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Trading Places or Changing Spaces? At the Crossroads of Defining and Redressing Segregation

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Article

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Segregation rates have remained stagnant in many regions of the United States since the passage of the federal Fair Housing Act (FHA) in 1968 and experts expect them to increase in large metropolitan areas. Consequently, poor Blacks will be subjected to the extreme deprivation of group life chances that characterize racially and economically segregated environments. The global pandemic has only further exacerbated these dire circumstances. While severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) may not discriminate, housing, healthcare, criminal, and economic policies have, rendering impoverished communities of color particularly vulnerable to the ravages of the coronavirus disease 2019 (COVID-19).

The FHA recognizes two theories of discriminatory-effect claims: (1) disparate impact and (2) segregative effect. The U.S. Supreme Court recently upheld each in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, but lower courts have interpreted the majority opinion to erect unprecedented requirements for plaintiffs seeking to vindicate their fair housing rights. Under President Biden, the U.S. Department of Housing and Urban Development proposed new regulations to buttress these discriminatory-effect theories in contrast to the curtailing rules of the Trump administration.*

For over fifty years, fair housing advocates have debated whether remediation should entail moving racial minorities to affluent, white neighborhoods or enriching disinvested communities of color. The Court's ruling left the decision to public officials and housing providers, but it offered no clear formula for maneuvering around the prospects of discriminatory-effect liabilities. This Article endeavors to fill in that blank by exposing the faulty ideological underpinnings and constricted definitions that inhibit the FHA's segregative-effect theory from guiding a constructive dialogue on these policy choices. Specifically, its colorblind framework disconnects race from its operation as a mechanism for distributing access to vital resources.

Current doctrine solely looks to racial demographics to identify and redress segregation. As such, the rerouting of resources to majority-minority communities inherently raises the specter of perpetuating or exacerbating segregation in violation

of the FHA. This Article contends that a segregative-effect analysis should co-extensively assess this data set against the region's geography of opportunity. The proposed approach comports with the recognition of "lost housing opportunity" damages in fair housing jurisprudence and reflects insights from Empirical Methods and Critical Race Theory while offering a formula for redressing the racialized inequities embedded in both segregation and gentrification.

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MELVIN J. KELLEY IV [*]

INTRODUCTION

The contemporary proliferation of residential segregation across lines of race and class is not mere happenstance.[1] Indeed, it is one of the many foreseeable products stemming from the United States' historically racist policies and practices coupled with an ongoing failure to fully remediate the compounding injustices.[2] Given this context, it comes as no surprise that "[n]umerous tangible consequences are associated with the forced separation of Blacks and [w]hites by place, including . . . . heightened exposure to environmental hazards, relegation to underresourced schools, increased contact and surveillance by law enforcement, and even death, hence the term *death by residential segregation*."[3] To be sure, the isolation and exploitation of communities of color have always imparted exposure to heightened psychological and environmental stressors that operate to reduce life

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[1] Lori Latrice Martin & Kenneth J. Varner, *Race, Residential Segregation, and the Death of Democracy: Education and Myth of Postracialism*, 25 DEMOCRACY & EDUC. 1, 9 (2017). As used in this Article, the term "segregation" is best understood as adopting Monica Bell's four-prong analytical frame which situates segregation as a function of separation, concentration, subordination, and domination. Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 659 (2020). Under this rubric, predominantly white communities that have employed exclusionary "social closure" tactics, meaning methods of subordination to close off opportunities for oppressed groups and achieve or maintain a monopoly on resources such as power, prestige, education, and material wealth, would not be considered "segregated." Erika Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2383–91 (2021) (leveraging social closure theory to unveil oppressive power dynamics in access to education, but still employing the term segregation to refer to predominantly white school districts).

[2] Martin & Varner, *supra* note 1, at 3.

[3] *Id.* at 1.

expectancies when compared to their white counterparts.[4] However, this reality has only been further underscored by the disparate rates of infection and death impacting the Black community in the wake of the global pandemic.[5]

According to the U.S. Centers for Disease Control and Prevention, as of early June 2022, the United States has experienced 84,762,952 cases of the coronavirus disease 2019 (COVID-19) and 1,004,260 related deaths.[6] Data collection and analysis efforts continue, but many reports have found stark and alarming racial disparities amid these figures.[7] One early assessment found that Black and Latinx people were three times as likely to be infected as their white counterparts and nearly twice as likely to die thereafter.[8] Employing a measurement of direct and indirect deaths from COVID-19, more than half of the people who died during the first seven months of the pandemic were people of color.[9] Moreover, vaccination endeavors at state and local levels also reported troubling disparities, given the respective starting points for actual need as demonstrated by the number of cases in each population.[10] For example, data from North Carolina indicates that whites received eighty percent of the vaccines when they only constituted sixty-two percent of cases, while Blacks and other people of color received twenty percent of the vaccines although they made up thirty-eight percent of cases.[11]

More recent reviews suggest that a range of concerted efforts have narrowed, but have not eliminated, racial disparities as the global pandemic continues.[12] Ultimately, continued vigilance is warranted given the structural scaffold that undergirds race-based inequities.[13] While studies show that African Americans continue to experience interpersonal and institutional racism when navigating the healthcare system, residential segregation itself remains a critical factor in producing these divergent

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[4] *Id.* at 9.

[5] Dylan Scott, *Housing Segregation Left Black Americans More Vulnerable to Covid-19*, VOX (Ju1y 10, 2020, 4:38 PM), https://www.vox.com/2020/7/10/21319873/covid-19-coronavirus-cases-deaths-black-americans-housing-segregation.

[6] *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_totalcases (in the "View(left axis)" drop-down menu, select "Cumulative Cases") (last visited June 6, 2022); *id.* (in the "View(left axis") drop-down menu, select "Cumulative Deaths").

[7] Richard A. Oppel et. al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES, (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html.

[8] *Id.*

[9] Anna Flagg et al., *COVID-19's Toll on People of Color Is Worse Than We Knew*, MARSHALL PROJECT (Aug. 21, 2020, 12:22 PM), https://www.themarshallproject.org/2020/08/21/covid-19-s-toll-on-people-of-color-is-worse-than-we-knew.

[10] James H. Johnson Jr. et al, *Coronavirus Vaccine Distribution: Moving to a Race Conscious Approach for a Racially Disparate Problem*, 8 J. RACIAL & ETHNIC HEALTH DISPARITIES 799, 800 (2021).

[11] *Id.*

[12] Benedict I. Truman, Man-Huei Chang & Ramal Moonesinghe, *Provisional COVID-19 Age-Adjusted Death Rates, by Race and Ethnicity - United States, 2020-2021*, 71 MORBIDITY & MORTALITY WKLY. REP. 601, 603 (2022).

[13] *Id.* at 605.

trends across racial populations.[14] Residents of segregated neighborhoods experience poor housing; limited access to medical care; food insecurity; inferior transportation; reduced employment options; a toxic ecology; and disproportionate exposure to the criminal justice system.[15] These interlocking mechanisms power a "dynamic" apparatus that fuels "exposure to, transmission of," lack of vaccination against, and death by COVID-19.[16] Though a range of approaches for remediating segregation was set forth over fifty years ago in the infamous Kerner Commission Report,[17] the lack of implementation has left segregation rates from the late 1960s largely intact with expectations of substantial increases in large metropolitan areas in the future.[18] Absent effective interventions the tolling figure of unjust casualties will continue to mount.[19]

In response to over a hundred racial rebellions during the Long Hot Summer of 1967,[20] on February 29, 1968, President Lyndon B. Johnson's Kerner Commission released a report, urging unprecedented federal intervention to prevent the United States from becoming "two societies, one [B]lack, one white—separate and unequal."[21] The report candidly acknowledged that white society had created, maintained, and otherwise condoned poverty-stricken communities of color to facilitate the continued socio-political and economic domination of African Americans.[22] After detailing its findings, the Kerner Commission reviewed potential public policy responses and concluded there was "only [one] possible choice for America" to comprehensively redress segregation and the ensuing societal ills that fueled the uprisings.[23] To that end, the drafters recommended implementing a two-prong approach that coupled "enrichment," for racially identifiable regions marred by impoverished conditions, with the simultaneous development of initiatives that would permit marginalized populations to move to their preferred neighborhoods without facing race-based impediments.[24]

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[14] Scott, *supra* note 5.

[15] DREXEL UNIV., URB. HEALTH COLLABORATIVE, COVID-19 IN CONTEXT: RACISM, SEGREGATION, AND RACIAL INEQUITIES IN PHILADELPHIA 2 (2020).

[16] *Id.*

[17] STEPHEN MENENDIAN, RICHARD ROTHSTEIN & NIRALI BERI, THE ROAD NOT TAKEN: HOUSING AND CRIMINAL JUSTICE 50 YEARS AFTER THE KERNER COMMISSION REPORT 25 (2020).

[18] Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 581–83 (2015).

[19] Truman, Chang & Moonesinghe, *supra* note 12, at 605.

[20] 1967 saw a total of 164 eruptions of racial resistance, sixty percent of which occurred in July. OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 66 (1968) [hereinafter KERNER COMMISSION REPORT]. While 1967 marked the peak, such manifestations of socio-political unrest had been underway since 1963. *Id.* at 19–21.

[21] *Id.* at 1.

[22] *Id.* at 1, 5.

[23] *Id.* at 10.

[24] *Id.* at 10, 11.

Less than two months later, the federal Fair Housing Act (FHA) was passed on April 11, 1968.[25] In the decades since, a seemingly intractable debate has endured concerning which of the two tactics delineated in the Kerner Commission's framework should take precedence under the FHA, namely, pursuing integration endeavors or furthering community development.[26] Overwhelmingly, fair housing advocates have emphatically embraced the integration disposition.[27] Many have gone one step further and outright condemned community development tactics as vehicles that perversely operate to preserve segregated residential patterns.[28] To be sure, the Kerner Commission unequivocally placed a thumb on the scales in favor of advancing integration by increasing the mobility prospects of people of color.[29] Its policy proposal contemplated the improvement of destitute, majority-minority areas for pragmatic reasons, as no conceivable program could instantaneously yield wide-scale integration.[30] Yet, the report cautioned that this should only serve as an interim strategy, and the authors emphasized that the pursuit of integration was vital because "[t]he primary goal must be a single society, in which every citizen will be free to live and work according to his capabilities and desires, not his color."[31]

This Article argues that the text of the FHA, in conjunction with its subsequent interpretation by the U.S. Department of Housing and Urban Development (HUD) and the federal courts, evinces a deliberate attempt to allow pertinent parties a measure of leeway in proactively pursuing these potentially competing stratagems for advancing racial justice.[32] This insight provides a key point of entry for critiquing the current statistical frameworks that constrain the utility of the segregative-effect theory of liability, which has long been recognized under the FHA's prohibition of policies, practices,

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[25] Civil Rights Act of 1968, Pub. L. No. 90-284 § 800, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619).

[26] *See, e.g.*, Tim Iglesias, *Affordable Housing, Fair Housing and Community Development: Joined at the Hip, We Need to Learn to Walk Together*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 195, 199–200 (2017) (discussing the "quandary" presented by the FHA, which seeks to both advance integration and preclude the confinement of people of color in disinvested neighborhoods); EDWARD G. GOETZ, THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES 4–7 (2018) (summarizing the conflict between community development advocates and fair housing advocates as essentially a disagreement over the placement of affordable housing before delving into the deeper implications of each camp's position); john a. powell & Stephen Menedian, *Opportunity Communities: Overcoming the Debate Over Mobility Versus Place-Based Strategies*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 207 (Gregory D. Squires ed., 2017) (proposing a synthesized strategy for moving beyond the unresolved debate about whether to pursue and focus on place-based strategies, mobility strategies, or some combination of both).

[27] GOETZ, *supra* note 26, at 24.

[28] *Id.* at 147.

[29] KERNER COMMISSION REPORT, *supra* note 20, at 10–11.

[30] *Id.*

[31] *Id.* at 11.

[32] GOETZ, *supra* note 26, at 91–92 (discussing how the FHA fails to define "fair housing" and offers no reference to either "integration" or "segregation").

and actions that have the effect of creating, increasing, reinforcing, or perpetuating segregated housing patterns.[33] In addition to outlawing discrimination on the basis of protected characteristics and requiring HUD to affirmatively further fair housing through its program, the FHA also recognized two distinct theories of discriminatory-effect liability: (1) disparate impact and (2) segregative effect.[34] The first theory is implicated when the allegation entails "harm to a particular group of persons by a disparate impact," while the second theory concerns "harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."[35]

As a general matter, discriminatory-effect causes of action have primarily been marshalled under the disparate-impact theory. Further, since no claim has ever been sustained solely on a segregative-effect theory, it is unclear exactly what the theory adds as a practical matter.[36] However, the landscape is quickly shifting under the Biden administration, which has sought to mobilize HUD's rulemaking authority to reinvigorate both discriminatory-effect theories, in stark contrast to the Trump administration, which promulgated curtailing regulations.[37] This new direction is likely to prompt revisitation of the segregative-effect theory by fair housing advocates and courts, but the problem is that current doctrine relies exclusively on local census data as the source of information that enables substantiation of a segregative-effect claim.[38] This narrow fixation on proportionality and

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[33] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

[34] *See, e.g.*, Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357, 366 (2d Cir. 2003) (citing Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995).

[35] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469.

[36] Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 735–36 (2017) (reviewing segregative-effect cases and concluding that the theory has not yet added much to disparate-impact jurisprudence because the only successful segregative-effect claims have always been accompanied by an allegation of another plausible FHA violation). However, in some cases, the prospect of a successful segregative-effect claim has been higher than an associated disparate-impact cause of action. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977) (perceiving the segregative-effect claim as stronger than the disparate-impact assertion because the prospective tenants for a subsidized housing development, that had been denied under zoning regulations, were predominantly white, and yet the inclusion of some racial minorities still would have constituted a significant step toward integrating the overwhelmingly white village); Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522, 526–28, 530–31 (M.D. La. 1997) (finding that the defendants were entitled to summary judgement on the plaintiff's disparate-impact claim concerning how the revocation of a building permit for low-income housing disproportionately disadvantaged racial minorities, but allowing the race-based disparate treatment and segregative-effect claims to advance).

[37] Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590, 33,594 (proposed June 25, 2021) (to be codified at 24 C.F.R. pt. 100) (situating the revisitation of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard from 2020 as a response to a directive from President Biden calling for the federal agency to take all necessary steps to ensure compliance with the FHA).

[38] *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (admonishing the lower court for failing to uphold a segregative-effect claim

representation is only conducive to the FHA's integrative imperative, and it provides no clear basis for defending community development initiatives. Indeed, by this benchmark, the decision to pursue community development would almost always be vulnerable to the contention that the policy reinforces patterns of residential segregation in urban cities because of the higher population of people of color therein.

The peril of the current segregative-effect approach is exemplified in *Otero v. New York City Housing Authority*, where the New York City Housing Authority (NYCHA) had completed an urban renewal project but declined to follow its own tenant screening regulations that would have given priority to former occupants of the site.[39] The NYCHA contended that the previous residents were largely persons of color and that permitting them to return would impart a "tipping factor" that would trigger white flight, resulting in a non-white "pocket ghetto."[40] The Second Circuit overturned the district court's determination that the Authority's conduct was impermissible.[41] Instead, it held that integration did not operate as a "one-way street" and that the promotion of racial integration could come at the expense of non-white persons because the ensuing benefits redounded to the benefit of the community as a whole.[42] Thus, the NYCHA was permitted to defer to the discriminatory preferences of whites and disregard the interests of racial minorities who were not inherently opposed to living in communities with a higher proportion of households of color.[43] Many fair

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when a zoning ordinance precluded a new affordable housing development, whose prospective tenants were estimated to be twenty-five percent people of color, in a neighborhood that was ninety-eight percent white).

[39] Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1124 (2d Cir. 1973).

[40] *Id.*

[41] *Id.* at 1125.

[42] *Id.*

[43] *Id.* After *Otero*, the Second Circuit adopted a three-prong test for evaluating the validity of similar race-conscious integration plans. United States v. Starrett City Assocs., 840 F.2d 1096, 1101–02 (2d Cir. 1988). While limitations were established on frustrating the FHA's antidiscrimination provisions, the court did not disturb its underlying conclusion that integration objectives can be furthered to the detriment of racial minorities. *Id.* at 1103. Although there has been variance in the governing criteria, other courts that considered the tension of the FHA's integration imperative and antidiscrimination mandate have generally concurred that the former can trump the latter at least under some circumstances. *Compare* Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203, 1208 (6th Cir. 1988) (permitting racial quotas to foster integration until the objective was achieved), *with* Burney v. Hous. Auth., 551 F. Supp. 746 (W.D. Pa. 1982) (finding that the housing authority's tenant selection procedure violated the FHA because a less discriminatory procedure could eliminate tipping).

Given the foregoing, commentators have also raised concerns about whether residency preferences could serve as anti-displacement measures in majority-minority communities experiencing the pressures of gentrification. Zachary C. Freund, Note, *Perpetuating Segregation or Turning Discrimination on Its Head: Affordable Housing Residency Preferences as Anti-Displacement Measures*, 118 COLUM. L. REV. 833, 860–61 (2018) (discussing several potential challenges under the FHA, including discriminatory-effect liability, that residential preferences could be vulnerable to even when they are designed to benefit oppressed populations). Decisions like *Otero* could arguably be marshalled to advance the inverse proposition; namely, that policies can further antidiscrimination at the expense of integration. *Id.* at 860. However, this vision of the statute is unlikely to gain traction in the courts at present, given the prevailing perspective that the FHA is chiefly concerned with upending residential

housing advocates would readily acquiesce in the integration interpretation of the FHA and welcome the implications thereof.[44] After all, the key sponsor of the legislation, Senator Walter Mondale, is often cited as stating that the FHA was designed to replace racially concentrated poverty with "truly integrated and balanced living patterns."[45] Scholars, activists, and the judiciary have almost uniformly embraced Senator Mondale's statement as the proverbial central command for advancing fair housing interests.[46] Despite a litany of comments to the contrary, the FHA's text, purpose, and subsequent interpretation indicate that the "enrichment" of majority-minority neighborhoods was not to be abandoned for the sake of integration.[47]

Notably, the U.S. Supreme Court endorsed the viability of discriminatory-effect claims in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, but cautioned that "it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa."[48] Moreover, the Court expressly acknowledged that "[i]f the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose . . . ."[49] However, the litigation stemmed from a disparate-impact claim, so the Court's holding did not take up the question of squaring the segregative-effect theory and its current emphasis on racial demographic data with its disinclination to limit the discretion of housing authorities and developers in "choos[ing] to rejuvenate a city core or to promote new low-income housing in suburban communities."[50]

In keeping with the recognition of a zone for deliberation and in an attempt to minimize the peril while maximizing the promise of the segregative-effect theory, this Article argues that the best measure for

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patterns of racial or ethnic concentration. *Id.* at 861. There are also arguments that this integration approach improperly impedes prospects for meaningful fair housing choice. *See* W.C. Bunting, *In Defense of a Liberal Choice-Based Approach to Residential Segregation*, 88 TENN. L. REV. 335, 338 (2021) (contending that some marginalized groups voluntarily build communities to procure certain social benefits and, therefore, the government should adopt an ex ante choice-based approach to residential integration rather than an ex post outcome-based framework that seeks to achieve and maintain purportedly optimal residential patterns).

[44] Iglesias, *supra* note 26, at 199.

[45] 114 CONG. REC. 3422 (1968) (statement of Sen. Walter Mondale); Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 127 n.18 (2012).

[46] *See, e.g.*, Schwemm, *supra* note 45, at 126–28 (situating integration as a key purpose of the FHA).

[47] GOETZ, *supra* note 26, at 92–96.

[48] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015).

[49] *Id.* at 544. For a fuller discussion, *see* Part I.B–C.

[50] *Id.* at 542. *But cf.* Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After* Inclusive Communities, 24 GEO. MASON L. REV. 663, 701 (2017) (contending that the only principled reading of *Inclusive Communities* is that Justice Kennedy assumed either policy approach would remedy racial isolation and therefore, local policy choices must further the FHA's integration command).

evaluation of liability under such a claim is to put the harms of segregation at the forefront of the analysis.[51] Segregation was never just about separation; it operated as a legal regime that was designed to facilitate subordination and oppression.[52] Thus, "[e]ntrenched segregation tends to deny racial minorities equal access to jobs, government resources, amenities, . . . [and] quality schools[,]" and "also tends to disproportionately burden [them] with society's detritus: power plants and hazardous waste facilities[,]" as well as incidents of crime.[53] Further still, segregation can adversely impact social capital, and it provides the backdrop for the implementation of racially stratified policing practices.[54] Many integrationists are likewise privy to these facts and cite them when advancing their policy prescriptions.[55]

This Article's argument for the simultaneous and co-extensive consideration of census data in conjunction with the local geography of opportunity to detect and substantiate a segregative-effect claim proceeds in two parts. Part I provides an overview of the segregative-effect theory and reviews the current legal landscape for advancing such claims. First, this Part traces the genesis of discriminatory-effect claims back to their inception in Title VII jurisprudence and provides a brief synopsis of the first federal appellate case to hold that impacts, rather than motivations, could also be grounds for liability under Title VIII.[56] Then, it reviews the context for the promulgation of HUD's 2013 Discriminatory Effects Regulation, as well the content thereof. While this regulation was designed to promote uniformity among the federal circuit courts in the evaluation of discriminatory-effect allegations, the timing indicates that it also marked an attempt to insulate the approval of discriminatory-effect causes of action from the scrutiny of the U.S. Supreme Court under principles of administrative deference.[57]

Though the Court ultimately upheld the vitality of discriminatory-effect theories in 2015, its reasoning was not explicitly grounded in HUD's 2013

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[51] I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 44–45 (2009) (urging renewed focus on the harms of segregation).

[52] KERNER COMMISSION REPORT, *supra* note 20, at 3–7 (describing historical underpinnings and contemporaneous realities of segregated communities); *see also* Bell, *supra* note 1, at 659–60 (lamenting that segregation facilitates isolation and disempowerment, but current "conversations in law and policy fundamentally misunderstand what segregation entails" such that conservatives equate fair housing laws with the end of segregation, while liberals can miss racialized power dynamics that might appear neutral).

[53] Capers, *supra* note 51, at 44 (footnotes omitted).

[54] *Id.* at 45.

[55] *See, e.g.*, RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 338–52 (2018) (marshalling various case studies to conclude that lower Black/white segregation holds great promise for improving outcomes for African Americans with respect to employment, income, education, and health).

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

[57] *See, e.g.*, William F. Fuller, Note, *What's HUD Got to Do with It?: How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard*, 83 FORDHAM L. REV. 2047, 2058–62 (2015) (discussing HUD's disparate-impact rule and the two-step *Chevron* deference test established in Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984)).

Regulation, which has spawned a new era of confusion as lower courts struggle to determine the appropriate test for successful discriminatory-effect claims.[58] While HUD sought to leverage *Inclusive Communities* as a means of justifying severe limitations on discriminatory-effect causes of action under the Trump administration, the winds are now shifting under the Biden administration to keep HUD's 2013 Discriminatory Effect Regulation intact.[59] Nonetheless, Part I stresses that the most favorable resolution of the burdens of production will not yield substantial systemic relief unless racial demographic data is consulted alongside a region's geography of opportunity.

Part II substantiates the overarching contention of this Article by revisiting the historical antecedents of segregation. This backdrop provides context for evaluating the propriety of the FHA as a vehicle for redressing the harms of racialized spaces. The legislation that was forthcoming during the Civil Rights Movement of the 1960s was largely designed to respond to the problem of racial discrimination as understood under the tenets of colorblind ideology.[60] This framework viewed race as a set of phenotypical characteristics stemming from a person's genetic heritage.[61] From this perspective, racism was the irrational and immoral mistreatment of an individual on the basis of their race.[62] In accord, there was a substantial cohort who surmised that the antidiscrimination mandate embedded in the FHA was therefore an effective solution to segregation.[63] Since people of color would no long face racial barriers in access to housing, it followed that balanced demographics across neighborhoods would soon take root.[64]

After recapping the genesis of segregation and the operation of colorblindness ideology in fair housing jurisprudence, Part II turns to the insights from Empirical Methods and Critical Race Theory (e-CRT) to reveal the problem-solution alignment that taints the current conception of the segregative-effect theory. E-CRT adherents view race as grounded in political science and sociology, rather than biology, and accordingly adjust their empirical methodology.[65] Their insights force us to come to terms with

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[58] Inclusive Cmtys. Project v. Lincoln Prop. Co., 920 F.3d 890, 902 (5th Cir. 2019) (discussing various interpretations of the governing standards for evaluating a disparate-impact claim in the aftermath of *Inclusive Communities*).

[59] Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590, 33,594 (proposed June 25, 2021) (to be codified at 24 C.F.R. pt. 100).

[60] CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiv (Kimberlé Crenshaw et al. eds., 1995).

[61] *Id.* at xv.

[62] *Id.* at xiv.

[63] *Id.* at xv–xvi.

[64] ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 2–3 (1996).

[65] Osagie K. Obasogie, *Race and Science: Preconciliation as Reconciliation*, *in* RACIAL RECONCILIATION AND THE HEALING OF A NATION: BEYOND LAW AND RIGHTS 49, 59 (Charles J. Ogletree & Austin Sarat eds., 2017) [hereinafter Obasogie, *Race and Science*] (contending that federal administrative agencies should employ race impact assessments to ensure delegitimatized notions of biological race are not used to perpetuate and justify future harms against the descendants of historically marginalized populations).

the fact that any relevant data pool for the segregative-effect theory should provide a window into the corresponding racialized geopolitical inequities.[66] In addition to offering the foregoing theoretical and empirical justification grounded in e-CRT, Part II stresses the necessity of this paradigm shift as it relates to the practical problems presented by shifting demographic patterns due to trends in gentrification.[67] A number of commentators have lauded the purported integration benefits flowing from the migration of higher-income, white households into low-income communities of color because their presence stimulates much needed amenities and services.[68] However, there is ample reason to believe that such benefits are illusory because rising housing costs in gentrifying communities have resulted in the displacement of poorer households of color.[69] Moreover, even when they can retain a footing in the community, other mechanisms operate to enable affluent whites to continue to exclude poor Blacks from the political and social capital they have accumulated despite the heightened proximity in living quarters.[70]

After setting forth the theoretical and practical dimensions of the problem-solution misalignment, Part II concludes by tracing the evolution of "lost housing opportunity" damage awards in response to fair housing violations[71] to demonstrate that the proposal herein has already gained some

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[66] Monica Bell wrote:

> For purposes of measurability and convenience, social scientists often calculate racial separation alone to identify segregation. That reasonable methodological compromise has evolved, for some, into a conceptual statement about what residential segregation truly *is*. Yet, properly understood, racial separation by race is more like a miner's canary, warning us that much more sinister mechanisms of racial hierarchy maintenance are likely lurking.

Bell, *supra* note 1, at 660.

[67] Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 843 (2019) ("If economic and racial integration are not stable, and if gentrification instead leads to displacement of lower income residents of color, then gentrification seems in severe tension with fair housing goals.").

[68] J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405–06 (2003).

[69] *Compare* JASON RICHARDSON, BRUCE MITCHELL & JUAN FRANCO, NAT'L CMTY. REINVESTMENT COAL., SHIFTING NEIGHBORHOODS: GENTRIFICATION AND CULTURAL DISPLACEMENT IN AMERICAN CITIES 5 (2019) ("Using U.S. census and economic data, NCRC found that many major American cities showed signs of gentrification and some racialized displacement between 2000 and 2013. Gentrification was centered on vibrant downtown business districts, and in about a quarter of the cases it was accompanied by racialized displacement. Displacement disproportionately impacted [B]lack and Hispanic residents who were pushed away before they could benefit from increased property values and opportunities in revitalized neighborhoods."), *with* Adam Elliott-Cooper, Phil Hubbard & Loretta Lees, *Moving Beyond Marcuse: Gentrification, Displacement and the Violence of Un-Homing*, 44 PROGRESS IN HUM. GEOGRAPHY 492, 503–04 (2019) (acknowledging that additional data beyond census indicators is necessary to further substantiate their conclusion that displacement, encapsulating direct displacement of the poor by wealthy groups as well as the social, economic, and cultural transition which alienates established populations, is an inevitable consequence of neighborhood gentrification either in in the short or long-term).

[70] Johnson, *supra* note 67, at 845–46.

[71] *See, e.g.*, United States v. Hylton, 944 F. Supp. 2d 176, 197 (D. Conn. 2013), *aff'd*, 590 F. App'x 13 (2d Cir. 2014) (granting an award of several thousand dollars in lost housing opportunities to compensate

conceptual traction under Title VIII. A number of administrative and judicial decisions have found that a person who was unlawfully denied access to the housing of their choice on the basis of a protected characteristic suffered "lost housing opportunities" apart from any standard economic injuries and emotional distress.[72] The framework generally applies whenever the person was attempting to leave their neighborhood for a comparatively advantaged community, as measured by several factors that impact group life chances, including the quality of schools, crime rates, and poverty concentration.[73]

Courts have been increasingly receptive to the recognition of these neighborhood effects on households and have held that the victims of disparate treatment should be compensated for such cognizable, adverse consequences on their prospects for upward mobility and achievement.[74] Ultimately, the segregative-effect theory should operate on the same wavelength and require an analysis of how housing policies and practices are promoting equal opportunity for impoverished people of color to accurately identify and target the harms of segregation.[75] Here, Professor john powell's work in "opportunity map[ping]" is highlighted as a practical blueprint for connecting the principles of e-CRT to the proposed doctrinal expansion of lost housing opportunity damages into the segregative-effect context.[76] Moreover, HUD has collected and published data in a mapping tool that is publicly available, which should aid advocates in undertaking such comparative analyses of neighborhood conditions.[77] Finally, the Article concludes with a summation of its attempt to align theory and doctrine, so the debate on integration versus enrichment can at least continue on a field of data that provides an appropriate point of entry into the controversial dialogue.

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a victim of racial discrimination after expert testimony indicated that the defendant's unlawful conduct denied the plaintiff access to a city where conditions were conducive to greater upward mobility and higher achievement).

[72] *Hylton*, 944 F. Supp. 2d at 197.

[73] *Id.* at 186–87; *see also* Christopher C. Ligatti, *Max Weber Meets the Fair Housing Act: "Life Chances" and the Need for Expanded Lost Housing Opportunity Damages*, 6 BELMONT L. REV. 78, 85 (2018) (overviewing sociologist Max Weber's conception of life chances as the idea that indicators of socioeconomic status including, inter alia, race, religion and political affiliation would be accompanied by opportunities for education and employment that would determine an individual's ability to satisfy basic physical and mental needs).

[74] *See, e.g.*, *Hylton*, 944 F. Supp. 2d at 197 (basing its decision to award lost housing opportunity damages partly on the testimony of "an expert in the field of 'neighborhood effects'").

[75] *See* Martin & Varner, *supra* note 1, at 8 ("Equity is the only course of action that can counterbalance the racist underpinnings of segregation. Equity creates solutions that intentionally engage differences to remedy past treatment. Any solution forward cannot simply involve walking away from hundreds of years of oppression based on the simplistic notion of equality. Equity is unapologetic in working to divert and reinvest financial, emotional, and collective resources, in disproportion, to counteract what had already been in place.").

[76] Press Release, Othering & Belonging Inst., California Uses Our Opportunity Maps to Build Affordable Housing in Resource-Rich Regions (Jan. 10, 2019), https://belonging.berkeley.edu/california-uses-our-opportunity-maps-build-affordable-housing-resource-rich-regions.

[77] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,789 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

I. SITUATING SEGREGATIVE-EFFECT CLAIMS

This Part offers a brief recap of the genesis of the discriminatory-effect theory under Title VIII by revisiting its origins within the transplant of developments under Title VII to the housing context. While all federal appellate courts that have considered the question subsequently agreed that discriminatory-effect liability was tenable under the FHA, various standards proliferated until HUD passed a regulation in 2013 that sought to establish a uniform three-part burden shifting framework for the evaluation of such causes of action.[78] Nonetheless, the timing of this action cannot be appreciated without an understanding of the concerns that were simmering regarding the prospects of review by the U.S. Supreme Court, which had demonstrated hostility to race-conscious remedial measures and appeared eager to address the standing question of whether the FHA should be read to greenlight discriminatory-effect claims.

After recapping that series of events, Part I then examines the ensuing tensions that have hence risen in the wake of the Supreme Court's adoption of these theories, albeit with the imposition of constitutional "safeguards," which lower courts are now struggling to decipher and implement. The immediate import of these developments is unknown, so this Part concludes by identifying and reflecting on likely future directions for the segregative-effect theory. Notably, it seems likely that segregative-effect allegations will receive more attention because they have not been explicitly encumbered by the same judicial standards as disparate impact. Moreover, HUD is now demonstrating renewed interest in ensuring the salience and viability of both theories moving forward. Even still, as debates on pleading and evidentiary burdens carry on, this Article contends that the most liberal resolution thereof will still render segregative-effect claims ineffectual for addressing the unequal distribution of group life chances that have been created and perpetuated by historical and contemporary segregation.

A. *The Origin of Discriminatory-Effect Theories Under Title VIII*

The genesis of discriminatory-effect claims as a viable vehicle for advancing civil rights objectives is properly traced back to the U.S. Supreme Court's landmark decision in *Griggs v. Duke Power Co.*,[79] which held that disparate-impact liability was tenable under Title VII of the Civil Rights Act of 1964.[80] In *Griggs*, the employer maintained a policy that required its

[78] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460, 11,462 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). *Compare, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988) (applying three-step burden-shifting approach), *with* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (employing a four-factor balancing test).

[79] 401 U.S. 424 (1971).

[80] Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253 (codified as amended at

manual laborers to both hold a high school diploma and demonstrate proficiency on two intelligence tests.[81] Initially, the plaintiffs' allegations under Title VII included a claim that the policy had been adopted to further a racially discriminatory purpose, but the Fourth Circuit found that the assertion had not been substantiated.[82] On appeal, the plaintiffs focused on their contention that the reach of Title VII extended beyond the underlying motivation animating a practice to its actual effect.[83]

In resolving this question of first impression, the Court considered both the text and purpose of Title VII.[84] In relevant part, the legislation deemed it an unlawful practice for an employer to "limit, segregate, or classify his employees [or applicants for employment] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[85] An examination of this language indicated that Congress intended to "proscribe[] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[86] The statute's purpose was to further "equality of employment opportunities" through the removal of barriers that had previously functioned to favor whites to the detriment of other racial groups.[87] In accord, the recognition of disparate-impact claims was not only appropriate as a function of its text, but further served to facilitate its overarching goals.[88]

The logic of *Griggs* was first transplanted to the FHA by a federal appellate court in the matter of *United States v. City of Black Jack*.[89] Though the civil rights era marked a turning point in American history, disputes like *Griggs* and *Black Jack* indicated that the new direction was most assuredly not welcomed by all.[90] While statutes like Titles VII and VIII had outlawed overt invidious discrimination, the racial ideology as well as the ensuing plunder for whites it had served to justify were not dismantled.[91] In accord, incentives remained, both then and continuing henceforth to the present, for maintaining the status quo through the enactment and preservation of

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42 U.S.C. § 2000e-2).

[81] *Griggs*, 401 U.S. at 431–32.

[82] *Id.* at 428–29.

[83] *Id.* at 426.

[84] *Id*. at 431.

[85] 42 U.S.C. § 2000e-2(a)(2).

[86] *Griggs*, 401 U.S. at 431.

[87] *Id*. at 429–30.

[88] *Id.* at 429–30, 436.

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

[90] Rigel C. Oliveri, *Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis*, 80 MO. L. REV. 1053, 1062 (2015).

[91] Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2283–84 (2001) (contending that racial hierarchies are key determinants of access to tangible benefits and that understanding the rationalization fueling subordination, as well as the prospects for undermining the system and its logics, requires an assessment of the prevailing economic, international, and labor conditions).

policies that were designed to ensure white dominance without expressly naming this objective.[92] In *Black Jack*, this impetus surfaced in an attempt to wield municipal incorporation as a shield for erecting exclusionary zoning ordinances that prevented poor people of color from accessing housing in a predominantly white community.[93]

The tactic and corresponding polices at issue in *Black Jack* were far from anomalous.[94] In the aftermath of an explicit statutory ban on race-based discrimination, the vitality and utility of exclusionary zoning was even more pronounced as a tool to keep poor people of color out of white areas.[95] At the onset of the era of white flight into suburban communities,[96] the nation experienced a proliferation of zoning ordinances that mandated large lot sizes for single-family homes and prohibited the construction of multi-family housing.[97] Although facially neutral, the practical effect of the regulations meant that many disadvantaged minorities were foreclosed from finding economically viable options in the region.[98]

Prior to August 6, 1970, Black Jack had been part of a large unincorporated area in Missouri that was governed by St. Louis County.[99] Its population was ninety-nine percent white and the residents thereof were inclined to keep it that way, but a nonprofit organization known as the Inter Religious Center for Urban Affairs (ICUA) had other plans.[100] Specifically, the ICUA had proposed a project called Park View Heights that was designed to "create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis."[101] An application for federal financial support prompted HUD to issue a "feasibility letter" on June 5, 1970 which effectively gave a green light for the project as the agency would set aside enough funding to ensure implementation.[102] In response, residents expeditiously formed the Citizens for the Incorporation of Black Jack and successfully petitioned the St. Louis County Council for

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[92] Oliveri, *supra* note 90, at 1062, 1065; *see also* Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 828 (2011) ("'White dominance' invokes a sociological understanding of group social, economic, and political position. It points toward the reality of racialized mass incarceration; to disparities in access to adequate housing, schools, and healthcare; to startling differences in economic security.").

[93] Oliveri, *supra* note 90, at 1062.

[94] *Id.*

[95] *Id.*

[96] MARK T. MULDER, SHADES OF WHITE FLIGHT: EVANGELICAL CONGREGATIONS AND URBAN DEPARTURE 2 (2015) (offering an overview of "white flight" as a process that involved white homeowners leaving northern cities to take up residence in suburban enclaves after efforts to maintain residential segregation through intimidation and zoning laws failed to fully restrict African American mobility in the wake of their northward migration from the South).

[97] Oliveri, *supra* note 90, at 1062, 1065.

[98] *Id.* at 1062.

[99] United States v. City of Black Jack, 508 F.2d 1179, 1182–83 (8th Cir. 1974).

[100] *Id.*

[101] *Id.* at 1182.

[102] *Id.*

authorization to be established as an independent municipality.[103] Two months after incorporation, the newly elected officials of Black Jack proceeded to pass a zoning ordinance that "prohibited the construction of any new multifamily dwellings and designated any such current housing structures as nonconforming uses."[104]

The U.S. Department of Justice (DOJ) brought suit arguing that the policy had not only been adopted for a racially discriminatory purpose, but was also discriminatory in effect.[105] While the evidence indicated that several members of the community and at least one zoning official were motivated by racial animus, the district court declined to impute these goals to the legislation as a whole because the prevailing reported objectives in preserving property values as well as preventing congestion on the road and in the schools were well within the bounds of municipal police power.[106] The DOJ routed its discriminatory-effect contentions in two packages, which have hence provided the formulation for disparate-impact and segregative-effect theories, respectively.[107] It charged that the ordinance had a racially discriminatory effect both in terms of disparate impact and segregative effect correspondingly "because: (1) more [B]lacks than whites would be served by Park View Heights, and (2) Park View Heights would contain a higher percentage of [B]lacks to whites than Black Jack presently does."[108] Although the court appeared open to recognizing discriminatory-effect liability as a general matter, it found the proffered statistical evidence insufficient to sustain these allegations.[109]

On appeal, the Eighth Circuit reversed both conclusions and, in so doing, became the first federal appellate court to recognize discriminatory-effect liability under the FHA.[110] The court was not hard pressed to find a violation of the FHA. Indeed, it found no factual support for Black Jack's purported legitimate objectives in passing the zoning ordinance.[111] Instead, it was clear that "at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone."[112] Nonetheless, the court opted to forego a disparate treatment rationale and, instead, buttressed its holding by recognizing discriminatory-effect liability and finding violations thereof.[113] Its assessment of these claims began by harkening back to

[103] *Id.*
[104] *Id.* at 1183.
[105] United States v. City of Black Jack, 372 F. Supp. 319, 328–30 (E.D. Mo. 1974).
[106] *Id.* at 328–29.
[107] *Id.* at 329.
[108] *Id.*
[109] *Id.* at 329–30.
[110] United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974); *see also* Schwemm, *supra* note 36, at 713–17 (providing an overview of both discriminatory-effect theories and noting a longstanding history of their recognition by federal appellate courts that began with *Black Jack*).
[111] *Black Jack*, 508 F.2d at 1187–88.
[112] *Id.* at 1185 n.3.
[113] *Id.* at 1184–85 (clarifying that a plaintiff need not demonstrate intent because "[e]ffect and not

Griggs.[114] Just as Title VII required the removal of artificial barriers that operated to effectuate racial discrimination in employment "such barriers must also give way in the field of housing."[115] In accord, "[t]he plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated."[116]

A disparate-impact violation was found because "[t]he ultimate effect of the ordinance was to foreclose [eighty-five] percent of the [B]lacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when [forty] percent of them were living in substandard or overcrowded units."[117] The segregative-effect ramifications were also striking as Black Jack's virtually all white population stood in stark contrast to the racial demographics of St. Louis which was almost forty-one percent Black.[118] Visually, the court took note that the cumulative impact of Black Jack's conduct, alongside other municipalities employing similar tactics in the region, was fueling an "inexorable process whereby the St. Louis metropolitan area bec[a]me[] one that 'has the racial shape of a donut, with [Blacks] in the hole and with mostly [w]hites occupying the ring.'"[119] Given that the proffered rationales for the policy were found to be untenable, the city could not justify these undue impacts.[120] Though *Black Jack* marked the first federal appellate decision to recognize discriminatory-effect claims under Title VIII, every such court hence that has reviewed the question came to the same conclusion.[121]

B. *Enter HUD's 2013 Discriminatory Effects Regulation*

Although discriminatory-effect actions have been recognized by the federal courts since the 1970s,[122] HUD only passed a pertinent regulation governing these theories of liability in 2013.[123] While the eleven circuits that had considered the issue agreed that discriminatory-effect claims were viable, HUD asserted that the then-new rule was necessary to "formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the [FHA] and to provide nationwide consistency in the

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motivation is the touchstone, in part because clever men may easily conceal their motivations, but more importantly" because "thoughtfulness can be as disastrous and unfair to private rights and the public interest, as the perversity of a willful scheme").

[114] *Id.* at 1184.

[115] *Id.*

[116] *Id.* at 1185 (footnotes omitted).

[117] *Id.* at 1186.

[118] *Id.* at 1183.

[119] *Id.* at 1186.

[120] *Id.* at 1185–87.

[121] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:7 n.1 (2021) (collecting cases).

[122] *Black Jack*, 508 F.2d at 1185–86.

[123] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

application of that form of liability."[124] To be sure, prior to its passage, there was substantial variance in the methodological tests that proliferated over four decades of precedent as administrative and judicial tribunals set about the task of adjudicating matters entailing an allegation of discriminatory effect.[125]

In order to rectify this state of affairs, HUD's 2013 Discriminatory Effects Regulation set forth a standard three-part burden shifting framework that governs claims employing a disparate-impact or segregative-effect theory of liability.[126] Pursuant to this rule, the plaintiff must first establish a prima facie case by demonstrating that the challenged practice has, or will predictably cause, a discriminatory effect.[127] Thereafter, the defendant is afforded an opportunity to contend that the policy or practice is nonetheless justifiable because it is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[128] Finally, the plaintiff can still prevail if they can prove that the asserted objectives could be attained through other means that would have "a less discriminatory effect."[129] At the onset, substantiating a prima facie case effectively entails clearing three subcomponents.[130] For disparate impact this means: (1) identifying a specific policy or practice; (2) verifying a notable disparity in how this policy affects a protected group compared with others; and (3) proving that this harm is imparted by the defendant's policy.[131] In a parallel vein, advancing a segregative-effect theory maps onto these three elements but with some measure of variance at each stage to reflect its distinct theoretical and doctrinal foundation.[132]

With respect to the first prong, unlike disparate impact's limitation to a pattern, practice, or policy, segregative-effect theory might further extend its coverage to isolated decisions by housing providers.[133] Second, given the unique nature of the injury, the relevant data pool is different at step two.[134] Instead of comparing the adverse repercussions of a policy on a protected group as contrasted to others, the focus is on the harm to the community in general as measured by its impact on residential segregation

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[124] *Id.*
[125] *Id.*
[126] *Id.* at 11,482.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 11,468–69; *see also* SCHWEMM, *supra* note 121, § 10:5 (collecting relevant cases).
[131] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,482; Robert Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 693 (2016); Schwemm, *supra* note 36, at 712–13.
[132] *See also* Schwemm, *supra* note 36, at 712 (observing that case law and pertinent HUD regulations call for meeting three requirements in order to make out a prima facie case of segregative effect).
[133] *Id.* at 714.
[134] *Id.* at 713–14.

patterns of protected classes.[135] Finally, there must be a demonstration that the defendant's conduct created, increased, reinforced, or perpetuated segregated housing patterns.[136] Here, recent developments have suggested that the causal nexus could be more remote under a segregative-effect theory than for a disparate-impact claim.[137] Indeed, this is not surprising given that liability could be predicated on not just creating segregation, but also on maintaining or otherwise exacerbating such preexisting conditions.[138] This framing suggests a potential affirmative obligation to redress these ills.[139]

While the foregoing clarifications were welcome, HUD's pronounced interest in reducing uncertainty and inconsistency through the adoption of a uniform rule does not explain the timing of the agency's actions. To that end, one must take note of the socio-political and legal landscape that provided the context for this long overdue intervention. The accounting begins in 2011, when the U.S. Supreme Court, helmed by Chief Justice Roberts, appeared to take a pronounced interest in examining the propriety of discriminatory-effect claims under the FHA.[140] The manifestation of this impulse was embedded in its decision to review the matter of *Magner v. Gallagher*, which entailed an unsympathetic claim by owners of substandard housing that the city's code enforcement endeavors reduced the number of affordable units available to persons of color in violation of the FHA.[141]

The prospect of judicial review in *Magner* prompted heightened concern among civil rights activists about the continued salience of discriminatory-effect theories because the Court, just four years prior, had evinced unequivocal hostility to race-conscious remedial measures by striking down voluntary school desegregation efforts as unconstitutional in *Parents Involved*.[142] Shortly thereafter, HUD, operating under the Obama administration, initiated the process for developing a discriminatory-effect regulation by issuing a proposal and opening a period for public

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[135] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469; *see also* Schwemm, *supra* note 36, at 713–14 (explaining that statistical evidence is paramount in proving both discriminatory-effect theories but that the focus is different because segregative-effect claims must consider how a challenged action affects residential segregation rather than its impacts on a protected class, which is the domain of disparate impact).

[136] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469; SCHWEMM, *supra* note 121, § 10:5 n.3 (collecting relevant cases).

[137] Schwemm, *supra* note 36, at 757.

[138] *See infra* Part I.D.

[139] Seicshnaydre, *supra* note 50, at 690–91 ("Justice Kennedy's opinion does not privilege local government policy discretion over fair housing objectives. It merely gives local governments room to maneuver . . . . Thus, the discretion does not center on *whether* local governments may work to overcome segregation, but *how*.").

[140] Gallagher v. Magner, 619 F.3d 823, 831 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

[141] *Id.* at 830, 833.

[142] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (plurality opinion) (discussed *infra* Part II.B).

comments thereof.[143] There is no doubt that the hope was to insulate discriminatory-effect theories by situating their recognition as a function of administrative interpretation, promulgated in accord with a delegation of power from Congress, which would require some measure of judicial deference.[144]

As HUD's rulemaking process was unfolding, *Magner* moved to a settlement, but another opportunity arose shortly thereafter for the Court to reach the question of discriminatory effects in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc*.[145] It was during this window, between the petition for certiorari and the subsequent grant by the U.S. Supreme Court,[146] that HUD finalized its disparate-impact rule.[147] Nonetheless, this time around, high certainty permeated that the Court was poised to make an adverse ruling on the fate of disparate impact because it had just come off the heels of its 2013 decision in *Shelby County v. Holder*, which invalidated the continued application of a key provision in the Voting Rights Act of 1965 that was designed to combat racial discrimination in voting.[148] While the petition in *Mt. Holly* sought to challenge a municipal revitalization plan because it unduly raised costs and disproportionately displaced racial minorities, the claim could have been construed as impeding local government initiatives designed to redress blighted neighborhood conditions.[149] Yet again, members of the fair housing community were able to breathe a sigh of relief when the case settled just three weeks prior to its scheduled oral argument.[150]

Ultimately, the third time proved to be the proverbial charm as the Court finally addressed the viability of discriminatory-effect claims under the FHA

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[143] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

[144] As the agency primarily responsible for administering the FHA, HUD's regulations interpreting the FHA have been deemed entitled to substantial deference. *See* 42 U.S.C. § 3608(a); Meyer v. Holley, 537 U.S. 280, 287–88 (2003); *see also* Fuller, *supra* note 57, at 2059–60 (arguing that HUD's disparate-impact rule should be entitled to deference under the two-part test announced in *Chevron*, which provides that a reviewing court will uphold an agency's interpretation of a statute that it is charged with administering as long as: (1) the governing legislation is silent or ambiguous on the specific question at issue and (2) the agency's interpretation is a reasonable construction of the law's provisions).

[145] Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 570 U.S. 904 (2013), *cert. dismissed*, 571 U.S. 1020 (2013).

[146] *Id.*; Stacy Seicshnaydre, *Will Disparate Impact Survive?*, CONST. DAILY (Nov. 21, 2013), https://web.archive.org/web/20190615133246/https://constitutioncenter.org/blog/will-disparate-impact-survive.

[147] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

[148] Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013); *see also* Jamelle Bouie, *The Next Assault on Civil Rights*, SLATE (Oct. 9, 2014, 10:53 AM), https://slate.com/news-and-politics/2014/10/the-supreme-courts-next-attack-on-civil-rights-the-justices-will-likely-end-the-fair-housing-acts-disparate-impact-rule.html (arguing that the Roberts Court has been hostile toward both voting rights as well as affirmative action and appears poised to target fair housing next).

[149] Seicshnaydre, *supra* note 146.

[150] *Id.*

in *Inclusive Communities*.[151] The matter entailed the Texas Department of Housing and Community Affairs' administration of the Low-Income Housing Tax Credit Program (LIHTC), which subsidizes the acquisition, construction, and rehabilitation of affordable rental housing.[152] The federally funded initiative requires state agencies, or their designees, to develop and implement a set of selection criteria for distributing the credits among prospective housing developer applicants.[153] The Inclusive Communities Project, a nonprofit that aims to promote racially and economically diverse communities through the expansion of affordable housing opportunities, brought suit alleging that the operation of the program violated the FHA under disparate-impact theory because it encouraged LIHTC projects to be concentrated in predominantly Black neighborhoods in Dallas and away from white suburban areas.[154] To the surprise of many, the Court ruled that the disparate-impact theory of liability was indeed cognizable under the FHA.[155]

C. *Supreme Court Endorsement? Unpacking the Enigma of* Inclusive Communities

Despite the holding in *Inclusive Communities*, the Court undertook its analysis of the FHA without affording any noted measure of deference to HUD's 2013 Discriminatory Effects Regulation.[156] Instead, the majority opinion, authored by Justice Kennedy, relied primarily on a comparison between the text of the FHA and other federal statutes advancing civil rights objectives in employment and education respectively, which had previously been interpreted by the Court as authorizing disparate-impact liability.[157] In addition to these parallels in statutory language, Justice Kennedy found that this expansive reading was appropriate in light of the FHA's role in the nation's ongoing struggle against racial segregation.[158] While many lauded the plaintiff's victory as advancing civil rights in access to housing, other commentators recognized that any purported celebration was perhaps

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[151] Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

[152] *Id.*; *see also* NAT'L LOW INCOME HOUS. COAL. & PUB. & AFFORDABLE HOUS. RSCH. CORP., BALANCING PRIORITIES: PRESERVATION & NEIGHBORHOOD OPPORTUNITY IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BEYOND YEAR 30 6–8 (2018), https://nlihc.org/sites/default/files/Balancing-Priorities.pdf (providing an overview of the LIHTC program).

[153] *Inclusive Cmtys.*, 135 S. Ct. at 2513.

[154] *Id.* at 2514.

[155] Scott M. Badami, *"Disparate Impact" Claims Survive Fair Housing Act Challenge*, FOX ROTHSCHILD LLP: FAIR HOUS. DEF. (June 26, 2015), https://fairhousing.foxrothschild.com/2015/06/articles/discrimination/disparate-impact-claims-survive-fair-housing-act-challenge/.

[156] *Inclusive Cmtys.*, 135 S. Ct. at 2516–17.

[157] *Id.* at 2516–19 (situating previous interpretations of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 as instructive guideposts for how to read the FHA, but also marshalling Bd. of Ed. of City Sch. Dist. v. Harris, 100 S. Ct. 363 (1979), which upheld disparate-impact liability for all discriminatory practices outlawed under the Emergency School Aid Act after examining the legislation's text, history, purpose and structure).

[158] *Id.* at 2525–26.

premature because the language in the decision gave pause in predicting the actual impact of the holding moving forward.[159]

Before the matter came before the U.S. Supreme Court, the Fifth Circuit had not only verified the salience of discriminatory-effect liability, but outright adopted HUD's 2013 Discriminatory Effects Regulation as the governing guidepost in evaluating such causes of action under the FHA.[160] Though this opinion was technically affirmed, Justice Kennedy did not expressly acquiesce in HUD's interpretation and raised several cautionary tales concerning the reach of disparate-impact claims in the future.[161] Notably, in revisiting *Griggs*, Justice Kennedy made it clear that disparate-impact liability under both Title VII and Title VIII would only mandate the "'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[162] Further still, "adequate safe guards at the prima facie stage" were deemed essential to minimize undue exposure to defendants and avoid the constitutional questions that would proliferate if housing providers were effectively forced to constantly consider race so as to avoid a lawsuit.[163] From this vantage point, Justice Kennedy observed a plaintiff would have to prove "robust causality" by demonstrating a statistical disparity was actually caused by the defendant's policy.[164]

While some suggested the variation in semantics employed by the Court as contrasted with the language in HUD's Regulation were slight and potentially negligible,[165] the district court on remand understood *Inclusive Communities* to have erected "a materially different (and more onerous) prima facie case burden of proof."[166] It proceeded to find that the plaintiffs had failed to point to a specific policy rather than the overall application decision making process for LIHTC housing and thus, could not meet the

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[159] *See* Lauren Clatch, Inclusive Communities *and the Question of Impact: Pro-Plaintiff?*, MINN. L. REV. DE NOVO (Dec. 8, 2016), https://minnesotalawreview.org/2016/12/08/inclusive-communities-and-the-question-of-impact (cautioning that the decision was not unambiguously pro-plaintiff and, therefore, an assessment of its impact would have to wait until results manifested in subsequent district court decisions). *Compare, e.g.*, Elizabeth L. McKeen, Bimal Patel & Ashley Pavel, *Robust Causality and Cautionary Standards: Why the* Inclusive Communities *Decision, Despite Upholding Disparate-Impact Liability, Establishes New Protections for Defendants—Part I*, 132 BANKING L.J. 553, 557 (2015) (arguing that the holding adds nothing for plaintiffs while adding protections to defendants), *with* Dennis Parker, *Why Today Was a Battle Won in the War Against Racial Discrimination*, ACLU (June 25, 2015, 2:15 PM), https://www.aclu.org/blog/racial-justice/why-today-was-battle-won-war-against-racial-discrimination (describing the opinion as not throwing any "additional boulders" in the path toward equality).

[160] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., 747 F.3d 275, 282 (5th Cir. 2014).

[161] *Inclusive Cmtys.*, 135 S. Ct. at 2522–26.

[162] *Id.* at 2522.

[163] *Id.* at 2523.

[164] *Id.*

[165] Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 121 (2015).

[166] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., No. 3:08-CV-0546-D, 2016 WL 4494322, at *1 (N.D. Tex. Aug. 26, 2016).

"robust" causality requirement for a prima facie burden.[167] As a result, the matter was outright dismissed.[168] In the vacuum of a definitive statement on the relationship between the apparent limitations erected in *Inclusive Communities* and HUD's 2013 Regulation, the lower courts have once again splintered in their approaches to evaluating disparate-impact claims.[169]

A survey at the federal appellate level reveals varying interpretations and implementations of Justice Kennedy's opinion. In *MHANY Management, Inc. v. County of Nassau*, the Second Circuit held that HUD's 2013 regulation was entitled to deference and that the Supreme Court had implicitly adopted the agency's standard in *Inclusive Communities*.[170] The Fifth Circuit recently found the conclusion reached in *Mhany Management Inc.* untenable.[171] In *Inclusive Communities Project, Inc. v. Lincoln Property Company*, the Fifth Circuit determined that the plaintiffs were unable to reach the "robust causa[lity]" test set forth in *Inclusive Communities*.[172] In explicating this conclusion, the court noted that, unlike the Second Circuit, it read *Inclusive Communities* as "undoubtedly announc[ing] a more demanding test than that set forth in the HUD Regulation."[173] The Fourth Circuit's approach, also referenced by the Fifth Circuit in *Lincoln Property*, effectively sidesteps a detailing of any notable difference between *Inclusive Communities* and HUD's 2013 Discriminatory Effects Regulation.[174] Specifically, in *Reyes v. Waples Mobile Home Park Limited Partnership*, the Fourth Circuit made it clear that *Inclusive Communities* would control its inquiry to the extent that there were any material deviations from the HUD regulation—though none were expressly noted—while simultaneously maintaining that the agency's standard was nonetheless entitled to deference.[175]

Most circuit courts, like the Fourth and Fifth, have adopted the language of "robust causality" as conveyed in *Inclusive Communities*, but here again

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[167] *Id.* at *6–8.

[168] *Id.* at *13.

[169] *See* Claire Williams, Note, Inclusive Communities *and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants*, 102 MINN. L. REV. 969, 989–90 (2017) ("The language in *Inclusive Communities* is not clear about when the robust causality standard should be employed, at summary judgment phase or earlier at the pleading stage, which conflicts with the nature of the two different stages of litigation."). *Compare, e.g.*, *Inclusive Cmtys*, 2016 WL 4494322, at *1 (describing the new burden as "more onerous"), *and* Ellis v. City of Minneapolis, No. 14-cv-3045, 2016 WL 1222227, at *5 (D. Minn. Mar. 28, 2016) (applying robust causality standard at the pleading stage), *with* Winfield v. City of New York, No. 15CV5236, 2016 WL 6208564, at *6 (S.D.N.Y. Oct. 24, 2016) (reasoning that the guidance from *Inclusive Communities* on establishing a prima facie case for disparate-impact liability did not alter the standard at the stage of pleading such that a plaintiff need only produce allegations that give rise to the pertinent inference rather than proffer statistical evidence).

[170] MHANY Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 618–20 (2d Cir. 2016) (upholding determination that plaintiffs had established prima facie case of discriminatory effects in challenging a municipality's refusal to accommodate requests for rezoning a parcel to permit multifamily housing).

[171] Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 902 (5th Cir. 2019).

[172] *Id.* at 906.

[173] *Id.* at 902.

[174] Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 424 n.4 (4th Cir. 2018).

[175] *Id.* at 432 n.10.

its import has been the subject of different treatments.[176] In *Reyes*, the majority opinion suggested that any instance where a housing policy or practice has been found to adversely impact a protected class more than others could potentially support a finding of robust causation.[177] In contrast, the dissenting opinion would not have found that robust causation was established because the defendants were not responsible for the underlying demographics of the relevant community, and as such, the expansion of an immigration status screening policy from the leaseholder to all adult occupants had not "caused" a disparate impact on persons of Latinx ancestry.[178] The Eleventh Circuit seemed to operate in a parallel vein to the logic of the *Reyes* dissent in *Oviedo Town Center II, L.L.L.P. v. City of Oviedo*.[179] There, the court stressed the Supreme Court's injection of "robust causality" as a means of "ensuring that racial imbalance does not, without more, establish a prima facie case of disparate impact."[180] In *Ellis v. City of Minneapolis,* the Eighth Circuit also found that *Inclusive Communities* provided new guidance and required plaintiffs to "point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity" as a prerequisite for establishing a prima facie case.[181]

In *Lincoln Property*, the Fifth Circuit adopted strands from all of the foregoing approaches in dismissing a disparate-impact claim against private property owners who refused to participate in the Housing Choice Voucher (HCV) program when their rental units were in a majority white area.[182] First, it read the majority opinion in *Reyes* for the narrow proposition that there it was the defendant's change in the governing policy and subsequent enforcement thereof that was responsible for the disparate impact.[183] This treatment resolved the tension between the majority and dissenting opinions because the finding was no longer contingent on the purported "geographical happenstance" concerning the relevant racial demographics of residents in the community.[184] In accord, the rationale of the Eleventh Circuit also found

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[176] *Lincoln Prop.*, 920 F.3d at 903–05 (reviewing different standards on "robust causation" in sister circuits).

[177] *Id.* at 906.

[178] *Reyes*, 903 F.3d at 434–35 (Keenan, J., dissenting).

[179] 759 F. App'x 828 (11th Cir. 2018).

[180] *Id.* at 834–35 (finding that a city-wide comparative analysis was necessary before owners of a majority-minority affordable housing complex could potentially establish a prima facie case of disparate impact from a municipal utility rate increase).

[181] Ellis v. City of Minneapolis, 860 F.3d 1106, 1113–14 (8th Cir. 2017) (holding that for-profit, low-income housing providers' allegations that city inspections disparately impacted racial minorities amounted to a disagreement over the extent of deficiencies under reasonable housing-code provisions).

[182] *Lincoln Prop.*, 920 F.3d at 895, 909. The HCV program, commonly known as Section 8, is funded by HUD, but administered by state and local housing authorities. Thereunder, rental subsidies are paid to landlords on behalf of admitted low-income households. However, landlord participation is voluntary unless state or local law provides otherwise. *Id.* at 900.

[183] *Lincoln Prop.*, 920 F.3d at 906.

[184] *Id.*

a foothold and permitted the Fifth Circuit to reason that the housing providers could not be held responsible for the geographic distribution of racial minorities in the region or for the overrepresentation of African Americans as voucher holders.[185] Finally, its opinion also gave a nod to the proposition advanced by the Eighth Circuit in *Ellis*.[186] Specifically, it noted that a private entity's decision to opt out of a voluntary government program could not be deemed "artificial, arbitrary, and unnecessary" without sufficient factual allegations to the contrary.[187] The Fifth Circuit subsequently declined to modify or reverse the standard announced in *Lincoln Property* in the matter of *Inclusive Communities Project, Inc. v. Heartland Community Association*.[188] Over dissenting opinions and other objections, lower courts in the Fifth Circuit have hence followed suit. Notably, the court in *Treece v. Perrier Condominium Owners Association, Inc.* commented that, "[a]pparently, the Fifth Circuit has taken the Supreme Court at its word that it did not intend for it to be easy to establish robust causation in an FHA case and did not intend to hold a defendant liable for a disparity it did not create."[189]

D. *Enduring Questions for Segregative-Effect Claims amid Evolving HUD Regulations and Contrasting Case Law*

Yet another wrinkle exists in terms of trying get a bead on the legal landscape governing discriminatory-effect theories under the FHA. *Inclusive Communities* only dealt with the question of disparate-impact liability so its significance, if any, for segregative-effect claims is still uncertain.[190] To the extent that the "robust causality" language has been understood to mount a heightened standard of review for disparate-impact liability, this development would not necessarily map onto the segregative-effect theory.[191] Nonetheless, it certainly raises the specter of unresolved questions.[192] Two glimpses into the uncertain future have been offered at this juncture.

First, in *Lincoln Property*, the Fifth Circuit not only addressed the sustainability of a disparate-impact cause of action, but also had the occasion

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[185] *Id.* at 907.

[186] *Id.*

[187] *Id.*

[188] Inclusive Cmtys. Project, Inc. v. Heartland Cmty. Ass'n, 824 F. App'x 210, 217–18 (5th Cir. 2020).

[189] Treece v. Perrier Condo. Owners Ass'n, 519 F. Supp. 3d 342, 359 (E.D. La. 2021).

[190] Schwemm, *supra* note36, at 714 ("The Supreme Court's 2015 decision in *Inclusive Communities* endorsed FHA disparate-impact claims, but did not deal with—indeed, barely mentioned—the segregative-effect theory.").

[191] *Id.* at 757–78 ("[T]o date, the cases have only demanded that a segregative-effect plaintiff show that the defendant blocked an integrated housing proposal in a white area or fostered such a proposal in a minority area.").

[192] Recent Case, *Fair Housing Act – Segregative-Effect Claims – Fifth Circuit Dismisses Segregative-Effect Claim Against Private Actors.* – Inclusive Communities Project, Inc. v. Lincoln Property Co., *920 F.3d 890 (5th Cir. 2019),* reh'g en banc denied, *930 F.3d 660 (5th Cir. 2019)*, 133 HARV. L. REV. 1476, 1476 (2020) [hereinafter HLR, *Fifth Circuit Dismisses Segregative-Effect Claim*].

to consider the plaintiff's claim that the defendants' refusal to accept vouchers in white areas perpetuated racial segregation.[193] In anchoring its assessment, the court turned to *Huntington Branch, NAACP v. Town of Huntington*, a seminal discriminatory-effect case out of the Second Circuit, which found that a local government's zoning policies had perpetuated segregation through its restrictions on sites deemed suitable for private multifamily housing construction.[194] Nonetheless, in light of its engagement with *Inclusive Communities*, the Fifth Circuit found that the Supreme Court's cautionary tales still had import in this setting.[195] However, somewhat surprisingly, this impulse manifested in distinguishing *Huntington Branch* on the grounds that it dealt with a public entity.[196] Here, the potential for placing affirmative obligations on private landlords was deemed to run afoul of the safeguards announced in *Inclusive Communities* for ensuring that "valid governmental and private priorities" were not displaced.[197]

On this front, the outcome in *Lincoln Property* has been properly critiqued for lacking a foundation either in the statute's language or in precedent because no such public-private distinction was drawn in *Inclusive Communities*.[198] Others have argued that a more appropriate translation of the perceived limitations established in *Inclusive Communities* to segregative-effect theories would have been better served by repacking "robust causality" as mounting a new "*significantly* perpetuat[ing] segregation" threshold.[199] In this way, the opinion could have more faithfully paid homage to the underlying concerns about cabining the reach of discriminatory-effect theories in triggering liability due to observed racial imbalances that cannot be adequately traced to the defendant's policy.[200] Though no threshold has ever been established for triggering segregative-effect liability, this approach would have also had the benefit of reflecting a set of similar concerns evinced in a handful of prior cases that were seeking "significant" impacts before finding a violation of the FHA.[201]

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[193] Inclusive Cmtys. Project v. Lincoln Prop. Co., 920 F.3d 890, 908 (5th Cir. 2019). Plaintiffs also alleged disparate treatment on the basis of race, but the assertions were dismissed as "vague and conclusory." *Id.* at 911.

[194] *Id.* at 908.

[195] *Id.* at 908–09.

[196] *Id.* at 908.

[197] *Id.* at 908–09 (quoting Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015)).

[198] HLR, *Fifth Circuit Dismisses Segregative-Effect Claim*, *supra* note 192, at 1480.

[199] *Id.* at 1481 & n.64.

[200] *Id.* at 1481–83.

[201] *See* Davis v. N.Y.C. Hous. Auth., 166 F.3d 432, 438 (2d Cir. 1999) ("The proper standard to be applied on remand is whether the proposed use of the working family preference will *significantly* perpetuate segregation at the relevant NYCHA developments."); Ave. 6E Invs., LLC v. City of Yuma, No. 2:09-cv-00297 JWS, 2013 WL 2455928, at *7 (D. Ariz. June 5, 2013), *rev'd on other grounds*, 818 F.3d 493 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 295 (2016) (rejecting a segregative-effect claim because the racial impact of the blocked development, which was proposed near an integrated area, was not "significant enough" to reduce segregation there).

In sharp contrast, Judge Davis concurred in part and dissented in part from the majority opinion in *Lincoln Property*.[202] With respect to the segregative-effect claim, he eschewed any such public-private distinction and stuck by the operative language animating the theory, which outlaws actions that create, increase, reinforce, or perpetuate segregation.[203] As such, Judge Davis argued that to prevail in this cause of action a plaintiff need only demonstrate pre-existing patterns of segregation and that the challenged conduct will perpetuate that segregation, not that it was the root cause thereof.[204] Although the application for rehearing en banc was denied by a vote of nine to seven, the latter camp of judges who dissented from the denial not only praised Judge Davis' dissents in *Lincoln Propert*y, but forcefully echoed the conclusion that liability is proper when a defendant's actions perpetuate or further existing segregation.[205]

A second peek at the hazy horizon is offered by HUD's current campaign to undo the attempted dismantling of the 2013 Discriminatory Effects Standard during the Trump administration. Under the guise of comporting with *Inclusive Communities*, former U.S. Secretary of HUD, Ben Carson, promulgated a new regulation in 2020 that radically altered the standards for advancing and defending a disparate-impact cause of action under the FHA.[206] This new regulation passed but never took effect because it was successfully challenged in the matter of *Massachusetts Fair Housing Center*.[207] Plaintiffs argued, among other contentions, that the 2020 rule violated the Administrative Procedure Act, which requires federal agencies to engage in "reasoned decision-making" and enables courts to set aside agency actions that are "arbitrary or capricious."[208] The court found that the plaintiffs demonstrated a substantial likelihood of success and issued a preliminary injunction on enforcement of the 2020 rule thereby leaving the 2013 regulation intact.[209]

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[202] *Lincoln Prop.*, 920 F.3d at 913 (Davis, J., concurring in part and dissenting in part). Specifically, he concurred in the dismissal of additional claims that were raised in the litigation pertaining to disparate treatment and unlawful advertising but dissented from the dismissal of both discriminatory-effect claims. *Id.* at 912–13.

[203] *Id.* at 922 (criticizing the majority for imputing a flawed vision of "robust causality" to the segregative-effect claim, which was a distinct cause of action targeting the perpetuation of segregation).

[204] *Id.* at 922–24 (contending that the majority's approach to causality would be tantamount to requiring the plaintiffs in *Grigg*s to show that their employer's policy caused African Americans to not have high school diplomas and would render discriminatory-effect liability a dead letter under the FHA).

[205] Inclusive Cmtys. Project v. Lincoln Prop. Co., 930 F.3d 660, 661, 666 (5th Cir. 2019) (Haynes, J., dissenting from the denial of rehearing en banc).

[206] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

[207] Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600, 611–12 (D. Mass. 2020).

[208] *Id.* at 609–10.

[209] *Id.* at 611.

Notably, the court held that HUD was not merely incorporating the results of *Inclusive Communities*, and that its claim to clarify the governing standards was untenable given the inclusion of new terms, an altered burden-shifting framework, and new defenses.[210] HUD is following suit with the decision and is now seeking to reinstate the previous regulation, but the contrast in content between HUD's 2013 and 2020 regulations provides another window into the enduring judicial debate about the reach of discriminatory-effect liability.[211] Per HUD's 2013 Regulation, a prima facie case is established by the plaintiff after identifying a practice that has caused or will predictably cause a discriminatory effect.[212] By contrast, HUD's 2020 regulation erects an explicit expansion of this initial step into a requirement for clearing five distinct hurdles at the pleading stage.[213]

Specifically, a plaintiff would have to allege sufficient facts and ultimately prove by a preponderance of the evidence that: (1) "the challenged policy . . . is arbitrary, artificial, and unnecessary"; (2) there is a "robust causal link" between the policy and its alleged effects; (3) the purported impact adversely affects members of a protected class; (4) any such disparity is "significant;" and (5) there is a direct link between the disparate impact and the ensuing injuries.[214] Advocates have been rightly concerned that the new rule would, at minimum, make it far more difficult for members of the protected classes to vindicate their rights when they are disproportionately subjected to adverse ramifications stemming from discriminatory housing policies in both the private and public sectors.[215] Especially noteworthy, on its face, the defendant is now alleviated of its burden to produce a legitimate justification for its policy if it does produce a demonstrable disparate impact.[216] Instead, pursuant to the first element, the plaintiff must now prove at the onset that there is no possible "valid interest or legitimate objective" that could be furthered by the defendant's practices.[217] Previously, a defendant would have been required to rebut a prima facie case

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[210] *Id.* at 610–11.

[211] *Id.*

[212] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,469 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

[213] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,332 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

[214] *Id.*

[215] *See, e.g.*, Press Release, Nat'l Low Income Hous. Coal., Preliminary Summary of Proposed Disparate Impact Rule 1 (Aug. 1, 2019), https://nlihc.org/sites/default/files/NLIHC-Preliminary-Summary-of-Proposed-Disparate-Impact-Rule.pdf (summarizing the key features in the proposed changes that collectively evinced a concerted effort by the Trump administration to "make it much more difficult, if not impossible, for communities of color to challenge discriminatory effects in housing").

[216] Olatunde Johnson & Michelle Aronowitz, *The Trump Administration's Assault on Fair Housing*, COMMON DREAMS (Aug. 24, 2019), https://www.commondreams.org/views/2019/08/24/trump-administrations-assault-fair-housing.

[217] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,332.

by claiming such a legitimate interest was animating its conduct, and the failure to do so would have permitted the plaintiff to prevail.[218]

In addition to this enhanced protection for defendants, the new rule offers two unprecedented defenses to disparate-impact causes of action.[219] First, the defendant could escape liability by asserting that its policy was mandated by federal, state, or local law, or required per a court order or administrative decree.[220] Yet another escape hatch is offered to a defendant using risk assessment tools that disproportionately affect protected classes if the prediction is accurate, which can be shown by demonstrating that the overarching standard is not unnecessarily restrictive as reflected in the outcomes of similarly situated protected and nonprotected persons.[221] Clearly, the reverberations here would be particularly liberatory for housing financial services including mortgage banking and homeowner's insurance.[222] Scholars and activists have noted that "[b]etween the unusually stringent and likely never to be satisfied prima facie case, and the two all-encompassing and easy to satisfy defenses, the proposed rule appears to use a belt and suspenders approach geared to ensure no effects case slips through."[223]

HUD's 2020 rule was also distinctly retitled "Implementation of the Fair Housing Act's Disparate Impact Standard"[224] and, in accord, removed the pre-existing operative language authorizing discriminatory-effect liability for policies and practices that "create[], increase[], reinforce[], or perpetuate[]" segregation.[225] This change did not go unnoticed, prompting activists to raise concerns that HUD may have been attempting to remove this theory from the purview of fair housing jurisprudence altogether.[226] HUD's official explanation in responding to such comments is that the "removal of this phrase was part of HUD's streamlining of the regulation and . . . generally, HUD views 'perpetuation of segregation' as a possible

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[218] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

[219] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,332–33.

[220] *Id.* at 60,333.

[221] *Id.*

[222] Johnson & Aronowitz, *supra* note 216.

[223] *Id.*

[224] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

[225] 24 C.F.R. § 100.500(a) (2014); *see also* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,306 (acknowledging that HUD had removed language regarding segregation from the definition of discriminatory effects but denying that the semantic adjustment substantively modified any obligations under the FHA).

[226] *See* Stephen Menendian, *Disparate Impact Liability Is the Best Remedy for Structural Racism*, U.C., BERKELEY: BERKELEY BLOG (Oct. 22, 2019), https://blogs.berkeley.edu/2019/10/22/disparate-impact-liability-is-the-best-remedy-for-structural-racism (contending the proposed new rule's elimination of language that defines discriminatory effects to encompass the perpetuation of segregation frustrates the integration goals of the FHA).

harmful result of unlawful behavior under the disparate-impact standard."[227] Most assuredly, the assertion flies in the face of over four decades of precedent, which has firmly cemented the segregative-effect theory as its own distinct vehicle for demonstrating a violation of the FHA.[228]

Nonetheless, it was prudent of HUD to candidly acknowledge the continued prospects of a segregation claim even as it sought to undermine discriminatory-effect liability. While *Inclusive Communities* only mentioned this theory in passing, when it did, its commentary evinced general approval.[229] For example, Justice Kennedy's opinion noted that the FHA seeks "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[230] Moreover, in situating its interpretation of the statutory language, the majority opinion considered it instructive that, through an amendment to the FHA in 1988, Congress effectively ratified several circuit decisions authorizing discriminatory-effect liability including *Black Jack*, *Arlington Heights*, and *Huntington Branch*.[231] These landmark decisions embraced not only disparate impact, but segregative-effect claims, as well.[232]

Further still, HUD's 2013 Discriminatory Effects Regulation sought to establish a uniform standard for both theories and, while it was not outright adopted, neither was it greeted with hostility.[233] To the contrary, the Court appeared to cite it with some measure of approval.[234] Indeed, this treatment is precisely what has led the Second Circuit to conclude that the regulation was implicitly embraced in *Inclusive Communities*.[235] Finally, Justice Kennedy's opinion ended by stating: "The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[236] As noted, under President Biden, HUD is mobilizing liberal interpretations of *Inclusive Communities* to launch a call for

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[227] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,306.

[228] Schwemm, *supra* note 36, at 710.

[229] *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519–22 (2015).

[230] *Id.* at 2522.

[231] *Id.* at 2519–20.

[232] *See*, *e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988); Metro. Hous. Dev. Corp. v. Vill. Of Arlington Heights, 558 F.2d 1283, 1288 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974).

[233] *See Inclusive Cmtys.*, 135 S. Ct. at 2522–23 (citing HUD's 2013 Discriminatory Effects Regulation with approval for providing a framework that affords defendants an opportunity to state and explain the valid interests served by their policies as a mechanism to ensure appropriate limitations on disparate-impact liability while permitting housing authorities and private developers a measure of discretion in formulating initiatives).

[234] *See id.* (agreeing with HUD's interpretation of the FHA and the agency's corresponding guidance as set forth in provisions of the 2013 Discriminatory Effects Regulation).

[235] MHANY Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 618 (2d Cir. 2016).

[236] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2525–26.

reinstating HUD's 2013 Discriminatory Effects Regulation altogether.[237] Nonetheless, even if this outcome is achieved, it is possible that additional decisions in the vein of *Lincoln Property* will be forthcoming as other courts steadfastly consider how to translate the perceived "safeguards" announced in *Inclusive Communities* to the evaluation of a segregative-effect cause of action. After all, the current split in the lower courts stems from a divergence in interpreting the Supreme Court as acquiescing in the authority of HUD's 2013 regulation or abrogating its legitimacy.[238] Those marching to the beat of the latter drum will be unlikely to yield in the wake a regulatory shift headed by the Biden administration.

E. *Exposing the Intrinsic Limitation of Both Conservative and Liberal Approaches*

Although the particulars of the ultimate standards for weighing the success of a segregative-effect claim will have notable import in individual cases, this Article suggests that no approach thereunder can adequately rectify the oppressive conditions imparted by policies and practices that create, increase, reinforce, or perpetuate segregation. While the hurdles continue to shift and evolve, at bottom, the landscape for vindicating a segregative-effect claim has and will continue to center on the review of local census data in isolation to ascertain how regional racial demographics are impacted by a policy, practice, or decision.[239]

Though HUD's 2013 Discriminatory Effects Standard attempted to promulgate a standard three-part burden-shifting framework for the evaluation of a segregative-effect claim, it declined to offer much guidance on the parameters concerning the contours of the statistical evidence that would lead to successful vindication.[240] Given that the demonstration of a violation was a "fact-specific inquiry" coupled with the expansive reach of the FHA across the private and public spheres, HUD thought it would be "impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts."[241] In the absence of additional regulatory insights, consulting the results in prior cases is instructive. Recall that advancing this cause of action effectively requires: (1) identification of a

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[237] Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590, 33,590 (proposed June 25, 2021) (to be codified at 24 C.F.R. pt. 100).

[238] *See* Treece v. Perrier Condo. Owners Ass'n, 519 F. Supp. 3d 342, 352–33 (E.D. La. 2021) (explaining that the Fifth Circuit acknowledged that debate existed on whether the Supreme Court adopted or modified HUD's 2013 Discriminatory Effects Regulation, but nonetheless concluded that *Inclusive Communities* announced a more demanding test).

[239] *See* Schwemm, *supra* note 36, at 738 ("While a variety of data sources may be used in disparate-impact cases, the segregative-effect precedents suggest a fairly straightforward approach that relies almost exclusively on local census data.").

[240] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460, 11,468 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

[241] *Id.* at 11,468.

policy, practice or decision; (2) verification that a community is experiencing segregation; and (3) demonstration that the challenged action has created, increased, reinforced, or perpetuated said segregated conditions (or is otherwise likely to do so).[242] A review of the most salient cases indicates that courts generally rely on local census data as a vehicle for concluding whether or not a community should be deemed racially segregated.[243]

Generally, neighborhoods that had populations that were over ninety percent white warranted the conclusion that the area was segregated.[244] In contrast, courts were inclined to reject the assertion of segregation whenever the racial demographics in the local community were more or less reflective of respective group representations at the larger metropolitan level.[245] Illustrating the nexus between segregation and the defendant's policy has similarly entailed a fairly straightforward assessment based on census data.[246] If the policy or practice at issue is blocking or restricting an affordable housing development, courts have been inclined to assume that the likely demographics would be reflective of the income-eligible population in the metropolitan area.[247] As such, predominantly white communities that impede economical housing opportunities in racially diverse metropolitan regions present the circumstances that are likely to satisfy a court in its efforts to ensure that the requisite causal nexus is present.[248]

To the extent that we can anticipate continued efforts to migrate the "safeguards" of *Inclusive Communities* to the segregative-effect theory, the reverberations of "robust causality" may very well mean heightened standards for a segregative-effect cause of action.[249] At this juncture, despite glimmers of an alternative direction as articulated by the dissent of Judge Davis in *Lincoln Property* and those who stood in solidarity, the most likely candidate for this transplantation is a "significant[]" standard before liability is triggered under a segregative-effect theory.[250] First, the issue was already

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[242] Schwemm, *supra* note 36, at 756–58.

[243] *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. Of Arlington Heights, 558 F.2d 1283, 1286–87, 1291 n.9 (7th Cir. 1977) (finding "overwhelming" segregation when census data revealed that the Village's population was ninety-nine percent white in a metropolitan area that otherwise had a substantial presence of African Americans).

[244] *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 929, 931, 937 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (describing the Town as ninety-five percent white and the relevant community as ninety-eight percent white).

[245] Ave. 6E Invs., LLC v. City of Yuma, No. 2:09-cv-00297 JWS, 2013 WL 2455928, at *7 (D. Ariz. June 5, 2013) (rejecting a segregative-effect claim because the Latinx community had already been integrating into the region over the past two decades such that the white population had fallen from seventy-five percent in 1990 to somewhere between forty-eight and sixty-five percent as of 2010 and, therefore, the modest additional integrative impact of the housing proposal was insufficient to support a finding of a violation).

[246] United States v. City of Black Jack, 508 F.2d 1183, 1183–86 (8th Cir. 1974).

[247] *Arlington Heights*, 558 F.2d at 1291.

[248] *Huntington*, 844 F.2d at 937–38.

[249] Schwemm, *supra* note 36, at 728–29.

[250] HLR, *Fifth Circuit Dismisses Segregative-Effect Claim*, *supra* note 192, at 1476–77.

flagged by some courts before *Inclusive Communities*.[251] Second, it seems to be a far more accurate reflection of the Court's recently expressed concerns about reining in the reach of discriminatory-effect liability than the proposed resolution proffered by *Lincoln Property*, wherein the Fifth Circuit drew a rather unprecedented distinction between public and private actors under the FHA.[252] Finally, this formulation would also parallel the standards announced in HUD's 2020 Disparate Impact Standard, which specifically requires the plaintiff to assert that the identified disparity is "significant" in order to establish a prima facie case.[253]

If the foregoing development transpires, the result may be that plaintiffs will have to rely on more sophisticated methodologies to identify segregated neighborhoods and illustrate the import of the defendant's action in imparting, maintaining, or exacerbating those conditions.[254] However, the playing field will not be dramatically altered from its current fixation on engaging with the phenomenon of racial segregation through the sole prism of demographic data. Unfortunately, no matter how low or high the evidentiary burden, this tool will remain utterly and wholly incapable of redressing segregation because it adopts a fundamentally flawed definition of the problem and correspondingly points to an ineffectual remedy while improperly curtailing the discretion of housing developers and public officials.

II. A CRITICAL EXAMINATION OF RACIAL SEGREGATION

This Part endeavors to unpack the unstated ideological perspective that currently animates the contours of the segregative-effect theory and fair housing advocacy more broadly. Our understanding of the genesis and persistence of racial segregation, as well as its ensuing harms, will necessarily direct the content of our proposed tactics for effective remediation. While no statutory definition has ever been forthcoming,[255] a 2015 HUD regulation in conjunction with judicial evaluation of segregative-effect claims reveals a consensus that "segregation" is present whenever the racial demographics of a particular community are disproportionately skewed as considered against the backdrop of the broader metropolitan area.[256] Given the nation's history, one would be hard pressed to deny the salience of injecting the presence of

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[251] *See, e.g.*, *In re* Malone, 592 F. Supp. 1135, 1147, 1152, 1167 (E.D. Mo. 1984) (finding that the potential introduction of ten to fifteen Black persons into an all-white population of 2,400 could not sustain a segregative-effect claim because the impact of the project "on segregated housing patterns is insignificant and such a *de minimus* [sic] impact is not sufficient to establish a *prima facie* violation of the Fair Housing Act"), *aff'd*, 794 F.2d 680 (table) (8th Cir. 1986).

[252] Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 907–08 (5th Cir. 2019).

[253] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,332 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

[254] Schwemm, *supra* note 36, at 739.

[255] GOETZ, *supra* note 26, at 92.

[256] *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1974) (discussed *supra* Part I.A).

racial concentrations into a formula that would provide a window into segregation.[257] However, without more, the approach offers a tool that is ill-suited for the task at hand.

In this Part, the Article contends that the truncated landscape governing the segregative-effect theory is an enduring remnant of the colorblindness ideology that dominated the discourse on the appropriate bounds of antidiscrimination doctrine during the Civil Rights Movement of the 1960s.[258] While the concept of an ideology has been interrogated under an array of multidisciplinary perspectives that have spawned competing interpretations thereof, the term "ideology," as used herein, generally refers to: "the broad mental and moral frameworks, or 'grids,' that social groups use to make sense of the world, to decide what is right and wrong, true or false, important or unimportant."[259] The precepts of colorblindness provided several "frames" or "dominant themes" for filtering through the debates on the best policy proposals for redressing racial injustices through civil rights legislation. [260]

Most critically, colorblindness posited that "race" is merely a set of phenotypical characteristics, including skin color and hair texture, that were the products of one's genetic heritage.[261] From this perch, racism was understood to be the irrational, arbitrary, and immoral mistreatment of individuals based on these innate characteristics.[262] On the one hand, conservatives contended that such conduct was rare and pushed for intent requirements in the law.[263] On the other hand, liberals thought it was more widespread and pushed for discriminatory-effect liability, so neutral rules that disproportionality impact racial minorities could be challenged whenever the policy or practice was unjustifiable.[264]

Critical race scholarship grew out of a deep dissatisfaction with the restrictions imposed by the terrain of the debate.[265] Instead of acquiescing in the mainstream discourse, these scholars argued for a definition of race that retained its socio-political, cultural, historical, economic, and psychological dimensions.[266] Today, colorblindness has evolved into post-racialism and diversity ideology, but the underlying frameworks are mere upgrades that

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[257] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988) (describing the interwoven and interlocking oppression of spatial separation and material subordination that African Americans were subjected to during Jim Crow).

[258] CRITICAL RACE THEORY, *supra* note 60, at xiv; Eduardo Bonilla-Silva, *The Structure of Racism in Color-Blind, "Post-Racial" America*, 59 AM. BEHAV. SCIENTIST 1358, 1368–69 (2015).

[259] EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 62 (2001).

[260] Bonilla-Silva, *supra* note 258, at 1364.

[261] CRITICAL RACE THEORY, *supra* note 60, at xiv–xv.

[262] *Id.*

[263] *Id.* at xvii.

[264] *Id.*

[265] *Id.* at xiv–xvii, xix.

[266] *Id.* at xiv.

similarly fail to capture an accurate portrait of race.[267] This Part explains why such truncated visions must be abandoned in favor of the lens employed by critical race theorists if the segregative-effect theory is to have any salience as a tool for advancing racial equality, whether through integration or enrichment.

A. *The Root and Branches of Housing Segregation*

In *Inclusive Communities*, Justice Kennedy posited that the FHA was paramount "in our Nation's continuing struggle against racial isolation [and in] in striving to achieve our 'historic commitment to creating an integrated society.'"[268] These sentiments are widely shared among the scholars, attorneys, and activists who comprise the community of mainstream fair housing advocates. At bottom, integration has been situated as the solution to segregation.[269] Evaluation of any remedial tactic first requires that we have a grasp on the underlying problem, namely, segregation. To that end, a substantial collection of materials is readily available for those who have been inclined to develop a deeper understanding of the history of racial segregation in the United States.[270] These sources provide a standard account of how the nation became racially segregated. For present purposes, a brief recap in broad strokes is warranted.

After the abrupt end of the Reconstruction Era, the newly procured rights of African Americans were stripped of their potential vitality in the wake of antagonistic judicial opinions and ephemeral federal enforcement.[271] The context enabled Southern whites to unleash "an unrestrained form of White supremacy, violence, segregation, and racial discrimination" on formerly enslaved Blacks.[272] Opportunities to flee the deplorable conditions in the Jim Crow South came en masse when labor shortages during World War I and World War II provided employment prospects for African Americans.[273] Many Blacks migrated to the Northeast, Midwest, and West, but their presence in larger numbers only exacerbated anti-Black sentiments in these

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[267] *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (cautioning against race-conscious housing policies but greenlighting the employment of race-neutral efforts to combat racial isolation and foster diversity as a means of solving the problems facing inner cities).

[268] *Id.*

[269] *Id.*

[270] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

[271] Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 183–84 (1995).

[272] Christopher M. Span, *Post-Slavery? Post-Segregation? Post-Racial? A History of the Impact of Slavery, Segregation, and Racism on the Education of African Americans*, 117 TCHRS. COLL. REC. 53, 61 (2015).

[273] ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 8–9, 14 (2010).

localities, which provided the scaffold for implementing a range of legal and extralegal measures designed to promote segregation.[274]

Initially, the primary vehicle for the enforcement of racial residential boundaries was white-on-Black violence.[275] This hostility soon became official public policy as zoning ordinances that explicitly mandated the racial composition of neighborhoods swept the nation.[276] However, these policies were deemed unlawful under the Civil Rights Act of 1866 as well as the Due Process Clause of the Fourteenth Amendment.[277] Nonetheless, zoning still became an essential tool for maintaining a racial division in neighborhoods through the promulgation of limitations on the type of housing that would be permissible within municipalities or in specific subsections.[278] As a rule, this primarily manifested in efforts to decrease the prospects of affordable housing so that the majority of disproportionately impoverished African Americans would be unable to afford to move to the area.[279] This net operated to catch most, but not all, which necessitated reliance on racially restrictive covenants as a failsafe.[280] These agreements consisted of contracts or property deeds that precluded the use or occupancy of designated homes by African Americans.[281] Since they were private in nature, they were deemed not to run afoul of the Constitution.[282] Later, however, the U.S. Supreme Court ruled that judicial enforcement of the covenants would constitute impermissible state action in violation of the Equal Protection Clause.[283]

Prior to the 1930s, the federal government saw access to housing as a private matter, but addressing the aftermath of the Great Depression necessitated an unprecedented public intervention to resuscitate the

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[274] DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954 3 (2005); *see also*, Michael S. Givel, *Evolution of a Sundown Town and Racial Caste System: Norman, Oklahoma from 1889 to 1967*, 21 ETHNICITIES 664, 665 (2021) (providing that from the 1890s to 1960s, approximately 10,000 localities were sundown counties or towns, wherein Blacks were expelled or banished particularly after dark, and the vast majority were not situated in states from the Deep South).

[275] *Id.* at 664 (overviewing a host of practices mobilized by sundown regions including violence and threats as well as the denial of civil and political rights); *see also* Massey, *supra* note 18, at 572 (describing how African Americans arriving to new cities throughout the country during the Great Black Migration were subjected to angry white mobs, burning crosses, bombings, shootings, and arson when they attempted to enter white neighborhoods).

[276] *Id.*

[277] Buchanan v. Warley, 245 U.S. 60, 79, 82 (1917).

[278] Oliveri, *supra* note 90, at 1062.

[279] *Id.*

[280] Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 551 (2000–01) (describing the nuanced geopolitical dynamics informing the interplay between race-based zoning and racially restrictive covenants); Thomas J. Sugrue, *From Jim Crow to Fair Housing*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 14, 15 (Gregory D. Squires ed., 2017).

[281] Jones-Correa, *supra* note 280, at 541.

[282] *Id.* at 544.

[283] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

economy as households struggled to keep roofs over their heads.[284] One of the first of these ensuing endeavors was to create the Home Owners Loan Corporation (HOLC) in 1933, which was tasked with financing and refinancing mortgages for households in need of assistance.[285] To effectuate this work at a national scale, HOLC needed to develop a systemic standard for appraising the value of homes, as its lending endeavors inherently entailed exposure to notable risks of default.[286] The ensuing rating system employed four cascading categories of quality with each represented threefold by a corresponding number, letter, and color: (1) 1-A-Green ("best"), (2) 2-B-Blue ("still desirable"), (3) 3-C-Yellow ("definitely declining"), and (4) 4-D-Red ("hazardous").[287] Invariably, predominantly Black neighborhoods and often even communities with small populations of African Americans were sorted in the worst category and denoted as "red" or "hazardous." [288] There is some evidence to suggest that HOLC undertook its mortgage assistance without undue consideration of the "red" designation.[289] Yet its system was mobilized by private banks and other financial institutions who began to "red line" communities and foreclose lending opportunities to residents in these areas.[290]

Moreover, just one year after HOLC was founded, the Federal Housing Administration was established in 1934.[291] The agency was tasked with insuring long-term mortgage loans made by private lenders for the rehabilitation, construction, and sale of housing.[292] In this way, their services induced lenders with available funding to invest in residential mortgages by insuring them against any losses on these instruments.[293] While its policies and practices generally favored single-family suburban development, the agency simultaneously implemented red-lining to categorically deny its insured loans to communities of color, thereby trapping residents in neighborhoods with high concentrations of poverty and blighted conditions.[294] The agency's discriminatory practices were also replicated by the Veterans Administration, which was established in 1944 to help some sixteen million servicemen purchase a home after the end of World War II.[295] By 1962, $120

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[284] KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 191–93 (1985).

[285] *Id.* at 195–96.

[286] *Id.*at 197.

[287] *Id.* at 202.

[288] *Id.* at 198, 202.

[289] *Id.* at 202.

[290] *Id.* at 203.

[291] *Id.*

[292] *Id.* at 204.

[293] *Id.*

[294] *Id.* at 213.

[295] MEIZHU LUI, THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE 256–57 (2006).

billion in new housing had been financed by these federal agencies, and ninety-eight percent of those funds were directed to white homeowners.[296]

In conjunction with these home financing efforts, the federal government undertook to directly provide public housing opportunities for low-income households.[297] Its initial efforts began with the passage of the National Industrial Recovery Act in 1933, which authorized the Public Works Administration (PWA) to promote housing, but the few projects that were still forthcoming under the auspices of the PWA operated to impart segregated conditions, sometimes even in areas where the conditions had not previously existed.[298] The federal government's second swing via the United States Housing Authority (USHA) left a more pronounced imprint on the fabric of historical and contemporary segregation.[299] Established under the United States Housing Act, also known as the Wagner-Steagall Act, the USHA was authorized to funnel federal funds to properly founded local housing agencies through loans and subsidies for construction and maintenance costs.[300] A key dynamic shaping the spatial distribution of these units was its deference to local authorities.[301]

First, municipalities had to establish the housing authorities that could serve as recipients of the federal funds.[302] Many predominantly white-suburban enclaves simply declined to create these entities.[303] Second, even if fund-recipients were formed, local public officials confined the housing developments to sites adjacent to impoverished communities of color or placed them on marginalized land next to highways, railroads, or industrial zones.[304] By 1962, there were half a million units that had collectively been built under various public housing programs, and over two million people called them home.[305] Devoid of resources, lacking amenities, "[p]oorly maintained, segregated, cheaply constructed, and often physically dangerous, the projects" quickly became the "'dumping ground for the poor.'"[306] Ensuing social afflictions took root, including crime and vandalism, further solidifying the "image of suburbia as a place of refuge for the problems of race, crime, and poverty."[307]

White flight ensued, and the exodus was streamlined thanks to the home financing policies and practices of the Federal Housing Administration and

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[296] *Id.* at 257.
[297] JACKSON, *supra* note 284, at 219.
[298] ROTHSTEIN, *supra* note 270, at 21–23.
[299] JACKSON, *supra* note 284, at 224–25.
[300] *Id.* at 224.
[301] *Id.*
[302] *Id.*
[303] *Id.* at 224–25.
[304] Sugrue, *supra* note 280, at 14, 17.
[305] JACKSON, *supra* note 284, at 224.
[306] *Id.* at 228.
[307] *Id.* at 219.

the Veterans Administration.[308] Vacancies at public housing sites that were initially designated for whites were eventually filled with African Americans.[309] However, the continuing loss of a moderate-income base further exacerbated endemic funding challenges to adequately maintain the premises.[310] Opportunities for Black neighborhood expansion in the private sector were presented in the wake of the massive outflow of whites who were departing city centers for the suburbs, but the terms of purchasing or leasing were often exploitative.[311] Further, whenever this growth threatened the newly established racial boundaries, urban renewal programs were introduced that permitted local authorities to acquire the properties via eminent domain.[312] The communities were subsequently razed and slated for redevelopment as middle-class commercial or residential zones.[313] Operating in tandem, the Federal-Aid Highway Act of 1956 provided approximately $25 billion for the construction of a national network of interstate highways.[314] Leveraging public monies, federal, state, and local officials literally paved roads that physically and economically decimated Black neighborhoods, while simultaneously facilitating convenient commuting for white suburbanites who still worked in cities.[315]

African Americans seeking opportunities to escape poverty-stricken segregated communities faced nigh insurmountable odds. Assistance was hard to come by as the National Association of Real Estate Boards issued ethical guidelines from the 1930s to the 1960s that expressly cautioned its members to "never be instrumental in introducing to a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in a neighborhood."[316] To ensure that its directives were not open to interpretation, an industry brochure provided several examples including "a colored man of means who was giving his children a college education and thought they were entitled to live among whites. . . . No matter what the motive or character of the would-be purchasers, if the deal would institute a form of blight, then certainly the well-meaning broker must work against its consummation."[317]

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[308] Massey, *supra* note 18, at 573.

[309] Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america.

[310] *Id.*

[311] Massey, *supra* note 18, at 574.

[312] *Id.*

[313] *Id.*

[314] Marlon G. Boarnet, *National Transportation Planning: Lessons from the U.S. Interstate Highways*, 31 TRANSP. POL'Y 73, 73 (2014).

[315] Deborah N. Archer, "*White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1273–74 (2020).

[316] ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 201 (1969).

[317] CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 156 (1955).

African American households that managed to garner sufficient "means" and the necessary courage to gain a foothold in white communities, were sometimes offered bribes to voluntarily vacate, but even more often, were met with violence to prompt a hasty, involuntary departure.[318] Such acts were far from isolated as "[c]ross burnings, arson window breakings, and mobs greeted Black newcomers to white neighborhoods in nearly every major northern city between the 1920s and 1960s."[319] It would be an incomplete picture to suggest that the federal, state, and local governments were not implicated in this systemic violence.[320] Indeed, even when not directly involved as perpetrators, as was not atypical, the impunity afforded to white private citizens who engaged in unlawful acts was only feasible with the tacit approval of public authorities that were tasked with investigating and prosecuting crimes.[321]

B. *Unpacking Colorblindness and the Integration Imperative*

What appears to have been most surprising to those who had not previously considered the roots of segregation was the extent to which not merely individual private actors, but a host of federal, state, and local policies operated to create and perpetuate racial discrimination in housing.[322] However, this amnesia is not surprising given the colorblindness ideology that has become the primary lens for engaging with our nation's troubled racial history.[323] Recall that from this perspective, race is merely a "biological or cultural category easy to read through marks in the body (phenotype) or the cultural practices of the group."[324] Further, "racism" is defined as "the belief that some people are better than others because of their race."[325] Prior to the advent of colorblindness, the ideology of white supremacy provided the justification for the subjugation and exploitation of African Americans.[326] The ongoing movement for open housing, and civil

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[318] ROTHSTEIN, *supra* note 270, at 139–40.

[319] Sugrue, *supra* note 280, at 19.

[320] ROTHSTEIN, *supra* note 270, at 147–48.

[321] *Id.* at 150–51.

[322] *Id.* at xii ("Half a century ago, the truth of de jure segregation was well known, but since then we suppressed our historical memory and soothed ourselves into believing that it all happened by accident or by misguided private prejudice. Popularized by Supreme Court majorities from the 1970s to the present, the de facto segregation myth has now been adopted by conventional opinion, liberal, and conservative alike."); Sugrue, *supra* note 280, at 18 (explaining how racial housing segregation became commonly understood to be a function of individual preferences, free choice, and a reflection of the principle that "birds of a feather flock together").

[323] Haney López, *supra* note 92, at 809–11, 824 (describing the evolution of colorblindness and noting that under its precepts, race is not understood as a "categorical system constructed over a long history of group-based exploitation").

[324] Bonilla-Silva, *supra* note 258, at 1359.

[325] *Id.*

[326] EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2 (5th ed. 2018) ("Whereas Jim Crow racism explained [B]lacks' social standing as a result of their biological and moral inferiority, color-blind racism

rights advocacy efforts more broadly, gained momentum in the mid-twentieth century from a variety of deep-seated social, political, and economic forces that were reshaping the landscape for the continued salience of the prevailing white supremacy sentiments that had hitherto provided the foundation for the regime of Jim Crow.[327]

Early efforts to challenge state-sponsored discrimination were predicated on an understanding that racism was a moral issue. This perspective was saliently featured in Gunnar Myrdal's unprecedented study of African Americans in the United States titled *An American Dilemma*. Funded by the Carnegie Corporation, Myrdal's report was released in 1944 and concluded that the "American Dilemma" imparted by sordid race relations was, despite its economic, social, and political dimensions, "a problem in the heart of the [white] American."[328] In defending this assertion Myrdal contended that the American ethos was profoundly influenced by the enlightenment ideals of rationality such that "intellectual order" was highly desirable in the typical American's "moral set-up."[329] For Myrdal then, this dissociative contradiction could be rectified by presenting Americans with data and information that would depict an accurate "social reality," which would then push white Americans to cease discriminatory practices as they brought their conduct in line with their espoused values.[330]

Although it operated on the same wavelength as the enlightenment model, the demand for colorblind policies was initially understood as a radical challenge to the operation of the nation's system of racial caste.[331] For example, Thurgood Marshall, who succeeded Charles Hamilton Houston as Special Counsel for the National Association for the Advancement of Colored People (NAACP) and later founded the Legal Defense and Educational Fund (LDF), argued that "classifications and distinctions based on race or color have no *moral or legal validity in our society. They are contrary to our constitution and laws* . . . ."[332] Unfortunately, colorblindness proved to be a trojan horse that would permit continued white dominance without reliance on naked claims of white supremacy.[333]

Its utility as a conceptual framework to further these ends was set at the very inception of colorblindness, which is properly traced back to Justice

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avoids such facile arguments. Instead, whites rationalize minorities' contemporary status as the product of market dynamics, naturally occurring phenomena, and [B]lacks' imputed cultural limitations.").

[327] Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 14 (1994).

[328] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xlvii (1944).

[329] *Id.* at xlvi.

[330] *Id.* at xlix.

[331] Haney López, *supra* note 92, at 809.

[332] *Id.* (citing Brief for Petitioner at 27, Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948) (No. 369), 1947 WL 44231, at *27) (emphasis added).

[333] *Id.* at 810.

Harlan's dissent in the infamous matter of *Plessy v. Ferguson*, wherein the Court sanctioned the doctrine of "separate, but equal" as a guise for the systemic oppression of African Americans under Jim Crow.[334] Justice Harlan declared:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior dominant, ruling class of citizens. There is no caste here. Our Constitution is *color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[335]

Harlan's premonition that the embrace of colorblindness would not necessitate a disturbance of the superordinate position of whites as a socio-political reality has borne out.[336] The blueprint he proffered has, at times, been proactively wielded as a sword.[337] For example in an attempt to resist desegregation mandates, North Carolina passed a law in 1969 providing that "[n]o student shall be assigned or compelled to attend any school on account of race, creed, color or national origin . . . ."[338] The state law was struck down under the Equal Protection Clause by the U.S. Supreme Court on the grounds that "the statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*."[339] Unfortunately, antidiscrimination jurisprudence did not maintain this nuanced engagement with colorblindness.[340]

Given the foregoing, it is perhaps not surprising that conservative voices acquiesced in the transition from white supremacy to colorblindness. After all, "[i]n our times, conservatives utilize the very rhetoric of tolerance, color-blindness, and equal opportunity that once characterized progressive discourse to mark the limits of reform."[341] Indeed, one of the most

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[334] Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

[335] *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

[336] Bonilla-Silva, *supra* note 258, at 1368 ("Racism has always been systemic in our nation, but racial domination was structured differently during slavery than during Jim Crow, and since the late 1960s, the 'new racism' regime developed as the way of reproducing [w]hite rule. The 'new racism,' like all previous racial orders, has evolved, and today we are witnessing . . . a 'multiracial [w]hite supremacy.'").

[337] Haney López, *supra* note 92, at 810.

[338] N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 44 n.1 (1971) (quoting N.C. GEN. STAT. § 115-176.1 (1969)).

[339] *Id.* at 45–46.

[340] Haney López, *supra* note 92, at 811.

[341] Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 762.

disconcerting manifestations thereof in recent years can be found in the plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.[342] There, Chief Justice Roberts proclaimed that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" in concluding that voluntary race-conscious integration plans to redress de facto segregation in the K-12 schooling context were unconstitutional.[343] Even still, white liberals also found the ideological transformation appealing during the era of the Civil Rights Movement because it comported with enlightenment ideals and provided grounds for distinguishing themselves from white supremacists.[344] In short, the former had employed rationalism and objectivity to transcend racial bigotry in favor of policies promoting universalism, while the latter maintained backward and ignorant views that fostered a sense of race as central to their self-identity.[345]

With respect to antidiscrimination principles, conservatives and liberals generally distinguished themselves by their stance on issues like affirmation action and whether liability should be premised on intent or effect as well as the extent to which rights might be implicated at all when no explicit race-based public policy is mandating harmful conditions.[346] Nonetheless, despite these important differences, each camp's "basic comprehension of racial justice has the same underlying structure—to universalize institutional practices in order to efface the distortions of irrational factors like race, to make social life neutral to racial identity."[347] The corresponding formula for advancing racial progress was fairly simple and operated as follows: "[o]nce we remove prejudice, reason will take its place; once we remove discrimination, neutrality will take its place; and once we remove segregation, integration will take its place."[348] Senator Mondale's vision for the FHA followed suit.[349] It assumed that the goal of integration would follow from the ban on discrimination in housing transactions.[350]

C. *Achieving Problem-Solution Alignment by Redefining Race and Segregation Under Title VIII*

To date, there is no universally accepted legal definition of race either in the antidiscrimination context or in the law more broadly.[351] The

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[342] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (plurality opinion).

[343] *Id.* at 736, 748.

[344] Peller, *supra* note 341, at 761.

[345] *Id.* at 771–72.

[346] *Id.* at 764–66.

[347] *Id.* at 772–73.

[348] *Id.* at 773.

[349] 114 CONG. REC. 3422 (1968) (statement of Sen. Walter Mondale).

[350] GOETZ, *supra* note 26, at 96.

[351] Destiny Peery, *(Re)defining Race: Addressing the Consequences of the Law's Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1842 (2017).

prevailing void is not without irony given the initial pains that were undertaken to establish and fortify evidentiary boundaries for determining a person's racial identity under federal and state law in Antebellum America.[352] The ensuing blank slate has primarily been filled *sub silento* with the articulations offered by post-racialism and diversity, which effectively mark an extension of the prior era of colorblindness.[353] Post-racialism also views race largely as a byproduct of genetic heritage but will allow that the current plight of people of color can be traced, at least in part, to pervasive historical discrimination.[354] Nonetheless, without its broader socio-political ramifications front and center, the current solution still resounds in adequate representation vis-à-vis diversity.[355] The switch enables a measure of calibrated color consciousness, but stops at the surface and thereby, permits structural advantages and disadvantages to remain intact.[356]

This Part endeavors to mobilize insights from critical race theorists who have hence revisited race-conscious traditions like Black nationalism to rearticulate a vision of race that rejects a biological anchor and instead situates its substantive contours as a socio-political construct that "signifies and symbolizes social conflicts and interests by referring to different types of human bodies."[357] Building on this contribution, subsequent e-CRT scholars have cautioned that statistical inquiries into the significance of race must reflect that it "is only ever a social construct—a dynamic of power (history, culture, economics, and representation)."[358] Thus, "theoretical framing of [the] analysis and findings, and the choice of empirical foci are inevitably shaped by political concerns."[359]

The current fixation on racial demographics is no accident, but the practical deficiencies of employing this metric to redress segregation either through opportunity moves or community development is laid bare by recent trends in gentrification.[360] This Part explores this phenomenon to demonstrate the necessity of a statistical inquiry that captures the available resources in a community as well as the identities of its constituents.[361] It

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[352] *Id.* at 1833, 1842–43.

[353] *Id.* at 1825–26.

[354] Haney López, *supra* note 92, at 809–11.

[355] Sarah Mayorga-Gallo, *The White-Centering Logic of Diversity Ideology*, 63 AM. BEHAV. SCIENTIST 1789, 1793 (2019).

[356] *Id.* at 1793–94.

[357] john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 104 (1997).

[358] David Gillborn, Paul Warmington & Sean Demack, *QuantCrit: Education, Policy, 'Big Data' and Principles for a Critical Race Theory of Statistics*, 21 RACE ETHNICITY & EDUC. 158, 170 (2018).

[359] Michelle Christian, Louise Seamster & Victor Ray, *Critical Race Theory and Empirical Sociology*, 65 AM. BEHAV. SCIENTIST 1019, 1021 (2021) (citation omitted).

[360] David D. Troutt, *Cities, Fair Housing, and Gentrification: A Proposal in Progressive Federalism*, 40 CARDOZO L. REV. 1177, 1179–80 (2019) (contending that combatting the adverse repercussions of gentrification necessitates recognition of a third fair housing interest in "housing stability" in addition to its mandate of antidiscrimination and segregation reduction).

[361] SARAH MAYORGA-GALLO, *Solving the Wrong Problem*, *in* BEHIND THE WHITE PICKET FENCE:

concludes by arguing that fair housing jurisprudence has already recognized the salience of neighborhood effects when awarding "lost housing opportunity" damages to victims of discrimination.[362] Transplanting the concept can and should be accomplished through the consideration of relevant equity metrics as captured by recent "opportunity mapping" projects.[363]

1. *Lessons from Empirical Methods and Critical Race Theory*

Since the inception of a race-based regime of slavery, it was necessary to delineate an enforceable line in the law between who would be considered Black and white.[364] Later, the legal toolkit became essential in the context of facilitating immigration or naturalization decisions as well as in efforts to erect anti-miscegenation statutes and other segregation mandates.[365] Some of these efforts relied on purportedly "scientific" and "objective" benchmarks such as ancestry and blood quantum, but turns to appearance, demeanor, and "common sense" were often cited at different times as well.[366] Today, no such concerted efforts have been undertaken.[367]

Yet, tellingly, the Eleventh Circuit was recently asked to explicitly weigh in on the definition of race in the matter of *EEOC v. Catastrophe Management Solutions*.[368] There, the plaintiff alleged that the defendant-employer discriminated against her on the basis of race when the firm requested that she cut her locs pursuant to its grooming policy.[369] The federal circuit affirmed the lower court's ruling[370] and held that Title VII's historical context evinced an understanding of race as biologically-grounded, rather than socially-constructed.[371] Thus, the plaintiff's locs were not an immutable racial characteristic that was entitled to protection.[372] The court declined to alter this prevailing definition, suggesting it was a better question for the legislative branch to address.[373]

Nonetheless, the biological contention is utterly unsustainable.[374] In contrast, critical theorists posit that racial categories are generated in a

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POWER AND PRIVILEGE IN A MULTIETHNIC NEIGHBORHOOD 148, 151 (2014) ("[O]ur analysis of these [multiethnic] spaces must be based on a more sophisticated and nuanced understanding than the presumption that statistical integration mandates equity across groups.").

[362] United States v. Hylton, 944 F. Supp. 2d 176, 197 (D. Conn. 2013).

[363] *See* OTHERING & BELONGING INST., U.C. BERKELY, EXPANDING THE CIRCLE OF HUMAN CONCERN: ADVANCING BELONGING SINCE 2012 26 (2019) (discussing policy reforms in California's Low Income Housing Tax Credit (LIHTC) program that were spurred by its opportunity maps).

[364] Peery, *supra* note 351, at 1832.

[365] *Id.* at 1837.

[366] *Id.* at 1837–38.

[367] *Id.* at 1841–42.

[368] 852 F.3d 1018, 1026 (11th Cir. 2016).

[369] *Id.* at 1023–24.

[370] *Id.* at 1021.

[371] *Id.* at 1026–27.

[372] *Id.* at 1030, 1035.

[373] *Id.* at 1035.

[374] Obasogie, *Race & Science*, *supra* note 65, at 52.

process known as "racial formation" wherein the dominant group typically distinguishes itself from others based on a set of actual or perceived characteristics or attributes that are then deemed inferior.[375] In turn, these racial designations enable "racial projects" that seek to reorganize and redistribute valuable resources for the benefit of the dominant group and to the detriment of the oppressed group.[376] In the United States then, "race" has consistently served as a tool for maintaining and establishing white privilege through the era of slavery down to the present, notwithstanding the advent of civil rights legislation.[377]

Most assuredly, the racialization of space via housing segregation is one the most salient exemplars of an ongoing racial project.[378] Professor Daria Roithmayr has argued that racial segregation in housing, as well as its corresponding implications for wealth disparities and unequal access to education, stems from whites creating racial cartels during slavery and Jim Crow to establish monopolies on key resources.[379] Similarly, Professor Martha Mahoney has described segregation as "the product of notions of [B]lack inferiority and white superiority, manifested geographically through the exclusion of Blacks from more privileged white neighborhoods and the concentration of Blacks into subordinated neighborhoods stigmatized by both race and poverty."[380]

In consulting pertinent fair housing materials, precise definitions of integration and segregation respectively are forthcoming in HUD's 2015 Affirmatively Furthering Fair Housing Regulation (2015 AFFH Regulation) that interprets the agency's statutory obligation, and by extension, its grantees, to actively eliminate discrimination and segregation.[381] Here again, the Trump administration had upended the 2015 AFFH Regulation, and in its stead, erected a rule titled Preserving Community and Neighborhood Choice, which mobilized principles of colorblindness and federalism to limit this duty to taking any rational action that would promote decent housing free from unlawful discrimination.[382] However, the Biden administration swiftly intervened to restore the definitions and corresponding certifications

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[375] Kirstie A. Dorr, *The "Post-National" Racial State, Domestication, and Multiscalar Organizing in the New Millennium*, *in* RACIAL RECONCILIATION AND THE HEALING OF A NATION, *supra* note 65, at 150, 154–55.

[376] *Id.* at 155, 166, 176.

[377] powell, *supra* note 357, at 106, 109.

[378] *Id.* at 109, 117.

[379] Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 50–52 (2010).

[380] Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995).

[381] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,354 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

[382] Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47902 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

that were established in the 2015 AFFH Regulation, albeit with leeway on the planning process for compliance thereto.[383]

The 2015 AFFH Regulation sets forth that segregation "means a condition within the . . . geographic area of analysis . . . in which there is a high concentration of persons of a particular race . . . in a particular geographic area when compared to broader geographic area." [384] In contrast, integration entails the absence of such a condition such that there is not "a high concentration of persons of a particular race . . . when compared to a broader geographic area."[385] By their own terms, the identification of segregation as well as the proposed vehicle of redress via integration are respectively defined solely as a function of racial demographics—the power dimensions concerning racial privileges and disadvantages as reflected in associated geopolitical spaces are absent.[386]

Revealingly, this interpretation is confirmed by a proffered definition for a distinct category under the 2015 AFFH Regulation known as a "racially or ethnically concentrated area of poverty," which refers to a "geographic area with significant concentrations of poverty and minority populations."[387] The move is a confirmation that race has generally been disconnected from its function as a system of resource distribution and that the overarching response in fair housing jurisprudence has been to address the "symbolic" as opposed to the "material" manifestations of racial discrimination.[388] In order to respond to both harms, particularly as the geopolitical landscape of racial inequities continues to evolve, the segregative-effect theory must adopt a lens that understands the perpetuation of racial concentrations of poverty and unequal access to opportunity to be the grounds for a violation of the FHA.[389]

While the effort to direct our attention to impoverished racially or ethnically concentrated communities is laudable,[390] the move to do so outside the context of an understanding of segregation itself further

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[383] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,788–89 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

[384] 24 C.F.R. § 5.152 (2020).

[385] *Id.*

[386] powell, *supra* note 357, at116–18.

[387] 24 C.F.R. § 5.152 (2020).

[388] Crenshaw, *supra* note 257, at 1377–78.

[389] *Id.* at 1378 ("Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people.").

[390] HUD's 2015 AFFH Regulation, despite passionate internal disputes, attempted to remain neutral in the mobility versus place-based debate, but many fair housing staff and stakeholders were initially uncomfortable with a formulation that incorporated a lens of concentrated poverty because it was not part of the traditional fair housing stance. Raphael W. Bostic et al., *Fair Housing from the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, *in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOOD 74, 88 (Justin P. Steil et al. eds., 2021).

compounds a misdiagnosis of the problem and points to erroneous or incomplete solutions.[391] The role of race and its centrality in the racial project of segregation, as outlined in the overview of its historical roots, is best captured by Professor Glenn Bracey's aggregation of critical race theory tenets to describe a unified vision of the American nation state.[392] In this account, the state cannot be ascribed an identity as an independent actor with its own set of interests; instead, it is properly conceived of as a "*tool* created, maintained, and used by whites to advance their collective racial interests."[393] Thus, the endemic line-blurring between the role of private actors and public policy in the creation and maintenance of segregation is a testament to the racialized instrumentalist control of the state that whites have wielded.[394]

Critical race scholarship has proven to provide a salient platform for exposing the dynamics permitting racial oppression to persist in the post-civil rights era.[395] Even still, many critics have found fault in the methodologies that have been employed to substantiate its associated claims.[396] In its early years, critical race theory (CRT) scholars typically buttressed their arguments through narratives or the interrogation of doctrine to reveal internal inconsistencies or by highlighting the relevance of socio-political factors to inform the terrain governing the ebbs and flows of racial progress.[397] Outside of a few isolated projects, many participants declined to engage with social science because prior civil rights advocates had not garnered much success from the tactic.[398] Moreover, adherents of CRT were aware that social scientific claims, often focusing on individuals and couched in terms of objectivity and neutrality, could serve as shrouds that obscured how policies in fact furthered racial projects.[399]

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[391] *Id.* at 1378–79 ("It is not separation *per se* that made segregation subordinating, but the fact that it was enforced and supported by state power, and accompanied by the explicit belief in African-American inferiority. . . . White race consciousness, in a new form but still virulent, plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks.").

[392] Glen E. Bracey II, *Toward A Critical Race Theory of State*, 41 CRITICAL SOCIO. 553 (2015).

[393] *Id.* at 558; *see also* Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1857) (holding that persons of African ancestry were not citizens of the United States because "by common consent, [they] had been excluded from civilized Governments and the family of nations, and doomed to slavery").

[394] Bracey, *supra* note 392, at 558.

[395] Osagie K. Obasogie, *Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 185 (2013).

[396] *Id.* at 184–85.

[397] *Id.*

[398] *Id.*; *see also* Melvin J. Kelley IV, *Retuning Bell: Searching for Freedom's Ring as Whiteness Resurges in Value*, 34 HARV. J. RACIAL & ETHNIC JUST. 131, 156–59 (2018) (situating CRT as a second generation of critical race scholarship that was partly formed in response to the disillusionment of *Brown*, where social science was key to the Court's finding that de jure segregation in public schools was unconstitutional).

[399] Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 161 (2014).

However, despite these noted tensions, a new generation known as e-CRT has taken root and seeks to establish an evolution in race scholarship through "an empirical intervention into CRT *and* CRT intervention into empirical studies."[400] A key principle that has been shaping this work is that the study of race is inherently a political endeavor because the underlying category itself is a reification of a social construct that operates as a conduit for filtering groups in a hierarchy that measures who is fit to access resources and who is not.[401] In accord, empirical studies must employ relational racial categorization as each group can only be understood as a function of their respective positionality across an uneven power terrain.[402]

Given CRT's initial use of narratives, there has generally been less concern with engaging its theoretical contributions through the insights of qualitative methodologies.[403] Nonetheless, there has been an increasing call for combining CRT and quantitative methods and although the endeavors are still new, a few cautionary tales have already been forthcoming to better guide these research efforts.[404] Notably, Professors Gillborn, Warmington and Demack have suggested the following five guideposts: (1) maintaining the centrality of racism in planning and implementing the research project; (2) resisting temptation to engage with numbers as inherently neutral because racial ideology can impact the persons involved; (3) understanding that race only exists to facilitate racial projects; (4) data requires context that should be provided by consulting the lived experiences of directly impacted populations; and (5) ensuring, in accord with the principles of CRT, that the associated studies can serve to resist racism.[405]

2. *Segregation by Another Name? Exposing the Oppression in Gentrification*

There is an increasing consensus that gentrification does, or at least is very likely to, raise concerns with potential fair housing implications. After examining various articulations and identifying common denominators, Professor Erika Wilson has taken "gentrification to mean an influx of capital into a community that once suffered from a disinvestment of capital, which results in the movement of people, particularly higher-income people, into a community."[406] From a demographic perspective, this integrative transformation has prompted "cheers" from some commentators.[407] More recently though, even those otherwise onboard with the integrationist

[400] Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1595, 1638 (2011).
[401] Christian, Seamster & Ray, *supra* note 359, at 1021.
[402] *Id.* at 1022.
[403] Gillborn, Warmington & Demack, *supra* note 358, at 175.
[404] *Id.* at 159–60.
[405] *Id.* at 175.
[406] Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 685 (2015).
[407] Johnson, *supra* note 67, at 843.

program, have noted that gentrification can and has displaced low-income households of color as rents and property values increase.[408] Since the precepts of fair housing have always been concerned with the lack of housing choices available to historically marginalized groups then it should arguably provide a remedy where "gentrification creates a distinct risk of residential exclusion and displacement that has a disparate impact on [protected] populations."[409]

Integrationists often propose that heightened contact among different racial groups will decrease prejudice and promote a pluralist democracy, but they are also keenly aware that affluent, predominantly-white neighborhoods are home to valuable resources in terms of educational institutions and employment prospects among other amenities.[410] These insights sparked interest in creating pathways for "opportunity moves," which would enable poor people of color to depart distressed municipalities in favor of thriving suburban communities.[411] Now that affluent whites are coming back to urban cities, integration theorists have suggested that gentrification might bring a number of benefits including: quality housing, poverty de-concentration, reduced crime, better schools due to an inflow of public and private funding as well as an increased capacity to attract first-rate instructors, sustainable businesses and public spaces, and access to social networks that might yield connections to higher-paying jobs.[412]

Early empirical studies suggested that these purported benefits could accrue without the risk of displacement.[413] However, more recent efforts have been able to take advantage of new data sets and it is now fair to say that "there are no serious studies demonstrating that displacement does not occur at all."[414] This is particularly true if one adopts a broad view of displacement that does not just entail "direct replacement of poorer by wealthy groups" either through demolition projects or a decrease in affordable units, but also "involves forms of social, economic and cultural transition which alienate established populations."[415] Indeed, given this framing, it is not surprising that groups that manage to physically remain in place may still face exclusion from improving or newly established amenities.[416] For instance, Wilson has found that gentrifying cities are enacting or expanding urban

[408] Troutt, *supra* note 360, at 1204.

[409] *Id.* at 1180.

[410] Johnson, *supra* note 67, at 843.

[411] Peter Bergman et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* 3–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26164, 2020).

[412] Johnson, *supra* note 67, at 841–42.

[413] LANCE FREEMAN, THERE GOES THE 'HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP 43 (2006) (using data centered on Harlem that had stable subsidized housing from 1970 to 2000 to suggest minimal displacement but accruing benefits).

[414] Elliott-Cooper, Hubbard & Lees, *supra* note 69, at 496 (quoting Kate Shaw, *Gentrification: What It Is, Why It Is, and What Can Be Done About It*, 2 GEOGRAPHY COMPASS 1697 (2008)).

[415] *Id.* at 504.

[416] *Id.*

school reforms so as to attract white, middle-class students through the replacement of public schools with charter schools and the use of neighborhood boundaries for school assignments as opposed to open enrollments.[417] Even within diverse educational institutions, concerns abound about the adverse impact on students of color stemming from tracking and disproportionate disciplinary measures.[418]

The list of concerns does not end there. Increased democratic interaction across groups may not occur as newcomers flock to expensive or socio-culturally distinct outlets for food and entertainment.[419] In fact, such encounters have actually prompted recent transplants to criminalize the activities of established residents, further fueling the occupation of communities of color by law enforcement authorities with sometimes fatal results.[420] "Longstanding community practices such as kids playing basketball on the corner, neighbors sitting on their front stoops, or friends hanging out in the street are seen as suspicious and worthy of law-enforcement intervention by the newcomers."[421] A number of killings have ensued for conduct that was reported as concerning to outsiders, but understood as entirely nonthreatening by rooted residents.[422] The violence and "un-homing" of gentrification has increasingly led to concerns that it is more akin to imperialism and colonialism rather than an integrative precursor to be celebrated.[423]

Given the foregoing dynamics, social scientists have begun to question whether the focus on integration policies like mobility programs is a distraction that seeks to solve the wrong problem.[424] While examining regions that have a disproportionate concentration of racial minorities provides a window into the contemporary reproduction of inequality, it does not follow *a fortiori* that balanced demographics necessitates equitable conditions on the ground.[425] There is ample evidence that the proximity of different groups in multiracial spaces, whether in urban cities or suburban neighborhoods, is not in and of itself sufficient to level the playing field.[426] As discussed above, notwithstanding the presence of other racial and ethnic

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[417] Wilson, *supra* note 406, at 682.

[418] Johnson, *supra* note 67, at 845.

[419] *Id.*

[420] Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 360 (2019).

[421] *Id.* at 361.

[422] Adam Gabbatt, *Saheed Vassell Killing Puts Policing and Gentrification in the Spotlight*, GUARDIAN, (Apr. 7, 2018, 7:00 AM), https://www.theguardian.com/us-news/2018/apr/07/saheed-vassell-policing-gentrification-brooklyn-nypd; Rebecca Solnit, *Death by Gentrification: The Killing That Shamed San Francisco*, GUARDIAN, (Mar. 21, 2016, 1:38 PM), https://www.theguardian.com/us-news/2016/mar/21/death-by-gentrification-the-killing-that-shamed-san-francisco.

[423] Elliott-Cooper, Hubbard & Lees, *supra* note 69, at 503.

[424] MAYORGA-GALLO, *supra* note 361, at 148.

[425] *Id.* at 153.

[426] *Id.* at 148, 153.

households, communities have and continue to be shaped in ways that suit the needs and desires of affluent, white residents at the expense of others.[427] Thus, in accord with the insights of e-CRT, there has been a call for debunking the "presumption that statistical integration mandates equity across groups."[428] Instead, "[s]cholars must take into account measures of power and the distribution of resources across different groups when discussing integration."[429]

3. *Transplanting "Lost Housing Opportunities" to Segregative Effect*

In other contexts, fair housing jurisprudence has already been receptive to the use of expert testimony in centering and substantiating the harms of segregation through awards for lost housing opportunities when protected persons are unlawfully denied an opportunity to purchase or rent a home.[430] The monetary compensation that is due on this front is a reflection of the comparative loss of access to amenities or public goods and resources that may have otherwise been available to the plaintiff if they were not unlawfully denied access to a housing opportunity in their preferred neighborhood.[431] While the concept has been gaining traction since the 1990s,[432] its most notable articulation was expressed in recent years in the matter of *United States v. Hylton*.[433]

There, the court concluded that an African American woman with two children was denied housing on the basis of her race.[434] The housing provider had expressly rejected her as a potential subtenant when he inquired about her race and discovered she was Black.[435] Unequivocally, he made it clear to the current household, which included an interracial couple and their children, that "he did not want too many [B]lack people at the property" and he summarily concluded that the prospective subtenant would not be able to afford the rent despite indications to the contrary.[436] The plaintiff presented the expert testimony of Professor Lance Freeman to substantiate the claim for

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[427] *Id.* at 151.
[428] *Id.*
[429] *Id.* at 154.
[430] Ligatti, *supra* note 73, at 105.
[431] *Id.* at 103.
[432] *See*, *e.g.*, Sams v. U.S. Dep't of Hous. & Urb. Dev., No. 94-1695, 1996 WL 13810, at *4 (4th Cir. Jan. 16, 1996) (upholding damages for the loss of a housing opportunity to a family that had been subjected to unlawful familial status discrimination, as the record indicated that the prospective rental constituted an ideal environment because the space was conducive to homeschooling the children and the house was also situated in a neighborhood that offered more safety and stability).
[433] United States v. Hylton, 944 F. Supp. 2d 176, 186 (D. Conn. 2013).
[434] *Id.* at 187. *But cf.* Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301, 341–44 (2019) (contending that plaintiff Ms. DeMechia Wilson was a victim of intersectional discrimination stemming from concurrent and collective membership in three protected classes including race, gender, and familial status).
[435] *Hylton*, 944 F. Supp. 2d at 184.
[436] *Id.*

loss of housing opportunity.[437] Per this testimony, the "neighborhood effects thesis" was offered to contextualize the claim positing that conditions in a person's community could impact their employment prospects, educational attainment, and health.[438]

Here, the evidence indicated that the plaintiff was forced to reside in a neighborhood with a substantially higher rate of crime and a far greater concentration of poverty.[439] Further, even though her children went to a higher quality school outside of the neighborhood district, it was found that their interaction with comparatively less advantaged peers in the community was still adversely impacting their personal growth.[440] The court ultimately concluded that $20,000 in damages was appropriate.[441] While this figure strikes as relatively low, particularly given the range of other awards in other fair housing matters, it nonetheless hints at the recognition of the true impact of segregation.[442] Still, commentators have appropriately suggested that even as currently configured, loss of housing opportunity damages would benefit from a deeper engagement with theory and data to more accurately monetize the enduring repercussions of confinement to a disadvantaged community.[443]

The neighborhood effects framework employed in *Hylton* is particularly attuned to conditions within neighborhoods, which provided the context for Freeman's comparative analysis.[444] Scholars have further mobilized these insights to discern a broader model known as the "geography of opportunity," which assesses the placement of resources within a designated region.[445] Just as in the context of loss of housing opportunity, "opportunities" are generally defined as the set of circumstances or conditions that better situate individuals to achieve or excel.[446] Standard measures of opportunity include information on schools, crime, poverty, healthcare, transportation, employment, and grocery stores.[447] This mode of analysis enables indexing or scoring to identify regions on a spectrum from "low opportunity" to "high opportunity."[448]

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[437] *Id.* at 197.

[438] *Id.*

[439] *Id.*

[440] *Id.* The finding is not surprising given the bleak prospects for achievement that warp the trajectory of youth in racially and economically segregative environment. *See supra* Introduction.

[441] *Hylton*, 944 F. Supp. 2d at 197.

[442] Ligatti, *supra* note 73, at 107.

[443] *See, e.g.*, *id.* at 80 (arguing for robust statistical and economic analysis to assist in formulating guideposts for remedying opportunity gaps as supplemented by acknowledgment of associated emotional and mental distress).

[444] *Id.* at 87, 106.

[445] *Id.* at 88.

[446] *Id.*

[447] *Id.*

[448] *See, e.g.*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OHIO STATE UNIV., PEOPLE, PLACE AND OPPORTUNITY: MAPPING COMMUNITIES OF OPPORTUNITY IN CONNECTICUT 7–8 (Nov. 2009), https://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1043&context=cssp_papers (summarizing the methodology for calculating the opportunity level of every municipality in the state of Connecticut and providing color-coded map illustrating regional disparities).

Notably, Professor john powell has long been at the forefront of these endeavors. Beginning with his role as the Executive Director of the Kirwan Institute for the Study of Race and Ethnicity at the Ohio State University, powell pioneered a technique known as "opportunity mapping."[449] This methodology employs Geographic Information Systems (GIS) to visually portray aggregated data sets that demonstrate the resources, or lack thereof, in a metropolitan region or state.[450] The ensuing map enables us to pinpoint how variances in neighborhood conditions could either bolster or hinder a resident's path to achievement and success.[451] powell continues to engage in this work, in addition to leading many other important initiatives, as the Director of the Othering & Belonging Institute at the University of California, Berkeley.[452] Since the inception of opportunity mapping, the tool has been used to inform housing policy design and advocacy; community organizing, planning, and development; applied research; service delivery; coalition building; and targeted investments.[453] Most notably, for present purposes, the tool has been wielded by powell to provide expert testimony in the context of litigation.[454]

The matter of *HUD v. Thompson* entailed a class action lawsuit on behalf of more than 12,500 African American households who resided in Baltimore's public housing family units.[455] The complaint was initially filed in 1995 by the American Civil Liberties Union of Maryland and LDF against HUD as well as the Housing Authority of Baltimore City in addition to the municipality itself.[456] There, a decision to demolish a high-rise public housing complex and provide replacement housing in segregated communities was challenged under various provisions of the federal Fair Housing Act, including the segregative-effect theory.[457] It took over seventeen years, but the case finally settled in 2012 and powell's opportunity maps of Baltimore proved essential in shaping the remedial resolution.[458] Ultimately, powell took an integrationist disposition and the settlement reflected these principles by

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[449] Brian Stromberg, *Using Opportunity Mapping to Improve Affordable Housing Policy*, NAT'L HOUS. CONF. (Jun. 17, 2016), https://nhc.org/using-opportunity-mapping-to-improve-affordable-housing-policy/; KIRWAN INST., *supra* note 448.

[450] KIRWAN INST., *supra* note 448, at 7–8.

[451] *Id.* at 1.

[452] john a. powell, BERKELEY L.: FACULTY PROFILES, https://www.law.berkeley.edu/our-faculty/faculty-profiles/john-powell/ (last visited May 21, 2022).

[453] KIRWAN INST., *supra* note 448, at 2–3.

[454] *See* Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398 (D. Md. 2005); *Case: Thompson v. HUD*, LEGAL DEF. FUND, https://www.naacpldf.org/case-issue/thompson-v-hud/ (last visited May 21, 2022) (crediting, among others, john powell with providing expert testimony in support of the LDF's proposed remedy for settling a class action housing discrimination case).

[455] *Case: Thompson v. HUD*, *supra* note 454.

[456] *Thompson*, 348 F. Supp. at 404, 411.

[457] *Id.* at 407–08.

[458] Settlement Agreement, *Thompson*, 348 F. Supp. 2d 398 (No. MJG 95-309).

elevating a mobility program that would enable people of color to move to high-opportunity areas in predominantly white communities.[459]

Nonetheless, powell's proposed guidelines in fashioning an appropriate remedy stressed that "the success of these processes and policies must be explicitly evaluated against the goals of desegregation *and* opportunity access."[460] Moreover, he believed participation in any integrative housing program "should be optional, to be effective," which meant that participants must have "structured choices" that were "guided by the duty to desegregate public housing *and* provide access to opportunity."[461] More recently, powell's scholarship has further elevated the importance of centering access to opportunity as a means to advance racial and economic justice.[462] Specifically, he observed that contemporary patterns of demographic change and gentrification threaten to undermine both the rationality and sustainability of traditional mobility placed programs, which were developed at a time when racial segregation was primarily defined by the urban and suburban divide.[463] Given this shift, powell has argued that opportunity-based mapping can offer a context sensitive approach for tailored strategies to redress segregation in the twenty-first century.[464]

A primary purpose of the FHA was to broaden the range of choices that households of color could exercise by removing race-based impediments.[465] Professors Seicshnaydre and McFarlane have critically reexamined this notion of "housing choice" and concluded that it does not exist for consumers of color because the market continues to cater to the segregation preferences exhibited by whites.[466] Despite an apparent preference for integration over enrichment, Seicshnaydre has been able to provide a framework that succinctly captures how each camp would benefit from a more robust grounding in opportunity metrics in furthering fair housing choice.[467] Specifically, she states:

> Demolition programs aimed at poverty deconcentration without regional inclusionary housing initiatives fall short of delivering

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[459] News Release, U.S. Dep't of Hous. & Urb. Dev., Court Approves Final Settlement Thompson v. HUD: Settlement Builds on Successful Baltimore Housing Mobility Program (Nov. 20, 2012), https://archives.hud.gov/news/2012/pr12-174.cfm.

[460] Remedial Phase Expert Report of john a. powell at 27, *Thompson*, 348 F. Supp. 2d 398 (No. MJG 95-309).

[461] *Id.* (emphasis added).

[462] powell & Menedian, *supra* note 26, at 207.

[463] *Id.* at 222.

[464] *Id.*

[465] 114 CONG. REC. 2278 (1968) (statement of Sen. Walter Mondale) ("[T]here is a substantial market of financially able [African Americans] prevented from buying housing of their choice because of deeply entrenched patterns of discrimination in the sale of housing in our country.").

[466] *See* Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 973 (2012); Audrey McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1188–89 (2019).

[467] Seicshnaydre, *supra* note 466, at 937.

> on the promise of housing choice. Advocacy efforts aimed at preserving public housing in its segregated form without acknowledging public housing's history as a de jure segregated institution also fall short of demanding full choice and inclusion for residents . . . . The right to housing choice often is framed as a right to a particular dwelling unit, but for choice to be meaningful, *consumers must be able to choose opportunity*.[468]

This observation mirrors the Court's reluctance in *Inclusive Communities* to make a conclusion at the onset as to whether a decision to build low-income housing in a blighted inner-city neighborhood over a suburb, or vice versa, would be conducive to advantaging or disadvantaging racial minorities.[469]

As it stands, both integration and enrichment bear the potential to generate access to resources for households of color.[470] Siting housing in struggling neighborhoods requires equalization of other facilities and services with safeguards to minimize the risk of displacement, while mobility programs require assurances that new opportunities are fully and readily accessible on the ground.[471] Centering opportunity maps in segregative-effect litigation provides a formula for both substantiating and defending a range of relevant private or public policies.[472] Moreover, in recent years, HUD created a mapping tool to aid agencies and jurisdictions in their fair housing planning endeavors.[473] While the initial audience consisted of entities and grantees who were legally obligated to affirmatively further fair housing, the underlying data and the tool itself are publicly available at no cost.[474] With a few clicks, maps can now be produced that provide information on demographics and a range of opportunity metrics such as poverty rates and employment figures.[475] Further still, HUD has issued assurances that the information will be kept up to date and so far the promise appears to have panned out.[476] In accord, future plaintiffs, defendants, and judges will have the practical means of implementing this proposal.

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[468] *Id.* at 998, 1003 (emphasis added).

[469] *See also* Seicshnaydre, *supra* note 50, at 700 (recognizing that the need for revitalization of neighborhoods harmed by segregation is beyond doubt, but cautioning that the concentration of low-income housing in communities of color must be accompanied by more otherwise it will just continue a policy of containment albeit by another name).

[470] *Id.* at 667–68.

[471] *Id.* at 690–92.

[472] Remedial Phase Expert Report of john a. powell, *supra* note 460, at 28–29, 33–34.

[473] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,789 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

[474] *Id.*

[475] *Id.*

[476] *Id.* at n.15.

CONCLUSION

To date, it remains unclear as to what exactly the segregative-effect theory of liability will add to the vindication of fair housing rights. Thus far, it has effectively served as a proverbial "plus one" in accompanying other allegations of fair housing violations. However, as the landscape continues to shift in the aftermath of *Inclusive Communities*, the time will be ripe for putting the segregative-effect theory to the test. Efforts to resist the imposition of heightened burdens as envisioned by *Lincoln Property* and *Heartland* should continue. However, the best possible outcome—including the full restoration of the 2013 Discriminatory Effects Regulation accompanied by an interpretation in accord with Judge Davis' dissent in *Lincoln Property*—is unlikely to yield meaningful systemic change. Instead, this Article suggests that there is a better approach, which not only responds to the Court's concerns, but more soundly identifies and targets the harms of segregation.

Title VIII, perhaps even more so than other civil rights legislation of the 1960s, was captured by a cramped vision of rectifying racial injustices through the prism of colorblind ideology. It operated under the presumption that race was largely a matter of phenotype as reflected by one's biological heritage, and it viewed racism as an act of individual bigotry predicated on the irrational consideration of race.[477] From this perspective, the ban on race-based discrimination would transition society to a regime of objectivity and neutrality, which would translate into integrated and balanced representation. The viability of a segregative-effect claim thus became entirely centered on addressing disproportionate racial representation in identified geographic jurisdictions as discerned via local census data. Early race-consciousness perspectives that pointed to the historical, pyscho-cultural, economic, and socio-political dimensions of race were delegitimized as a national coalition embraced the precepts of colorblindness and universalism.

As time has shown, these conceptions garnered such mass appeal because they provided a new ideological framework for continuing the racial project of domination that is at the center of segregation. The structure for perpetuating white dominance had already been established and recourse to racial bigotry or state-sanctioned segregation policies was no longer necessary. Critical race theorists have rightly redirected our attention to the fact that race only exists as a social category for determining which groups of persons are fit or unfit for accessing resources that increase one's life chances. In accord, the harms imparted by the racialized spaces that have been created and maintained by historical and contemporary segregation cannot be addressed by a framework that considers race in a vacuum disconnected from its inherent power dimensions.

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[477] *See supra* Part II.B.

Considering this dilemma from the lens of e-CRT points to recalibrating the segregative-effect theory such that the pertinent evidentiary basis for substantiating a claim requires the co-extensive consultation of racial demographics alongside a community's geography of opportunity. The proposed shift helps establish clearer boundaries to avoid the specter of constitutional questions while navigating practical problems in an era of gentrification. Moreover, it is not far-fetched given that fair housing jurisprudence has already recognized "loss of housing opportunity" damages when victims of discrimination are unlawfully precluded from accessing housing in communities that are comparatively advantaged given their attempted point of departure. Scholars have already demonstrated the practical viability of applying this formula on a micro, meso, or macro level through the development of opportunity maps that aggregate racial demographics alongside pertinent equity metrics. Now, HUD has accumulated the data and developed a tool that makes such maps readily available.[478] The debate concerning integration or community enrichment will continue, but at least housing providers and public authorities will have to justify or defend their actions in accordance with a plan for directly promoting the life chances of historically marginalized populations.

[478] *See supra* text accompanying note 473.