentrated in the ghetto. This separation will make it more and more difficult for Negroes to achieve anything like full employment in decent jobs. But if, over time, these residents began to find housing outside central cities, they would be exposed to more knowledge of job opportunities. They would have to make much shorter trips to reach jobs. They would have a far better chance of securing employment on a self-sustaining basis.<sup>291</sup>

The Commission reported that “[r]esidential segregation prevents equal access to employment opportunities and obstructs efforts to achieve integrated education. A single society cannot be achieved as long as this cornerstone of segregation stands.”<sup>292</sup>

The Commission recommended that the federal government “[e]nact a comprehensive and enforceable federal open housing law to cover the sale or rental of all housing, including single family homes” and “[r]eorient federal housing programs to place more low and moderate income housing outside of ghetto areas.”<sup>293</sup> The Commission explicitly stated that a purpose of fair housing

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nonslum areas, particularly the suburbs, and has a detrimental effect on ghetto housing itself.”)

289. *Id.* at 13, 260.

290. *Id.* at 260.

291. *Id.* at 224-25.

292. *Id.* at 260.

293. *Id.* at 13; *see also id.* at 260 (recommending “[e]nactment of a national, comprehensive and enforceable open-occupancy law” and “[r]eorientation of federal housing programs to place more low and moderate-income housing outside of ghetto areas”); *id.* at 263 (further describing these recommendations).

legislation was “opening up suburban areas to Negro occupancy.”<sup>294</sup> The Commission also said that “[o]pen housing legislation must be translated into open housing action.”<sup>295</sup> It noted that prior to 1968, public housing and other programs serving low-income people had “been concentrated in the ghettos. Nonghetto areas, particularly suburbs, for the most part have . . . successfully restricted use of these programs outside the ghetto.”<sup>296</sup> The Commission concluded that federal housing programs must refocus “so that the major thrust is in nonghetto areas. Public housing programs should . . . wherever possible, be used in nonghetto areas . . . .”<sup>297</sup>

As Senator Mondale pointed out, the Senate was aware of these findings, propositions, and recommendations well before the Commission issued its report. These conditions were well-known and well-established generally. Moreover, both the “coauthor of the [fair housing] amendment,” Senator Brooke, and a co-sponsor, Senator Harris, served on the Kerner Commission.<sup>298</sup> Senator Harris specifically discussed the Kerner Commission’s fair housing recommendations during the Senate debate<sup>299</sup> and Senator Mondale referred to them after the bill had been passed by the Senate.<sup>300</sup>

All of this was reflected in the debate on the 1968 Fair Housing Act. The floor debates in the Senate in 1968 were very focused on allowing Blacks to move to the suburbs.<sup>301</sup> In addition to the comments of Senators Mondale and Brooke which frequently have been quoted in Supreme Court decisions and elsewhere, other Senators expressed that view, among them, Senator Javits, Republican of New York.<sup>302</sup> Senator Hart, who had been the floor

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294. *Id.* at 217 (stating that “opening up suburban areas to Negro occupancy . . . obviously requires effective fair housing laws”); *see also id.* at 225 (“We do not believe that such an out-movement will occur spontaneously merely as a result of increasing prosperity among Negroes in central cities. A national fair housing law is essential to begin such movement. In many suburban areas, a program combining positive incentives with the building of new housing will be necessary to carry it out.”).

295. *Id.* at 263.

296. *Id.*

297. *Id.*

298. 114 CONG. REC. 3, 3422 (1968); KERNER REPORT, *supra* note 12, at vi.

299. STATUTORY HISTORY OF THE UNITED STATES, *supra* note 169, at 1696-97.

300. *Id.* at 1769.

301. *See, e.g.*, 114 CONG. REC. 3, 2703-07 (1968).

302. *Id.* at 2704 (statement of Sen. Javits) (“[T]he Negro, notwithstanding the fact that his income rose to the point that he, too, could go to the suburbs, was nonetheless restricted to core cities. . . . [I]f Negroes had been permitted the same freedom of purchase as white families in respect to suburban dwellings . . . . [T]hey have been unable, as has the white population, to escape to the suburbs.”).

manager for the 1966 omnibus bill that included fair housing, emphasized the fact that “the new construction, the new industrial plants, the new shopping centers are all out in the suburbs . . . .”<sup>303</sup> He said that a failure to vote cloture would hurt those who are “shopping for homes in the suburbs.”<sup>304</sup>

Members of Congress were concerned that “[a]lthough jobs moved to the suburbs . . . eighty percent of the nonwhite population of metropolitan areas in 1967 lived in central cities.”<sup>305</sup> Senator Mondale said that “[a]n important factor contributing to [their] exclusion . . . has been the policies and practices of agencies of government at all levels.”<sup>306</sup> Senator Mondale said that urban blacks “have been unable to move to suburban communities and other exclusively white areas.”<sup>307</sup> Senator Brooke complained of HUD’s failure to take affirmative action to achieve desegregation, stating: “Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines that housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed.”<sup>308</sup>

As we have seen, Dr. Robert Weaver, who was Secretary of HUD when Title VIII was being considered by Congress and then when it was enacted, certainly understood Title VIII as addressed to achieving suburban integration for Black families.<sup>309</sup> Perhaps more remarkably, this also was the understanding of the next HUD Secretary and the next President—George Romney and Richard Nixon.

In the 1968 presidential election campaign, Richard Nixon initially opposed the enactment of fair housing legislation,<sup>310</sup> but, after Dr. King’s assassination, Nixon supported the legislative compromise crafted by Senator Dirksen.<sup>311</sup> This was perceived as contradicting the views of suburban voters.<sup>312</sup> Nixon certainly

303. *Id.* at 2707.

304. 114 CONG. REC. 3, 2708 (1968).

305. Dubofsky, *supra* note 164, at 153 (citing 114 CONG. REC. 3, 3421 (1968)).

306. 114 CONG. REC. 2, 2277 (1968).

307. *Id.*; *see also* Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1014 (E.D. Pa. 1976) (quoting Senator Mondale).

308. 114 CONG. REC. 2, 2527-28 (1968).

309. Indeed, he had identified this as a crucial problem. *See supra* note 240.

310. DEAN J. KOTLOWSKI, NIXON’S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 46 (2001).

311. *Id.* at 47.

312. *Id.* (“In so doing, Nixon went against public opinion, especially in suburban areas and in the South.”). Kotlowski adds that,

Residents of suburban Houston became enraged when their congressman, George Bush, voted for the Fair Housing Act. The

understood that the fair housing act was seen as directed against suburbs. His campaign positions were characterized by “hedging”: he “did not raise the [fair housing] issue to woo minorities,” saying that he would not “campaign for the black vote at the risk of the suburban vote.”<sup>313</sup>

After he became president, “Nixon, with an eye toward his suburban constituency, kept the issue of open housing away from the White House.”<sup>314</sup> When a White House task force on low income housing recommended linking federal aid to suburban racial integration, Nixon wrote: “I am *absolutely* opposed to this. Knock it in the head now.”<sup>315</sup>

Nixon’s HUD Secretary, however, focused on attacking “the widening economic gulf between the races, which left many whites residing in comfortable suburbs while poor blacks endured a harsh life in urban slums.”<sup>316</sup> George Romney “strove to move blacks from cities into suburbs.”<sup>317</sup> Romney and other “HUD officials had construed the Fair Housing Act very broadly, as a mandate for integration.”<sup>318</sup> Romney’s General Counsel, David O. Maxwell, wrote that HUD had an obligation to consider the extent to which its every action “will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination.”<sup>319</sup> Romney stated that “the impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. . . . To solve problems of the ‘real city’, *only metropolitan-wide solutions will do.*”<sup>320</sup>

Romney advanced not only racial integration but also economic integration, proposing an “Open Communities” program that would condition HUD financial assistance on a community’s acceptance of

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youthful Republican perhaps supported the act to make up for his opposition to earlier civil rights legislation. In any event, Houstonians flooded Bush’s office with more than one thousand letters denouncing fair housing. *Id.* at 47-48.

313. *Id.* at 48.

314. *Id.*

315. *Id.* at 49. It is not clear whether the opposition was to racial integration per se, to economic integration, or to the use of federal aid as leverage.

316. *Id.* at 45.

317. *Id.*

318. *Id.* at 55.

319. David O. Maxwell, *HUD’s Project Selection Criteria—a Cure for “Impermissible Color Blindness”?*, 48 NOTRE DAME LAW. 92, 100 (1972).

320. *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 937 (7th Cir. 1974) (quoting Secretary Romney).



subsidized housing.<sup>321</sup> “His task force, to test this policy, targeted areas with high employment and few dwellings for poor minorities: Long Island, Cook County (Illinois), and the suburbs of Dallas, Boston, Newark, Buffalo, and Los Angeles.”<sup>322</sup> It also targeted, most famously and fruitlessly, Warren, Michigan, “a white, working-class, largely Catholic suburb of Detroit.”<sup>323</sup> “Romney and [HUD Undersecretary Richard] Van Dusen informed Warren officials that their community would not receive a \$3 million urban renewal grant until they accepted low-income housing.”<sup>324</sup> The residents and officials of Warren were not pleased; they protested vehemently.<sup>325</sup>

The upshot of the Warren controversy was that Nixon undercut Romney and supported the efforts by Warren and other suburbs to exclude subsidized housing for minorities. In doing so, however, Nixon affirmed the understanding that HUD’s obligation was affirmatively to further equal housing opportunity “on a metropolitan areawide basis.”<sup>326</sup> The President’s statement on equal opportunity in housing, issued on June 14, 1971, stated:

Based on a careful review of the legislative history of the 1964 and 1968 Civil Rights Acts . . . I interpret the “affirmative action” mandate of the 1968 act to mean that the administrator of a housing program should include, among the various criteria by which applications for assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination. . . . [This] does mean that in choosing among the various applications for Federal aid, consideration should be given to their impact on patterns of racial concentration. In furtherance of this policy, . . . [HUD and all] other departments and agencies administering housing programs . . . will administer their programs in a way which will advance

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321. KOTLOWSKI, *supra* note 310, at 54-55. “Romney . . . favored a more active remedy in which communities had to show nondiscrimination by accepting low-income housing. Nixon never endorsed this policy . . .” *Id.* at 55.

322. *Id.* at 56.

323. *Id.*

324. *Id.*

325. *Id.* at 57-59.

326. President’s Statement on Federal Policies Relative to Equal Housing Opportunity, 7 WKLY. COMP. PRES. DOC. 901 (June 14, 1971).

equal housing opportunity for people of all income levels *on a metropolitan areawide basis*.<sup>327</sup>

CONCLUSION: THE VITAL IMPORTANCE OF REGIONAL  
REMEDICATION OF RACIAL SEGREGATION

As we have seen, the Supreme Court and other courts that have interpreted the 1968 Fair Housing Act have held that it imposes on HUD and other federal agencies the obligation to act regionally to remedy racial segregation. Moreover, as we also have seen, the confinement of African-Americans to the cities, and the necessity of enabling them to move to the suburbs, was the central problem that the “affirmatively further” language was intended to solve. HUD’s role in creating the problem was fully recognized by Congress; the “affirmatively further” language was included specifically to address that. Even the Nixon Administration, which was charged with implementing the legislation immediately after its enactment, recognized this. It would be a complete distortion of this reality to accept HUD’s argument—forty years after the language first was introduced—that the provision does not justify ordering metropolitan relief to remedy urban concentration of Blacks.

Such a reversal in and distortion of interpretation of the Fair Housing Act would be particularly inappropriate in light of the growing recognition of the crucial role of regionalization in promoting the physical, mental, educational, environmental, social, and economic health of individuals and communities.<sup>328</sup> The federal, state, and local governments played a major role in imposing residential racial segregation on the Black residents of Baltimore and its suburbs.<sup>329</sup> Nonetheless, they have done nothing effective to undo that racial segregation.<sup>330</sup> Continuing, contemporary, racial discrimination and prejudice play a major role in continuing racial

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327. *Id.* (emphasis added).

328. See BRIGGS, *Introduction*, in THE GEOGRAPHY OF OPPORTUNITY, *supra* note 2, at 3 (“[R]egionalism has gained considerable momentum since the early 1990s”); see also Gregory D. Squires, *Urban Sprawl and the Uneven Development of Metropolitan America*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 1, 15 (Gregory D. Squires ed., 2002) (“In recent years, many communities [have proposed] more metropolitan or regional planning.”); *Editor’s Overview*, in REFLECTIONS ON REGIONALISM 1-8 (Bruce Katz ed. 2000).

329. See *Thompson v. HUD*, 348 F. Supp. 2d 398, 405-09 (D. Md. 2005).

330. See *id.* at 409; see also Goering, *supra* note 74, at 127 (HUD “has undertaken little or no proactive racial or class integration programs since the inception of federal housing policies . . .”).

separation.<sup>331</sup> At the same time, contemporary studies of stable integrated neighborhoods disclose that there are “[p]otentially useful strategies for encouraging whites and nonwhites to share neighborhoods.”<sup>332</sup> These activities, “particularly when they become part of the larger neighborhood culture, can fundamentally alter attitudes on both sides of the racial divide by highlighting what residents have in common, helping to build trust, and potentially reducing stereotypes.”<sup>333</sup> The 1968 Act requires affirmative action by the government to undo and counteract these powerful segregatory influences. HUD’s failure to perform its duty in this regard rightly was identified and can and should be remedied by the courts.

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331. *See, e.g.*, Charles, *supra* note 99, at 45, 73 (“Available evidence indicates that active, present-day racial prejudice plays a particularly important role in driving preferences.”); Margery Austin Turner & Dolores Acevado-Garcia, *Why Housing Mobility? The Research Evidence Today*, *POVERTY & RACE*, Jan.-Feb. 2005, at 1-2, 13-16.

332. Charles, *supra* note 99, at 74.

333. *Id.* at 75; *see also* James Rosenbaum et al., *supra* note 78, at 150, 171 (“Our research suggests that, even without encouragement, suburban neighbors are often receptive and more accepting over time.”); Fernanda Santos, *Yonkers Settles 27-Year Battle Over Desegregation*, *N.Y. TIMES*, Apr. 20, 2007, at A22 (quoting a former opponent of the Yonkers, New York, housing mobility remedy as stating: “In a sense, the desegregation plan did work . . . It didn’t spoil our neighborhoods; we had a lot of nice people who lived there. It wasn’t the horror that we all thought it was going to be.”).

APPENDIX<sup>334</sup>

334. Adapted by J. Benjamin Yousey-Hindes from MapWatch.com's "Map of Maryland Counties." © 2005, used with permission.