

NOTES

THE FORTY-YEAR “FIRST STEP”: THE FAIR HOUSING ACT AS AN INCOMPLETE TOOL FOR SUBURBAN INTEGRATION

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The Fair Housing Act serves as the primary federal statute prohibiting housing discrimination on the basis of race. The legislators who passed the Act in 1968 were motivated in part by desires to quell urban unrest, and to provide middle-class African Americans with the freedom to live within majority-white suburban neighborhoods. The Act, through its ban on racial discrimination, is supposed to help create integrated metropolitan communities. Forty years after the Fair Housing Act’s enactment, both housing discrimination and segregation within the suburbs remain prevalent. This Note seeks to provide understanding as to why there is a disconnect between the Fair Housing Act’s goals and its subsequent results. Through an examination of the Act’s legislative history and judicial interpretation, this Note argues that the federal statute serves as only a prelude to additional policies that should help provide equality to underdeveloped communities. The Fair Housing Act protects the option of a homebuyer to choose not to integrate. This consumer choice can subvert the Act’s goal of integration and can also cloud the ability of courts to identify discriminatory racial steering by agents of the buyer. In light of these challenges, this Note proposes a supplementary policy to the Fair Housing Act which focuses on enrichment of the urban ghetto. Through regional collaboration, metropolitan areas can help relieve disparate fiscal burdens that plague the ghetto as well as neighboring black middle-class neighborhoods. As these communities are empowered, the stereotypes and fears that prevent suburban integration should dissipate.

INTRODUCTION

The Gallery Place Metro station in Washington, D.C., is a major hub for the city’s subway system.¹ On weekday evenings, thousands of commuters flow through the station and onto the multiple subway lines that intersect at this point, on their way to suburban destinations in Maryland and Virginia. One subway platform at Gallery Place is shared by both the Green Line, which goes to Prince George’s County, Maryland, and the Yellow Line, which goes to the City of Alexandria, Virginia.² A typical commuter will always know which train will be next to arrive on that platform by the clear racial makeup of those who are waiting—black profes-

1. See Wash. Metro. Area Transit Auth., Metrorail System Map, at <http://www.wmata.com/metr rail/systemmap.cfm> (last visited Oct. 2, 2007) (on file with the *Columbia Law Review*).

2. See *id.*

sionals will be the overwhelming majority if the Green Line is about to arrive, and white professionals will dominate the platform if the Yellow Line is next. Coworkers and colleagues may have spent the day together working in an integrated environment toward a common occupational goal. However, when that Green or Yellow Line train comes, it is time for the races to separate and return to much less integrated suburban environments.

Metropolitan intersections such as the Gallery Place Metro station make the stark realities of racial separation among communities embarrassingly evident. For nearly forty years, the Fair Housing Act³ has been the federal law designated to address segregated living patterns.⁴ Its provisions broadly proscribe many of the discriminatory practices that contribute to the contemporary perpetuation of segregated communities.⁵ Despite this legal structure, the suburbs of many metropolitan areas currently contain spatially distinct middle-class enclaves, some majority black and some majority white.⁶ This geographic trend brings into question the overall effectiveness of the Act in either preventing discriminatory practices⁷ or breaking down patterns of segregated living.

This Note explores the ability of the Fair Housing Act to foster integration within the contemporary suburban middle-class marketplace.⁸ It argues that the Act was never intended to be the primary catalyst for neighborhood integration, and that supplementary policies are required

3. 42 U.S.C. §§ 3601–3619 (2000).

4. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (stating Fair Housing Act's goal of creating "truly integrated and balanced living patterns" (quoting 114 Cong. Rec. 2706, 3422 (1968))); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) ("The [Fair Housing] Act is concerned with ending racially segregated housing.").

5. See 42 U.S.C. § 3604 (declaring discriminatory practices associated with housing transactions unlawful, such as refusing "to sell or rent after the making of a bona fide offer, or [refusing] to negotiate . . . or otherwise mak[ing] unavailable or deny[ing] a dwelling to any person because of race").

6. See Xavier de Souza Briggs, *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity*, in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 17, 24–26 (Xavier de Souza Briggs ed., 2005) (discussing statistical ethnic composition of suburban metropolitan neighborhoods); see also Brad Heath, *Oralandar Brand-Williams & Shawn D. Lewis, Wealth Doesn't Stop Race Divide; Choice and Mistrust Keep Blacks, Whites Apart*, *Detroit News*, Nov. 3, 2002, at 1A ("Nationwide, it's whites and blacks with the most money who tend to be the most segregated."); *infra* note 100.

7. One such practice is the steering of prospective homeowners into racially distinct communities by real estate agents. See *infra* Part III.

8. "Middle-class" is an admittedly amorphous term. It is utilized in this Note to distinguish a segment of the African American population that would be more likely than less affluent counterparts to enter the private housing market. It is not defined as a statistically distinct category. See Bart Landry, *The New Black Middle-Class* 5–11 (1987) (determining definition of black middle class among multiple sociological theories); Mary Pattillo, *Black Middle-Class Neighborhoods*, 31 *Ann. Rev. Soc.* 305, 307 (2005) [hereinafter *Pattillo, Black Neighborhoods*] (describing various scholarly definitions of "middle-class").

to promote equality—the true driver for integration. Part I examines the volatile social conditions under which the Fair Housing Act was drafted, its limited role of protecting private consumer choice, and the subsequent judicial expansion of its purpose. Then, Part II shows how the private consumer choice protected by the Fair Housing Act functions to limit integration. It demonstrates how freedom of choice facilitates the resegregation of integrating neighborhoods, and also contributes to the growth of African American suburban enclaves⁹—communities with benefits and challenges. Part III discusses another impediment to suburban integration: the discriminatory practice of racial steering. It reviews how current jurisprudence seeks to eliminate this practice by which real estate agents help to maintain segregated neighborhoods by shaping consumer choice. This Part also uses racial steering as an example of how the Act's protection of private choice can undermine its own integrative goal. Finally, Part IV uses the original motivations behind the passage of the Act to suggest strategies that complement existing antidiscriminatory legislation while progressing further toward integration. It argues that although private choice must be safeguarded, integration can be expedited by expanding regional financial support for communities in need of empowerment.

I. THE FAIR HOUSING ACT AS A SOCIAL REENGINEERING TOOL

The Fair Housing Act was the last major piece of civil rights legislation of the 1960s.¹⁰ Responding to severe societal pressures, Congress

9. This Note focuses on integration from the perspective of African Americans, whose struggles provided the initial impetus for fair housing legislation. See Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 *Colum. L. Rev.* 1965, 1969 n.14 (2000) (“[T]here is a wide agreement among scholars that the problem of housing segregation is especially acute in the case of African-Americans.”). The integration of various other racial and ethnic groups, the Hispanic population in particular, is a growing matter that is beyond the scope of this work. However, some assertions within this Note may generally apply to issues of housing segregation involving a “dominant majority and subordinate minority racial grouping.” *Id.* at 1970 n.14.

For a discussion of metropolitan housing discrimination among Hispanic populations, see generally Margery Austin Turner et al., *U.S. Dep’t of Hous. & Urban Dev., Discrimination in Metropolitan Housing Markets: National Results from Phase I of the Housing Discrimination Study 2000* (2002) [hereinafter *HDS2000 Phase I*]; for results concerning Asian and Pacific Islander populations, see generally Margery Austin Turner et al., *U.S. Dep’t of Hous. & Urban Dev., Discrimination in Metropolitan Housing Markets: National Results from Phase II—Asians and Pacific Islanders, HDS 2000* (2002); and for results concerning Native American populations, see generally Margery Austin Turner et al., *U.S. Dep’t of Hous. & Urban Dev., Discrimination in Metropolitan Housing Markets: National Results from Phase III—Native Americans, HDS 2000* (2002).

10. See Sheryll D. Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* 3 (2004) [hereinafter *Cashin, Failures*] (“Housing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.”); Robert G. Schwemm, *Housing Discrimination Law and Litigation* § 2:2, at 2-6 (2006) (“Housing has proved to be ‘the last major frontier in civil rights’ and the area most resistant to change.” (quoting Charles M. Lamb, *Equal*

intended the Act to effectively outlaw all racially discriminatory actions within the housing industry.¹¹ Part I.A begins by describing the circumstances driving the Act's creation. Part I.B then defines the purpose and multiple goals of the Act as intended by its drafters. Finally, Part I.C continues by reviewing the courts' subsequent interpretation of the Act's goals in light of legislative intent and its application to unforeseen conflicts.

A. *Rage of the Ghetto and the Passage of the Fair Housing Act*

The Fair Housing Act was created under turbulent circumstances during a very unstable period of American history. Much of this instability centered on the existence and effects of urban ghettos—communities of geographic and social isolation which forcefully contained majority black populations through housing discrimination and threats of violence.¹² While the principles of the American dream promoted wealth, prosperity, and happiness for those who worked hard,¹³ African Americans faced serious barriers to achieving the same benefits for their labor. Outside the ghetto, suburban areas were growing and thriving with new housing developments and job opportunities.¹⁴ These new mid-

Housing Opportunity, *in* Implementation of Civil Rights Policy 148, 148 (Charles S. Bullock & Charles M. Lamb eds., 1984)).

11. See 114 Cong. Rec. 3421 (1968) (statement of Sen. Mondale) (noting importance of bill “requiring all who engage in housing transactions not to discriminate”).

12. For a description of the historical development of the ghetto, see Douglas S. Massey & Nancy A. Denton, *American Apartheid* 17–59 (1993); David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 J. Pol. Econ. 455, 462–70 (1999). Segregation through urban ghettos has not always described the makeup of American cities. At the turn of the twentieth century, residential integration among races was a much more common occurrence in urban environments. See Massey & Denton, *supra*, at 17 (describing period of less segregation before 1900); Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 Nw. U. L. Rev. 874, 876–77 (1988) (noting that most African Americans did not live in predominately black districts at turn of century).

One major driver for the growth of housing segregation and the creation of the ghetto was the federal government. During the period of rapid suburban development following World War II, the Federal Housing Administration provided mortgage financing in a racially discriminatory manner. See Massey & Denton, *supra*, at 52–55 (noting official rating system which favored neighborhoods occupied by those of “same social and racial classes”); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L. Rev. 1285, 1308–11 (1995) (reviewing history of federal government's discriminatory lending practices); Adam Weiss, Note, *Grutter*, Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Suits, 107 Colum. L. Rev. 1195, 1200–02 (2007) (same). Through the practice known as redlining, the government avoided investments in neighborhoods thought to be risky due to the presence of African Americans. Schill & Wachter, *supra*, at 1310–11.

13. See Landry, *supra* note 8, at 178 (“Part of the American dream is to own one's own home, in a safe neighborhood and compatible with one's perceived status.”).

14. See 114 Cong. Rec. 2276 (statement of Sen. Mondale) (“[E]xpanding job opportunities are going to be in or near suburbia rather than in the core cities. Since 80

dle-class options were closed to African Americans, regardless of their ability to afford housing outside the ghetto.¹⁵ Even black soldiers who fought "for American rights" were denied access to the suburbs upon their return from the Vietnam War.¹⁶ These discriminatory practices within the housing market caused legislators to describe urban conditions as a confinement to "ghetto jails."¹⁷

The exclusion of the ghetto from mainstream American living caused psychological damage across the African American community.¹⁸ Just as black children were stigmatized as inferior through educational segregation,¹⁹ adults in the ghetto faced the impotence of being unable to provide their family with desired living conditions proportionate to a financially comparable white family. This powerlessness threatened the self-worth and dignity of those adults charged with the responsibilities of being providers for others,²⁰ leading to "great practical psychological significance" for African Americans who had "'tried harder' and yet remain[ed] trapped in the ghetto for a lifetime."²¹

percent of the nonwhite population . . . lives in central cities, the handicaps of nonwhite jobseekers are apparent.").

15. See *id.* at 2278 ("[T]here is a substantial market of financially able Negroes prevented from buying housing of their choice because of deeply entrenched patterns of discrimination in the sale and rental of housing in our country."); Landry, *supra* note 8, at 180–81 (identifying "racial barriers" as impediment of black suburban growth).

16. 114 Cong. Rec. 2709 (statement of Sen. Kennedy); see also *id.* at 3422 (statement of Sen. Mondale) (recalling story of black naval officer who could not purchase housing of his choice).

17. *Id.* at 2274 (statement of Sen. Mondale).

18. See *id.* at 2281 ("The real evil in the ghetto effects is the rejection and humiliation of human beings." (quoting Fair Housing Act of 1967: Hearings Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency, 90th Cong. 179 (1967) (statement of Algernon Black, President, American Civil Liberties Union)).

19. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). But cf. Roy L. Brooks, *Analyzing Black Self-Esteem in the Post-Brown Era*, 4 Temp. Pol. & Civ. Rts. L. Rev. 215, 220 (1995) ("[T]he removal of racial segregation does little to improve an already healthy black self-esteem and, in fact, runs the risk of weakening systems within the black community—such as black schools—that have historically supported black self-esteem." (footnote omitted)).

Over fifty years after the *Brown* ruling, preliminary evidence is suggesting that school desegregation policy has had little effect on these feelings of inferiority among black children. See Film Documentary: *A Girl Like Me* (Kiri Davis, Director, Reel Works Teen Filmmaking, 2006), available at http://www.reelworks.org/watch2.php?class=Spring%202005&title=A%20Girl%20Like%20Me&filmer=Kiri%20Davis&fname=a_girl_like_me.flv (recreating Dr. Kenneth Clark's doll experiment used as evidence in *Brown*); cf. Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* 259–62 (2004) (describing present disparities in public education).

20. See 114 Cong. Rec. 3422 (statement of Sen. Mondale) (declaring inability to provide for family as threat to one's humanity).

21. *Id.* at 3421; see also Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 Washburn L.J. 149, 153 (1969) (describing psychological benefit of

Not surprisingly, the captives of the ghetto expressed their frustration. The combination of “economic deprivation, social isolation, and psychological alienation” fueled by the discriminatory conditions sparked riots in urban areas throughout the 1960s.²² The government sought to understand this phenomenon through the creation of the National Advisory Commission on Civil Disorders.²³ President Lyndon Johnson appointed Illinois governor Otto Kerner, Jr., to head the commission, whose membership included several other elected officials, most notably Edward W. Brooke III, the only African American member of the U.S. Senate.²⁴ The Kerner Commission—as it was popularly named—developed an in-depth report studying the factors producing civil unrest.

The Commission’s report boldly concluded that urban civil disorder was the effect of “[w]hite racism.”²⁵ All Americans sought both the material assets of the capitalist system and its subsequent psychological benefits of dignity and peace of mind.²⁶ However, according to the report, neither of these two American aspirations was attainable for the majority of black households.²⁷ Through segregation, discrimination, and the subsequent existence of the ghetto, an “explosive mixture” was created and had “catalyze[d]” into “frustrations of powerlessness” and urban disorder.²⁸ Also fueling the rioting was the response of “white terrorism” to nonviolent forms of black protest, leading activists to conclude that no other alternative existed besides violence.²⁹

In light of the causes of civil disorder, the Kerner Report recommended actions that would move the United States toward being a single nation instead of a dual society.³⁰ Three objectives for national action were suggested: a) eliminating barriers to choice (antidiscrimination); b) removing the frustration of powerlessness (empowerment); and c) increasing contact across racial lines to destroy stereotypes and hostility (integration).³¹ The objectives were to operate as steps, with *antidiscrimination* opening up the marketplace for African Americans who were financially *empowered* to choose to leave the ghetto and *integrate*.³² In or-

being able to leave ghetto). Dubofsky served as legislative assistant to Senator Walter Mondale, cosponsor of the Fair Housing Act. *Id.* at 149.

22. Massey & Denton, *supra* note 12, at 58.

23. Exec. Order No. 11,365, 3 C.F.R. 674 (Comp. 1967).

24. Nat’l Advisory Comm’n on Civil Disorders, Report of the Commission on Civil Disorders vi (1968) [hereinafter Kerner Report].

25. *Id.* at 91.

26. *Id.* at 92.

27. *Id.*

28. *Id.* at 91–93. Dr. Martin Luther King, Jr., aptly described the effect of this frustration when he stated that: “A riot is at bottom the language of the unheard.” Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community?* 112 (1967).

29. Kerner Report, *supra* note 24, at 92–93.

30. *Id.* at 225.

31. *Id.* at 230.

32. See *id.* at 222–25 (describing preferred policy option of integrating financially empowered African Americans).

der to achieve the first stage of this process, the Commission called for the "[e]nactment of a national, comprehensive and enforceable open-occupancy law."³³ Such legislative action would operate as a first step in allowing those who could afford to leave the ghetto to be able to do so immediately.³⁴

The Kerner Report was released on March 1, 1968, as the Senate was in the midst of a filibuster blocking civil rights legislation, which included provisions mandating open housing.³⁵ The provisions' cosponsors—Senator Walter Mondale and Commission member Edward Brooke—found that the report echoed their call for legislation that would disprove the cries of black militants³⁶ that white Americans were "basically indecent" and would "never[] give full equality" to African Americans.³⁷ The drafters felt that inaction by the Senate would discourage moderate black civil rights leaders and turn them to violence just like their more militant colleagues.³⁸ With the release of the Kerner Report and its clear recommendation for open housing, the sponsors were able to attain a two-thirds Senate vote for cloture of debate.³⁹ The legislation was passed by

33. *Id.* at 263.

34. See *id.* at 225 (stating that "[a] national fair housing law is essential to begin . . . movement" out of the ghetto).

35. See Dubofsky, *supra* note 21, at 158 (documenting Kerner Report's release date and its influence on "fourth attempt at cloture" of Senate debate).

36. See Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* 23 (1967) ("The colonial power structure clamped a boot of oppression on the neck of the black people and then, ironically, said 'they are not ready for freedom.' Left solely to the good will of the oppressor, the oppressed would *never* be ready."(emphasis added)).

37. 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale); see also Dubofsky, *supra* note 21, at 154 (describing fair housing law's potential effect on black militants and white households).

38. 114 Cong. Rec. 2274–75 (statement of Sen. Mondale); see also *id.* at 3425 (statement of Sen. Javits) (arguing inaction would justify militancy). As Senator Mondale stated during his argument for fair housing legislation:

Our friends in the ghetto who believe in due process—thankfully, they are by far in the majority—have not abandoned their hope that lawful processes can adjust these outrageous wrongs. But we have provided little by way of example from which they can argue. We have not shown in a substantial way that white America in fact is a decent white America, that those who argue for moderation and lawful processes are correct in that strategy.

Id. at 2275 (statement of Sen. Mondale).

There was widespread concern that any action by the government in response to urban rioting would be a reward to the rioters. See *id.* at 2708 (statement of Sen. Javits); Kerner Report, *supra* note 24, at 231. While the Commission's recommendations, and subsequent fair housing legislation, were definitely attempts to quell violence, they have been rationalized as necessary actions so as not to punish the entire black community—especially the seemingly nonviolent middle class—for the actions of a few. See 114 Cong. Rec. 2708 (statement of Sen. Javits).

39. See Massey & Denton, *supra* note 12, at 193; Dubofsky, *supra* note 21, at 158.

the Senate on March 11, 1968,⁴⁰ and awaited passage by the House of Representatives to become the Fair Housing Act.

In the House, the bill faced the threat of being weakened by amendments until Dr. Martin Luther King, Jr., was assassinated on Thursday, April 4.⁴¹ This tragic event brought the warnings of the Kerner Report, and the frustrations of African Americans, to a violent climax⁴² and was the driving force behind the bill becoming law in its form passed by the Senate.⁴³ After a weekend of urban rioting in major cities across the country, including Washington, D.C., the House passed the Fair Housing Act on April 10, as armed members of the National Guard protected the Capitol from nearby violence.⁴⁴ President Johnson signed the bill into law the very next day.⁴⁵

Despite the violent buildup to its passage, the Fair Housing Act bears traces of specific legislative goals. Part I.B. will clarify the intent of the Act as envisioned by its drafters in 1968.

B. *Legislative Goals of the Fair Housing Act*

The Fair Housing Act is a statute that takes aim at discrimination in the housing market through the regulation of sales and rentals by homeowners and marketplace actors.⁴⁶ Victims of such discrimination have

40. See 114 Cong. Rec. 5992 (recording 71 Yeas and 20 Nays for civil rights bill).

41. See Massey & Denton, *supra* note 12, at 194; Dubofsky, *supra* note 21, at 160.

42. Eldridge Cleaver, Minister of Information for the Black Panther Party, responded to Martin Luther King, Jr.'s assassination with the following statement:

That white America could produce the assassin of Dr. Martin Luther King is looked upon by black people—and not just those identified as black militants—as a final repudiation by white America of any hope of reconciliation, of any hope of change by peaceful and nonviolent means. So that it becomes clear that the only way for black people in this country to get the things that they want—and the things that they have a right to and that they deserve—is to meet fire with fire.

Eldridge Cleaver, *Post-Prison Writings and Speeches* 74 (Robert Scheer ed., 1969).

43. See Dubofsky, *supra* note 21, at 160 (stating that assassination “dislodged the Civil Rights Bill of 1968 from the Rules Committee”).

44. Massey & Denton, *supra* note 12, at 194; Dubofsky, *supra* note 21; see also Richard L. Lyons, *Measure Providing for Open Housing Goes to President*, *Wash. Post*, Apr. 11, 1968, at A1 (explaining passage of Fair Housing Act).

45. Massey & Denton, *supra* note 12, at 194; Dubofsky, *supra* note 21, at 160.

46. 42 U.S.C. § 3604 (2000). The Act made three major impacts on the housing marketplace: a) it prohibited sellers and renters from discriminating in transactions; b) it forbade intermediary actors such as real estate agents and mortgage brokers from discriminating in their facilitation of transactions; and c) it commanded the federal government to affirmatively promote fair housing. See *id.* §§ 3601–3616; Bell & Parchomovsky, *supra* note 9, at 1979 (discussing three effects of Act); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 *U. Miami L. Rev.* 1067, 1070 (1998) [hereinafter Calmore, *Race/ism*] (“[Broad legislative intent] suggests that fair housing is not only a remedy for individual claimants, but also that it seeks to eliminate discrimination from the housing market . . .”); Sander, *supra* note 12, at 880 (discussing Act as “three-pronged attack upon housing discrimination”). Bell and Parchomovsky also note that from an economic perspective, the Fair Housing Act “passed the cost of maintaining segregation on to white property owners, forcing them to exclude minorities

standing to bring suit for relief from their injuries as well as for damages.⁴⁷ In addition, the Fair Housing Act charges the government with an affirmative duty to promote fair housing through the Secretary of Housing and Urban Development.⁴⁸ The undefined term "fair housing" also describes the policy guiding the creation of the Act.⁴⁹

Two major goals can be observed from the legislative history of the Fair Housing Act—equal opportunity in housing choice and integrated living patterns. While these goals were to ultimately affect "the whole community,"⁵⁰ the Act's coauthors—Senators Brooke and Mondale—intended the provisions to strategically target middle-class African Americans. Opening up opportunities for the middle class through fair housing legislation was envisioned as only the first step toward changing the whole nation into an equal and integrated society.⁵¹

1. *Equal Opportunity*. — As a matter of "equal justice for all Americans,"⁵² Senator Brooke emphasized that fair housing legislation was essential to "requir[ing] that government protect the freedom of individuals to choose where they want to live."⁵³ Brooke sought to apply the lessons learned from his membership on the Kerner Commission by

by fencing themselves in, rather than fencing minorities out." Bell and Parchomovsky, *supra* note 9, at 1981; see also Cashin, *Failures*, *supra* note 10, at 185–201 (describing burden of exorbitant housing costs on majority white suburban communities). The costs of segregation, after the passage of the Act, have not been limited to white property owners. See *infra* Part II.B.4.

47. 42 U.S.C. §§ 3612–3613. The Attorney General may also commence civil actions when there is "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Act]." *Id.* § 3614.

In 1988, Congress passed the Fair Housing Amendments Act, which strengthened the enforcement ability of the Act and expanded the scope of its protection. Pub. L. No. 100-430, 102 Stat. 1619–39 (codified as amended at 42 U.S.C. §§ 3601–3619, 3631). The Fair Housing Act was originally passed with limitations on the ability of the Department of Housing and Urban Development (HUD) to remedy a discrimination complaint. 42 U.S.C. § 3610(a) (1982) (amended 1988); see also Schwemm, *supra* note 10, § 24:2, at 24-3 to -4 (describing limited administrative enforcement under original Act). The Fair Housing Amendments Act strengthened HUD's remedial power, and loosened restrictions on the statute of limitations and damages for discrimination claims. Fair Housing Amendments Act § 8; see also Schwemm, *supra* note 10, § 23:1, at 23-2 (explaining increased enforcement mechanisms of amendments).

48. 42 U.S.C. § 3608(e)(5).

49. See *id.* § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

50. 114 Cong. Rec. 2706 (1968) (statement of Sen. Javits); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Sen. Javits).

51. See John A. Powell, *Living and Learning: Linking Housing and Education*, 80 *Minn. L. Rev.* 749, 786 (1996) [hereinafter Powell, *Living*] ("[I]t is true that the middle class is likely to see the benefits of a more integrated society first . . .").

52. 114 Cong. Rec. 2279 (statement of Sen. Brooke).

53. *Id.* at 2525.

removing barriers to free choice from the housing industry.⁵⁴ This free choice would give families who could afford to leave the ghetto the ability to immediately escape to the suburbs. The legislation was not designed to eradicate the unjust conditions of the ghetto,⁵⁵ but to accommodate the black middle class, whose lifestyle was viewed as most closely approximating the hard-working ideals of America.⁵⁶

The sponsoring senators did not want to ignore those without the financial means to escape the ghetto, but they hoped that concern would be addressed through future policies and legislation.⁵⁷ As supported by the Kerner Commission, empowering those who remained in the ghetto was essential to developing integrated communities. The simple purpose of the Fair Housing Act, however, was to respond to the immediate need of African Americans who could move to the suburbs but for discrimination.⁵⁸ Equality demanded that the black middle class have the same chance to escape to the suburbs as the white middle class.

2. *Integrated Living Patterns.* — Senator Mondale is widely quoted as saying that the purpose of the Fair Housing Act was to replace the ghetto

54. See *id.* at 2282 (drawing from Kerner Commission experience to promote need for fair housing legislation); see also *supra* notes 30–34 and accompanying text. Although the Kerner Report had not been released until after most of the senatorial debate had ended, Senator Brooke was well aware of the recommendations, as they motivated his push for legislation:

I will call [fair housing] essential legislation.

I do not want to say what our Commission on Civil Disorders will report. We hope to report on or before March 1 of this year. We have been studying this very problem—among other problems, to be sure. The problem of housing certainly has been one of the great priorities in that Commission in finding the causes for the explosions of 1966 and 1967, so that we can prevent them in the future.

114 Cong. Rec. 2283 (statement of Sen. Brooke).

55. See *id.* at 2279 (“Fair housing does not promise to end the ghetto . . . but it will make it possible for those who have the resources to escape . . .”).

56. John O. Calmore noted this goal when arguing that ghetto poor moving to suburban opportunities would not yield ideal integrated patterns. Rather, such patterns would arise from movement by African Americans considered proper agents for integration—those who are “affluent, have the proper social profile and credentials, and are perceived as great neighbors, not threats to the structural strength of white neighborhoods.” Calmore, *Race/ism*, *supra* note 46, at 1103. Calmore called this trend the “Huxtable Family Syndrome,” named after the popular affluent black integrated family of *The Cosby Show*. *Id.*; see also John O. Calmore, *Random Notes of an Integration Warrior*, 81 *Minn. L. Rev.* 1441, 1443–48 (1997) (introducing “Huxtable Family Syndrome”).

57. See 114 Cong. Rec. 2280 (statement of Sen. Brooke) (“We cannot immediately recreate adequate services in the central city, but we must move toward that goal.”); *id.* at 2708 (statement of Sen. Hart) (arguing that “building up the ghetto” is only partial solution relative to fair housing). For a description of the Kerner Commission’s recommendations regarding empowering the ghetto, see *supra* notes 30–34 and accompanying text.

58. See 114 Cong. Rec. 2708 (statement of Sen. Hart) (“[T]he proposition that nobody has to run a litmus test of religion or race when he goes out to buy a home . . . is what this amendment is all about.”).

with "truly integrated and balanced living patterns."⁵⁹ This statement was coupled with the observation that fair housing would not yield a "great influx of all the Negroes in the ghettos into the suburbs," but would instead let economics and choice determine how many African Americans would be dispersed among the majority white suburban population.⁶⁰ According to Senator Mondale, the expansion of the ghetto—a fear driving many housing choices⁶¹—would "be slowed and replaced" by these ideal patterns of integrated living.⁶² Protecting private housing choice was the direct result of the Act, but the promotion of integrated living was to be an indirect result.⁶³ Through integration, Americans of various races would unite under a common understanding of each other's true nature, and not a "caricature" developed from stereotypes fostered through spatial distance.⁶⁴

3. *Fair Housing Act as the First Step.* — Fair housing legislation was "the best way for this Congress to start on the true road to integration."⁶⁵ Neither Senator Mondale nor Senator Brooke saw the Fair Housing Act as the solution, or even the driving force to achieve integration. The Act was intended to be only a first step. Although its passage was an amazing accomplishment, Senator Mondale viewed the Act as being "only a foot in the door."⁶⁶ Similarly, Senator Brooke observed that even though the legislation was "a giant step in the right direction," it was not a "cure [for] all the wrongs and ills in this country."⁶⁷ This view also aligned with the Kerner Commission's recommendation that the removal of discrimina-

59. *Id.* at 3422 (statement of Sen. Mondale); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Sen. Mondale); Schwemm, *supra* note 10, § 2:3, at 2-7 (same).

60. See 114 Cong. Rec. 3422 (statement of Sen. Mondale) ("[F]air housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that."). For a discussion of the desired percentage of African Americans within an integrated majority white setting, see *infra* notes 96–97 and accompanying text.

61. For a discussion of how the fear of ghetto expansion fuels resegregation, see *infra* Part II.A.

62. 114 Cong. Rec. 2275–76 (statement of Sen. Mondale).

63. See Sander, *supra* note 12, at 919–21 (arguing that one motivating factor behind Act was belief that removing discrimination was essential for creating economic and political environment in which integration could develop).

64. 114 Cong. Rec. 3422 (statement of Sen. Mondale).

65. *Id.* (emphasis added); see also Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 *Nw. U. L. Rev.* 491, 538 n.178 (1979) (interpreting Senator Mondale as seeing integration as expected result, but not direct goal of Fair Housing Act).

66. 114 Cong. Rec. 6000 (statement of Sen. Mondale).

67. *Id.* at 6001 (statement of Sen. Brooke). But see Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 *Urb. Law.* 369, 385 (1990) (noting Fair Housing Act drafters assumed outlawing discrimination would result in integration).

tion was to be the first objective, followed by strategies of empowerment and the facilitation of integration.⁶⁸

C. *Judicial Interpretation and Application of Fair Housing Act Goals*

The Fair Housing Act's broad textual mandates and sparse legislative history have forced courts to play an important role in the statute's interpretation. The Act contains an expansive policy of providing, "within constitutional limitations, for fair housing throughout the United States," yet it leaves the term "fair housing" undefined.⁶⁹ Additionally, the hectic circumstances surrounding the passage of the Act led to very limited legislative history.⁷⁰ Consequently, the courts have been charged with clarifying the applicability of the statute, in close approximation to the will of Congress.

The Supreme Court has acknowledged that Congress intended the legislation to be construed broadly, so as to root out discrimination within the housing industry.⁷¹ The Court has not contributed a definition of "fair housing"⁷² or examined the substantive merits of a discrimination claim, but it has shown support for the importance of achieving integration while deciding procedural matters related to the Act.⁷³ The

68. See Sander, *supra* note 12, at 920 n.364 (acknowledging political sentiments that fair housing legislation could not end segregation alone); *supra* notes 31–34 and accompanying text. Even the more moderate civil rights leaders of the 1960s considered the Act to be only the beginning of a series of requisite progressive action. Ralph Abernathy, successor to Dr. Martin Luther King, Jr., as head of the Southern Christian Leadership Conference, stated that the law was "merely a step in the right direction." Lyons, *supra* note 44. Urban League director Whitney Young Jr. called the legislation "only one step toward a national resurgence of decency." *Id.*

69. 42 U.S.C. § 3601 (2000); see also *id.* § 3602. This statutory vagueness is not accidental. See Christopher Bonastia, *Knocking on the Door 2* (2006) (describing public concern at federal government intervening in private housing market).

70. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) ("The legislative history of the Act is not too helpful."); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 & n.29 (3d Cir. 1977) (noting lack of committee reports); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496 (S.D. Ohio 1976) ("[A] realistic examination of the concerns that led to the adoption of this legislation proves a better guide to congressional intent than the dusty volumes of Sutherland on Statutory Interpretation.").

71. *Trafficante*, 409 U.S. at 209–12 (applying generous construction of standing to Fair Housing Act claims).

72. The District Court of Maryland, however, has recently defined fair housing, within the meaning of the Act, as "the provision of housing free from discrimination." *Thompson v. HUD*, 348 F. Supp. 2d 398, 456 (D. Md. 2005).

73. See, e.g., *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 112–15 (1979) (noting that "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered"); *Trafficante*, 409 U.S. at 210. But see Rubinowitz & Trosman, *supra* note 65, at 537–49 (distinguishing Court's view of integration as primary goal with legislative intent of integration as secondary outcome); Michael R. Tein, Comment, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing*

lower courts have also endorsed both equal opportunity and integration as goals of the legislation.⁷⁴

While the Kerner Commission and the drafters of the Act saw fair housing legislation as a preliminary step toward integration,⁷⁵ courts have adopted a more aggressive interpretation of the role of the Act in achieving this aim. Judges have viewed the Act as not merely breaking down the "walls of discrimination"⁷⁶ that have imprisoned individuals within the ghetto, but also providing an affirmative vehicle for attaining integration.⁷⁷ Under this approach, the Act is much more than just a preparatory step that would allow integration to develop through additional laws and policies.⁷⁸

This judicial view elevates the ability of the Fair Housing Act to attain integration as a direct goal, equal to the protection of equal choice opportunities. Conflicts may therefore result when integration is sought as a goal, to the detriment of equal choice.⁷⁹ In such cases, a housing provider may try to justify the use of racial quotas with the rationale of creat-

Discrimination, 140 U. Pa. L. Rev. 1463, 1467 (1992) (doubting integration as intended goal of FHA).

74. Schwemm, *supra* note 10, § 7:3 & n.2, at 7-5 to -6; see also *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979) (endorsing Senator Mondale's understanding of Fair Housing Act's integrative purpose as "[t]he primary objective"); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) ("Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment [to integration]."); *Barrick Realty, Inc. v. City of Gary, Ind.*, 491 F.2d 161, 164 (7th Cir. 1974) ("[T]he right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is [integration]."); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) ("Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.").

75. See *supra* Part I.B.3.

76. *Thompson*, 348 F. Supp. 2d at 456 (quoting 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler)).

77. See *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988) (stating congressional intent of antidiscrimination yielding integration); *Thompson*, 348 F. Supp. 2d at 456 (emphasizing legislative goal of reducing isolation of ghettos); *Burney v. Hous. Auth.*, 551 F. Supp. 746, 769 (W.D. Pa. 1982) ("Congress believed that . . . abolition of racially discriminatory housing practices ultimately would result in residential integration.").

78. See W. Dennis Keating, *The Suburban Racial Dilemma 196-97* (1994) (noting disagreement over purpose of Act); Bell & Parchomovsky, *supra* note 9, at 1979 n.47 (same); see also Alexander Polikoff, *Sustainable Integration or Inevitable Resegregation: The Troubling Questions*, in *Housing Desegregation and Federal Policy* 43, 47-50 (John M. Goering ed., 1986) (examining whether Fair Housing Act's intent was to solely eliminate discrimination or actively promote integration).

79. Cases have arisen in which housing opportunities for minorities have been limited in attempts to maintain stable integration. See *Starrett City*, 840 F.2d at 1098 (discussing housing development's use of racial quotas to help retain white tenants); *Otero*, 484 F.2d at 1124 (noting public housing authority's practice of rejecting minority applicants in favor of white applicants with lower priority in order to prevent "ghettoization").

ing stable integration.⁸⁰ Such “dual goal” conflicts were not addressed in the legislative history of the Act because the drafters never considered integration being achieved outside an environment of equal choice.⁸¹ Yet under current jurisprudence, the dual goals can at times conflict, with judges being the arbiters of the clashes.

Despite these occasionally conflicting goals, one might still expect the Fair Housing Act to have been an effective tool in fostering integration while removing discrimination from the marketplace. As affluent minorities moved out of the ghetto after the passage of the Act, white suburban areas should have gradually integrated, as anticipated by Senator Mondale. The current state of America’s metropolitan regions,⁸² however, indicates that something is preventing suburban integration. This Note will now analyze two interrelated explanations for this failure to eradicate residential segregation. First, Part II will examine how the free and equal housing choice protected through the Fair Housing Act also fosters the choice not to integrate. Then, Part III will examine the failure of the Fair Housing Act to root out racial steering, a practice whereby real estate agents subtly influence consumers to “choose” to live in segregated neighborhoods.

II. THE MIDDLE CLASS CHOICE NOT TO INTEGRATE

This Part will examine the conditions surrounding the choices of both black and white households to avoid integration. In an economically efficient private housing market, buyers must be allowed to have full and free choice, unlimited by arbitrary restrictions based on race, gender, and national origin.⁸³ Under the Fair Housing Act, sellers⁸⁴ may not re-

80. See *Starrett City*, 840 F.2d at 1099 (noting defendant’s use of residential patterns to rationalize use of racial quotas).

81. See *id.* at 1101 (“Congress saw the antidiscrimination policy as the means to effect the antisegregation-integration policy.”); *Burney*, 551 F. Supp. at 769 (“Congress perceived antisegregation and antidiscrimination to be complementary.”); Schwemm, *supra* note 10, § 11A:5, at 11A-20 to -22 (arguing that 1968 Congress would never have intended to limit housing choice for sake of integration); Sander, *supra* note 12, at 920–21 (“There is no evidence that congressmen who might have foreseen the resilience of segregation intended integration to override free housing choice.”).

82. See *infra* notes 99–101 and accompanying text.

83. See *Thompson v. HUD*, 348 F. Supp. 2d 398, 450 (D. Md. 2005) (noting testimony from Howard Law School Dean and former Mayor of Baltimore Kurt Schmoke that economics, not race, should be only limit on housing choice); Richard A. Posner, *Economic Analysis of Law* 15–16 (6th ed. 2003) (discussing relationship between efficiency and voluntary choice); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1145 (1986) (identifying circumstances when government must use regulation to protect private choice); Weiss, *supra* note 12, at 1200 (distinguishing buyer preference from seller preference).

84. Not all sellers in the private housing market are covered by the antidiscriminatory legislation. The “Mrs. Murphy” exception provides that owner-occupied housing with fewer than four units may be sold in a discriminatory manner if not publicly advertised. See 42 U.S.C. § 3603(b)(1) (2000).

fuse their products based on such market-limiting factors.⁸⁵ This market of private choice, protected by legislation, creates serious difficulties for integration and the enforcement of antidiscrimination.⁸⁶ Part II.A will examine the fear of ghetto expansion and how that affects the private choice of white households not to integrate. Part II.B will analyze the development of majority black suburban enclaves and the complex trade-offs that they present for their residents.

A. *Private Choice to Avoid a Perceived Ghetto*

The Fair Housing Act's promise to replace the growth of the ghetto with integrated living patterns⁸⁷ was not enough to alleviate the fears of majority white suburban communities. Many of these affluent neighborhoods have characteristics that offer their residents considerable quality of life: comfort, stability, schools where children can thrive and choose their destinies, reduced crime, proximity to commercial and employment opportunities, effective services, and low tax rates.⁸⁸ Before the enactment of the Fair Housing Act, minorities were openly excluded from these amenities through discrimination.⁸⁹ Now, private choice has become the primary means of avoiding the perceived threat to quality of life: living among a large proportion of African Americans.⁹⁰ For suburban homeowners, the greatest threat has been the infiltration of the ghetto and its alleged characteristics into their communities. Sociologists Douglas Massey and Nancy Denton described ghetto culture in their

85. William J. Levitt, one of the nation's largest homebuilders in the 1960s, testified to Congress that in a discriminatory marketplace, sellers who choose not to discriminate are hurt financially by those who choose such practice, making a fair housing law essential to a healthy marketplace. 114 Cong. Rec. 3421 (1968) (statement of Sen. Mondale) (recounting testimony of William J. Levitt).

86. For a discussion of the tension between private preference and legislative intervention, see generally Sunstein, *supra* note 83.

87. 114 Cong. Rec. 3422 (statement of Sen. Mondale); see also *supra* Part I.B.2.

88. See Bell & Parchomovsky, *supra* note 9, at 1966 (stating that "one's neighborhood largely determines one's achievements"); John O. Calmore, Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay, 71 N.C. L. Rev. 1487, 1489-90 (1993) [hereinafter Calmore, Kerner Commission] (stating that "[h]ousing . . . is much more than shelter: it provides social status, access to jobs, education and other services, a framework for the conduct of household work, and a way of structuring economic, social, and political relationships" (quoting *Critical Perspectives on Housing* xviii (Rachel G. Bratt et al. eds., 1986))); John A. Powell, Opportunity-Based Housing, 12 J. Affordable Housing & Community Dev. L. 188, 195 (2003) (arguing that housing unlocks many other desired opportunities, "including self-sustaining employment, a high level of educational attainment, good health, and the capacity to engage in political and civic processes").

89. See Massey & Denton, *supra* note 12, at 50 (discussing surveys and studies finding discrimination in real estate industry).

90. See Cutler et al., *supra* note 12, at 496 ("Over time, formal barriers to integration were eliminated, but discriminatory white tastes remained. White[] [families] still prefer to live with other white[] [families] more than black[] [families] prefer to live in white areas."); Weiss, *supra* note 12, at 1200 (explaining homebuyer freedom to segregate oneself).

highly influential work, *American Apartheid*: “In response to the harsh and isolated conditions of ghetto life, a segment of the urban black population has evolved a set of behaviors, attitudes, and values that are increasingly at variance with those held in the wider society . . . and in fact are negatively evaluated by most [Americans].”⁹¹ This culture is stereotypically associated with unemployment, single parenting, limited education, nonstandard English, and most importantly, depressed property values.⁹² These characteristics are thought to be detrimental to the American middle-class way of life.⁹³ While stereotyping among different socioeconomic groups is a universal human practice, African Americans as an entire race encounter ghetto stereotypes regardless of their economic class.⁹⁴

As a result of these stereotypes, race is utilized as a proxy for a diminishing quality of life.⁹⁵ There is a tolerable proportion of African Americans who may enter a majority white suburban community.⁹⁶ Once

91. Massey & Denton, *supra* note 12, at 165–66. But see Olati Johnson, Book Note, Integrating the “Underclass”: Confronting America’s Enduring Apartheid, 47 *Stan. L. Rev.* 787, 804 (1995) [hereinafter Johnson, *Apartheid*] (reviewing Massey & Denton, *supra* note 12) (critiquing Massey and Denton’s failure to compare ghetto culture with characteristics of dominant culture). A visible example of this negative perception is the popular reappropriation of the word “ghetto” in American vernacular as an adjective to describe anything that is considered of low quality.

92. See Massey & Denton, *supra* note 12, at 166–67; see also Bell & Parchomovsky, *supra* note 9, at 1983 (describing “vices” associated with lower economic status); Camille Zubrinsky Charles, Can We Live Together? Racial Preferences and Neighborhood Outcomes, in *The Geography of Opportunity*, *supra* note 6, at 45, 64 (noting belief of many white households that black residents lead to increase in “female head[s], unemployed adult members, and [number of] residents per [home]”). These racial stereotypes are false, when controlling for level of poverty. See Ingrid Gould Ellen, *Sharing America’s Neighborhood* 156 (2000).

93. Cf. Lawrence Bobo & Camille L. Zubrinsky, Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?, 74 *Soc. Forces* 883, 904 (1996) (explaining that white Americans “tend to view integration with any of the minority groups as threatening or undermining a previous status relation of superiority”).

94. See Calmore, *Race/ism*, *supra* note 46, at 1105 & n.215 (describing stigma of ghetto for middle-class African Americans).

95. See Ellen, *supra* note 92, at 47–48 (arguing that stereotypes against African Americans fuel avoidance of them); Bell & Parchomovsky, *supra* note 9, at 1983 (“[I]t is not racial animus per se, but rather various negative effects people associate with race that drive them to leave racially changing neighborhoods.”). But see Charles, *supra* note 92, at 64–65 (arguing that there is no evidence to support this theory, which at best plays minimal role).

96. Several scholars view the integration ideal as one in which African Americans disperse themselves among majority white neighborhoods such that they are only a minimal proportion of neighborhoods everywhere. See Anthony Downs, *Opening Up the Suburbs: An Urban Strategy for America* 99 (1973) (supporting quotas to ensure white majorities remain); Orlando Patterson, *The Ordeal of Integration: Progress and Resentment in America’s “Racial” Crisis* 46 (1997) (arguing that it is not “unreasonable” for Euro-Americans to expect to be overwhelming majority in communities); *infra* note 124. Studies indicate that many white American homeowners would tolerate such levels of integration. See Massey & Denton, *supra* note 12, at 111 (noting that most white

that proportion reaches an uncomfortable level, fears of ghetto development trigger an exodus of many of the white residents.⁹⁷ Free private choice is utilized by white households to escape the transitioning neighborhood to one where the local amenities and property values are not perceived to be threatened.⁹⁸ Meanwhile, middle-class African Americans who sought an integrated environment end up living in a resegregated community.⁹⁹

B. *Black Middle Class Enclaves*

The private choice of white households not to integrate can directly lead to majority black suburban communities. An increasing number of middle-class and affluent black households are living in these segregated environments.¹⁰⁰ As the overall population of middle-class African Americans grows, the size and number of these enclaves have also

Americans are comfortable living in proximity to small numbers of African Americans); W.A.V. Clark, Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model, 28 *Demography* 1, 2–3 (1991) (describing nearly unanimous view among white households that small numbers of minority neighbors are acceptable); but see *infra* Parts II.B.1–3.

97. This percentage is known as the “tipping point.” See Bell and Parchomovsky, *supra* note 9, at 1985–86 (detailing “tipping point” hypothesis); Thomas C. Schelling, Dynamic Models of Segregation, 1 *J. Mathematical Soc.* 143, 181–86 (1971) (same). But see generally William Easterly, Empirics of Strategic Interdependence: The Case of the Racial Tipping Point (N.Y. Univ. Dev. Research Inst., Working Paper No. 5, 2005), available at <http://www.nyu.edu/fas/institute/dri/DRIWP/DRIWP05.pdf> (on file with the *Columbia Law Review*) (arguing that exodus of white families from integrating community is continuous and not based on particular point).

98. See Bell & Parchomovsky, *supra* note 9, at 1996 (“[P]erceptions (even inaccurate ones) are crucial in determining how white homeowners will respond to racial change.” (emphasis added)); Sander, *supra* note 12, at 900–01 (concluding that preferences force most integrating communities to resegregate).

99. This process is further fueled by the fact that white and black households differ on their perception of a comfortable integrated percentage of African American neighbors. See Comm. on the Status of Black Americans et al., *A Common Destiny: Black and American Society* 141–44 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) (describing desired level of integration for African Americans being unacceptable for white Americans); Bell & Parchomovsky, *supra* note 9, at 1987 (describing influence of racial preferences on resegregation); Charles, *supra* note 92, at 51 (noting resegregation process even when neighborhood is affluent); Pattillo, *Black Neighborhoods*, *supra* note 8, at 318 (“[B]y the time blacks’ compositional preferences are met, the black population has exceeded the tolerance levels (or attraction levels) of most whites, and the neighborhood ‘tips.’” (citation omitted)); Sander, *supra* note 12, at 896–97 (noting discrepancy between white and black Americans’ definitions of racial balance).

100. See Sheryll D. Cashin, Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America, 86 *Cornell L. Rev.* 729, 741 (2001) [hereinafter Cashin, *Middle-Class*]. Cashin notes the difficulty in quantifying the exact number of black suburban enclaves, but provides the following clear examples: “Prince George’s County, Maryland; DeKalb County, Georgia; Dade County, Florida; and suburbs to the south of Chicago and to the northeast of St. Louis.” *Id.* at 742.

grown.¹⁰¹ This trend may not solely be the effect of the choices of white households, however. African Americans may also be consciously choosing not to integrate through their equal freedom under the Fair Housing Act.¹⁰² This subpart will observe the concept of “nonsegregation,” a term used to describe the conscious choice of African Americans to not integrate.¹⁰³

As defined by Robert Forman in 1971, “[n]onsegregation implies both the right of people to remain indefinitely where they are, even if in ghetto areas, and the elimination of restrictions on moving into other areas.”¹⁰⁴ This concept emphasizes the real benefits and comforts of living in an environment where one’s own racial group is the majority.¹⁰⁵ It also highlights some critiques of integration, especially the unique burdens that it places on African Americans.¹⁰⁶ Empowerment of a historically oppressed and underdeveloped population defines the overall appeal of nonsegregation.¹⁰⁷ This subpart describes how nonsegregation can be embraced as a response to failed integration attempts, sought as a source of political and economic power, and used as a means of attaining cultural comfort. These perceived benefits will be juxtaposed to the costs that many African Americans bear for the sake of nonsegregation.

1. *Integration Fatigue*. — Fatigue from a long and weary integration movement contributes to nonsegregationist ideas. Many middle-class African Americans have developed resentment, bitterness, or simple apathy to the concept of integration in light of resistance—both real and perceived—from the majority white population.¹⁰⁸ While there is no clear empirical correlation between affluence and resistance to integration among African Americans, polls have shown that more incidents of

101. Mary Pattillo-McCoy, *Black Picket Fences: Privilege and Peril Among the Black Middle Class* 27 (1999) [hereinafter *Pattillo-McCoy, Black Picket Fences*]; see also Drew S. Days, III, *Rethinking the Integrative Ideal: Housing*, 33 *McGeorge L. Rev.* 459, 468–69 (2002) (describing development of affluent black communities); cf. Sander, *supra* note 12, at 884 n.87 (“Perhaps the most common fallacy among students of racial segregation is that black ‘suburbanization’ is a good measure of increasing integration.”).

102. See Mae Gentry, *Niskey Lake, Atlanta’s Exclusive Black Neighborhood*, *Atlanta J.-Const.*, Sept. 25, 2002, at 10A (profiling affluent black community with residents who chose enclave over majority white options); Haya El Nasser, *Minorities Make Choice to Live with Their Own: Many Are Picking Less-Integrated Neighborhoods in the Suburbs*, *USA Today*, July 9, 2001, at 8A (examining trend of African Americans who are choosing not to integrate in part because “the need to integrate decreases” with socioeconomic gains).

103. *Pattillo*, *Black Neighborhoods*, *supra* note 8, at 322.

104. Robert Forman, *Black Ghettos, White Ghettos, and Slums* 46 (1971).

105. Cf. Richard Epstein, *Forbidden Grounds* 68–69 (1992) (arguing voluntary segregation to be economically efficient); Keating, *supra* note 78, at 27 (observing alternative to ghetto of small black enclaves in suburbs).

106. See *infra* Part II.B.1.

107. See *infra* Part II.B.2.

108. See Charles, *supra* note 92, at 74 (describing attitudinal studies of middle-class African Americans); Sander, *supra* note 12, at 893 (explaining how neighborhood hostility can serve as cost for black households moving into majority white neighborhoods).

racial prejudice are reported by the wealthier segment of the black population.¹⁰⁹ These polls of human attitudes may say more than any regression analysis could, because they more adequately reflect personal views developed over a lifetime of experiences with race.¹¹⁰

The heart of this resentment appears to be the feeling of rejection from the majority white community.¹¹¹ It is very reasonable to assume that over time black households who initially desired integration might grow weary and bitter from the repeated rejections of fearful white households.¹¹² Professor Cass Sunstein defined and described this concept as "adaptive preferences."¹¹³ When a beneficial opportunity is unavailable, a person may become conditioned to no longer desire that option.¹¹⁴ Within a housing context, the exodus of white households from communities with rapidly growing black populations may be a sign of rejection that is conditioning black middle-class households to no longer desire integration.

2. *Political and Economic Empowerment.* — While an adaptive preference mentality may be developing some nonsegregationist views, other appealing reasons exist for African Americans not to integrate. Nonsegregation can be a statement of political and economic empowerment. As emphasized by Professor John O. Calmore, the effects of historical segregation are typically viewed solely within a discriminatory context.¹¹⁵ African Americans were excluded from certain opportunities, so law and policy were utilized to include them. Another major effect of segregation, however, was domination.¹¹⁶ Beyond simple exclusion, African Americans were subordinated to levels of impotency. The removal of a population's fundamental freedoms calls into question the right of that

109. Ellis Cose, *The Rage of a Privileged Class* 38–39 (1993); see also Heath, Brand-Williams & Lewis, *supra* note 6 ("Decades of discrimination and not-so-subtle steering have bred wariness about crossing traditional boundaries. And some just prefer living in places where their neighbors look like they do."); see generally Joe R. Feagin & Melvin P. Sikes, *Living with Racism: The Black Middle Class Experience* (1994) (interviewing over 200 middle-class African Americans and sharing their constant experiences with racial hostility).

110. Cose, *supra* note 109, at 40. It appears that a fear of this white hostility is a major factor in the neighborhood decisions of black households. Pattillo, *Black Neighborhoods*, *supra* note 8, at 319.

111. See *supra* Part II.A.

112. See Calmore, *Race/ism*, *supra* note 46, at 1108 ("When I speak of black [families] 'choosing' to live in black neighborhoods I do not mean to suggest that segregation is literally voluntary. In reality, this option is often one of default or retreat."); cf. Sander, *supra* note 12, at 886 ("[M]iddle-class [African Americans] experience virtually the same level of segregation as the black community as a whole.").

113. Sunstein, *supra* note 83, at 1146–48; see also Bell & Parchomovsky, *supra* note 9, at 2026–27 (describing adaptive preference within context of neighborhood integration).

114. See Sunstein, *supra* note 83, at 1147 ("[P]eople fail to obtain goods that would turn out to be extremely rewarding, precisely because they do not want those goods, and their lack of desire turns on a lack of opportunities.").

115. Calmore, *Kerner Commission*, *supra* note 88, at 1499.

116. *Id.*

group even to be human. In the minds of many nonsegregationists, a push for integrative inclusion does not fully reclaim that power to be heard and respected within American society or to have true control over one's environment.¹¹⁷

Majority black middle-class communities can offer a concentration of political and economic control over local and possibly even national affairs.¹¹⁸ Politically, such communities can develop leaders with a specific accountability to a black constituency.¹¹⁹ With geographic proximity, mobilization of this constituency may also prove to be easier and more publicly significant.¹²⁰

Economically, the benefits of nonsegregation have been compared to the solidarity trends of immigrants. Clustering among immigrant groups has historically allowed for the development of significant markets of goods that meet consumers' ethnic preferences.¹²¹ Similarly, in today's marketplace, concentration can economically justify the development of goods and services that cater to African Americans, from greeting cards featuring black families, to darker "flesh"-colored band-aids, to hair salons and barbershops.¹²²

117. See *id.*

118. See Cynthia Horan, *Racializing Regime Politics*, 24 *J. Urb. Aff.* 19, 25 (2002) (arguing that "[n]ew access to city government . . . facilitat[es] the economic advancement of middle class African Americans").

119. See Keating, *supra* note 78, at 22–23 (documenting movement of black political power); Timothy Bledsoe et al., *Residential Context and Racial Solidarity Among African Americans*, 39 *Am. J. Pol. Sci.* 434, 434–35 (1995) (using empirical evidence to argue that majority black communities foster more racial solidarity than integrated communities with smaller populations of African Americans); Cashin, *Middle-Class*, *supra* note 100, at 754 (noting ease of forming "collective vision" with homogeneity); Goel, *supra* note 67, at 390–91 (discussing political benefits of African American concentration); John A. Powell, *Race and Space*, in *Challenges to Equality: Poverty and Race in America* 20, 25 (Chester Hartman ed., 2001) (noting importance of political power to minority communities).

120. In Prince George's County, Maryland, a majority black suburban district, the former County Executive Wayne K. Curry tried to utilize these mobilization tactics to influence that state's U.S. senatorial election—a race crucial for Democratic hopes of taking control of Congress. Curry, a Democrat, joined several black county council members in crossing party lines to support black Republican candidate Michael Steele. Ovetta Wiggins, *Black Democrats Cross Party Lines to Back Steele for U.S. Senate*, *Wash. Post*, Oct. 31, 2006, at B1. According to Curry, the political move was an attempt to make the concerns of African Americans "primary to those who always take our votes for granted . . . Steele made a case of politics being local and about the issues that were resonant here." Avis Thomas-Lester, *Leaders Say They Endorsed Republican to Wake Democrats*, *Wash. Post*, Nov. 6, 2006, at B4.

121. See Bell & Parchomovsky, *supra* note 9, at 1976–77 & nn.29–30 (comparing immigrant pooling benefits with effects of black segregation); Cutler et al., *supra* note 12, at 475 (describing immigrant preferences for living together).

122. For a description of the economically empowering benefits of majority black communities, see Kevin Chappell, *America's Wealthiest Black County*, *Ebony*, Nov. 2006, at 88. *Ebony* is a periodical that has served an African American readership for over sixty years. *Id.* at 12. *Ebony's* publisher, Johnson Publishing Company, notably describes its mission as:

3. *Cultural Comfort and Identity*. — Just as nonsegregation can empower the black middle class, it can also serve as a cultural “balm” for the pains of discrimination and assimilative forces.¹²³ If metropolitan communities are to be truly and completely integrated, they require African Americans to consist of roughly twenty-five percent of the population throughout the entire region.¹²⁴ This “ideal” requires the creation of a universal black minority, producing an environment that reduces the cultural comfort that African Americans feel when they comprise the majority of a community.¹²⁵ In a society where minority status is a way of life for most middle-class African Americans, the home is oftentimes viewed as a haven.¹²⁶ In addition, black middle-class parents have expressed a desire for their neighborhoods to be a resource of cultural self-identity for their children.¹²⁷ These desires for comfort and a foundation for

[I]ncreasing African-Americans' pride in themselves by presenting their past and present achievements to America and to the world. This has been done by portraying the Black American experience in all its dynamics through the medium of printed words, images, cosmetics and fashion. Through the years the company has also labored to provide irrefutable proof to millions of Black Americans, young and old, that their dreams can and do come true.

About Johnson Publishing Company, at http://www.johnsonpublishing.com/assembled/about_overview.html (last visited Oct. 2, 2007) (on file with the *Columbia Law Review*).

123. See Cashin, *Middle-Class*, supra note 100, at 747–48 (describing healing qualities of black suburban enclaves).

124. Derrick Bell, *Race, Racism and American Law* § 2.14, at 67 (4th ed. 2000); Pattillo, *Black Neighborhoods*, supra note 8, at 317 (quoting Patterson, supra note 96, at 46). According to Patterson, this demand on African Americans is “not an unreasonable bargain. Euro-Americans are, after all, over 80 percent of the population, so there is some give on their part in their willingness to live in neighborhoods with less than their proportion of the population.” Patterson, supra note 96, at 46.

125. See Calmore, *Kerner Commission*, supra note 88, at 1505 (describing integration imperative as threat to black culture and community); Goel, supra note 67, at 393–94 (arguing that protecting cultural identity may motivate spatial proximity); Alex M. Johnson Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African Americans Again*, 81 *Cal. L. Rev.* 1401, 1431 (1993) [hereinafter Johnson, *Bid Whist*] (recalling black nationalist perspectives on threat of integration in preservation of black culture); Gary Peller, *Race Consciousness*, 1990 *Duke L.J.* 758, 793–94 (explaining black nationalist perspective that individual and distinct African American identity has developed).

126. See Sam Fullwood III, *Waking from the Dream: My Life in the Black Middle-class 204–05* (1996) (“So much goes on at the job that we have to endure, the slights and the negative comments and feelings that we’re unwanted . . . [B]y the time I come home I don’t want to have to deal with white people anymore.”); Calmore, *Race/ism*, supra note 46, at 1106–08 (arguing that retreating from damaging experiences of other integrated contexts motivates nonsegregation); Pattillo, *Black Neighborhoods*, supra note 8, at 321 (“I like to come home to a place and be surrounded by folks who would not think of asking me, why?” (quoting Cora Daniels, *Black Power Inc.: The New Voice of Success* 178 (2004))).

127. Calmore, *Kerner Commission*, supra note 88, at 1507 (describing black parents who expressed “a critical need to have their children come home to a black neighborhood . . . otherwise the children could lose a social and cultural grounding that would militate against their growing up ‘lost, not knowing who they are’”); see also Gentry, supra note 102 (quoting resident of Atlanta black enclave, “I have white friends. I’ve worked for

identity represent quality of life factors that have just as much value and consideration as quality of schools, taxes, and crime rates.¹²⁸

4. *Costs of Nonsegregation.* — The benefits of nonsegregation may enhance the quality of life for many black middle-class families, but they come with serious costs.¹²⁹ Many traditional elements of a desired community—proximity to job and retail options, good schools, and low crime rates—are not available in majority black middle class areas.¹³⁰ Within a metropolitan region, the hubs of high economic growth and opportunity tend to be a great distance from black middle-class development.¹³¹ This trend forces workers who are not near these hubs to bear a very large commuter burden to work within the region's economic corridor.

In addition, major retailers tend to underinvest in black middle class communities, thus limiting local options for goods and services.¹³² Discrimination through the marketplace creates suburban localities void of major department stores, non-fast food restaurants, and high-end entertainment.¹³³ Consumers must therefore pay additional transportation costs to shop in their desired stores, which are usually located in majority white suburban enclaves. As a further frustration to black middle-class

years with white folks. I used to live in an all-white neighborhood . . . but when my son started to listen to Guns N' Roses and Van Halen, I looked at my wife and we knew it was time to go.”); Johnson, *Bid Whist*, supra note 125, at 1419–22 (distinguishing unique normative culture of African Americans based on historical victimization transferred from generation to generation).

128. See Charles, supra note 92, at 56–59 (examining racial makeup as quality of life factor in neighborhood selection).

129. See Cashin, *Failures*, supra note 10, at 134–35 (describing quality of life tradeoffs of black middle-class majority); Massey & Denton, supra note 12, at 150–53 (explaining prioritization of quality of life factors over integrative preferences).

130. See Monifa Thomas, *Suburbs No Guarantee of Opportunity*, Chi. Sun-Times, Nov. 15, 2005, at 6 (examining lack of amenities for black middle-class enclaves in Chicago).

131. Cashin, *Middle-Class*, supra note 100, at 756; see also Michael A. Stoll, *The Brookings Inst., Job Sprawl and the Spatial Mismatch Between Blacks and Jobs 3–9* (2005), available at http://www.brook.edu/dydocroot/metro/pubs/20050214_jobsprawl.pdf (on file with the *Columbia Law Review*) (identifying disparity in proximity of African Americans to job opportunities in areas of job sprawl).

132. Cashin, *Middle-Class*, supra note 100, at 757; see also Dahleen Glanton, *Lingering Lines of Discrimination: The Neighborhood Is Solidly Middle Class, but Its Residents Have Trouble Getting Even a Pizza Delivered to Their Front Door*, Chi. Trib., Mar. 1, 1998, at C1 (describing reluctance of delivery retailers to serve black middle class Chicago community); Ernest Holsendolph, *Capital Investors Turn Backs on Affluent Blacks*, Atlanta J.-Const., July 21, 1997, at E9 (depicting departure of businesses such as Kmart and Cracker Barrel after affluent African Americans entered area); Jackie Spinner, *Pr. George's 'Shop at Home' Campaign Means Tough Choices for Many*, Wash. Post, Jan. 18, 1998, at B1 (observing lack of retail options for black middle-class residents).

133. For a detailed description of the dilemma of commercial disinvestment within black middle-class suburbs, see Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a 'Race-Making Situation'*, 35 U. Mich. J.L. Reform 749, 770–76 (2002).

shoppers, there are frequent complaints of poor customer service provided by the retailers that actually exist in the community.¹³⁴

The same theme of paying additional costs to supplement suburban amenities is evident within the area of education. Many suburban families expect their local public schools to be regionally competitive. However, strong college preparatory public schools are difficult to find in black middle-class communities, especially relative to their majority white counterparts.¹³⁵ Enrollment in private schools has become both a cause of and response to this problem. Those who can afford the alternative will pay the additional tuition costs just to guarantee a quality education without challenges such as overcrowding, underachievement, and underfunding.¹³⁶

Part of the reason for this disparity in quality of life factors relative to "traditional" suburban communities is the proximity of many black suburban enclaves to concentrations of poverty. These communities often end up abutting the metropolitan region's impoverished black ghetto.¹³⁷ Majority white suburban enclaves tend to be much farther from concentrated poverty.¹³⁸ Consequently, the costs and tax burden of the black ghetto are disproportionately charged to members of majority black suburbs. These costs are so consistent around the nation that Professor Sheryll Cashin was forced to admit that she has not been able to find a single, "thriving black community with excellent public schools, an attractive and growing tax base, low crime rates, a host of stores, restaurants, and recreational amenities, in short, something approximating the advantages of majority-white communities"¹³⁹

This reality brings into question the actual choice that African Americans are making when they purchase a home in a community where they are the majority. This nonsegregative choice requires a sacrifice of those same amenities that all households value in their search for a

134. Cashin, *Failures*, supra note 10, at 154 (describing complaints of poor service by retailers in black suburb of Prince George's County, Maryland).

135. *Id.* at 146–47.

136. *Id.* at 141–47 (describing challenges faced by schools in Prince George's County, Maryland).

137. Pattillo-McCoy, *Black Picket Fences*, supra note 101, at 27; see also Ron Grossman & Byron P. White, *Poverty Surrounds Black Middle Class: Upscale Neighborhood Virtually an Island*, *Chi. Trib.*, Feb. 2, 1997, at C1 (observing proximity of Chicago black middle-class community to region's poverty).

138. See Massey & Denton, supra note 12, at 9 (noting that while middle class always tries to avoid the poor, middle-class African Americans are least likely to do so); Pattillo-McCoy, *Black Picket Fences*, supra note 101, at 29 (describing socioeconomic differences of white and black suburban populations).

139. Cashin, *Failures*, supra note 10, at 158. In Prince George's County, Maryland, many middle-class African Americans are moving to neighboring counties in search of these amenities. See Phillip Rucker & Avis Thomas-Lester, *Shifting Migration Patterns Alter Portrait of Pr. George's*, *Wash. Post*, July 26, 2007, at A1 ("[T]housands of middle-class people, many of them African American, have left for neighboring counties in search of better schools, less crime and bigger houses.").

community that facilitates the achievement of the American dream. Part III will examine another contributing factor in suburban segregation, the discriminatory practice of racial steering. A review of contemporary cases and regulations related to racial steering will show the difficulties of distinguishing private choice from discriminatory steering.

III. RACIAL STEERING AS AN OBSTACLE TO CHOICE

The perceived private choices of homeowners may actually be manipulated by the discriminatory practice of racial steering. Part III.A describes racial steering and explains how the practice has been widely viewed as violating the Fair Housing Act. Part III.B then describes the difficulties of actually prosecuting discriminatory real estate agents in situations when steering intertwines with private choice in a legally indistinguishable manner.

A. *Racial Steering in Law and in Practice*

Despite the Fair Housing Act's mandate that African Americans be allowed to choose where they want to live, racial steering stands as a considerable obstacle in their path.¹⁴⁰ The Supreme Court has defined the practice as:

[when] real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited by members of other races or groups.¹⁴¹

Although the Court has granted standing for plaintiffs to sue on claims attacking racial steering, it has not conclusively determined that the practice violates the Act.¹⁴² However, lower courts have held that ra-

140. See Sander, *supra* note 12, at 893 ("Discrimination today can be characterized as a deterrent rather than a wall.").

While the focus of this section is on racial steering, many other discriminatory forces are at work within the private housing market, especially in mortgage lending and insurance. Thus the elimination of racial steering may not fully eliminate all aspects of discrimination in the housing sales process. Therefore this Note will be considering the eradication of racial steering as at minimum a marginal improvement in overall housing choice for consumers. For an analysis of how discrimination in mortgage lending and insurance can lead to a "tax" on black homebuyers, see John Yinger, *Closed Doors, Opportunities Lost* 244 (1995). See generally Stephen L. Ross & John Yinger, *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair Lending Enforcement* (2002) (summarizing economic evidence on discrimination in mortgage markets).

141. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1 (1982).

142. See *id.* at 370 n.7 (noting that while lower court found racial steering to be violation of Fair Housing Act, Supreme Court would not express view of ruling's correctness); *Gladstone Realtors v. City of Bellwood*, 441 U.S. 91, 115 n.32 (1979) ("The federal courts . . . have concluded that racial steering is prohibited by [the Fair Housing Act]. We do not reach this issue, as it is not presented by this case.").

cial steering is prohibited under section 3604(a) of the Act,¹⁴³ which outlaws making housing "otherwise . . . unavailable . . . because of race, color, religion, sex, familial status, or national origin."¹⁴⁴ Additionally, the Department of Housing and Urban Development, the agency responsible for administering the Fair Housing Act,¹⁴⁵ has supported the courts by issuing regulations prohibiting racial steering.¹⁴⁶

Racial steering has historically been a common practice of real estate agents and brokers within the housing sales market.¹⁴⁷ Its most popular present day form is "geographic steering" used to maintain segregated living patterns. Geographic steering occurs when homebuyers are recommended houses in areas where they are in the racial majority. Real estate agents practicing geographic steering may also use the race of a homebuyer to determine the socioeconomic status, school quality, and racial makeup of the neighborhoods they recommend.¹⁴⁸ According to the 2000 Housing Discrimination Study (HDS2000), sponsored by the Department of Housing and Urban Development, geographic steering is an increasingly serious problem within the housing sales market. It represents one of the few forms of discrimination that is not declining within the industry.¹⁴⁹

HDS2000 classified geographic steering into three categories: information steering, segregation steering, and class steering.¹⁵⁰ Information steering involves an agent showing a different number of potential neighborhoods to black homeseekers than to white homeseekers.¹⁵¹ Segregation steering resembles traditional racial steering in that it entails black

143. *Cabrera v. Jakobovitz*, 24 F.3d 372, 390 (2d Cir. 1994); *City of Chi. v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990); *Sanders v. Dorris*, 873 F.2d 938, 943-44 (6th Cir. 1989); *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 139-41 (6th Cir. 1985); *McDonald v. Verble*, 622 F.2d 1227, 1233 (6th Cir. 1980); *United States v. Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978); Schwemm, *supra* note 10, § 13:5 & n.6, at 13-13 to -14 (citing lower federal court cases applying FHA to steering).

144. 42 U.S.C. § 3604(a) (2000).

145. See *id.* § 3608(a) ("The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.").

146. See 24 C.F.R. § 100.70(c) (2007).

147. See generally Rose Helper, *Racial Policies and Practices of Real Estate Brokers* (1969) (examining racial steering as foundation of real estate broker policy).

148. HDS2000 Phase I, *supra* note 9, at 6-1.

149. *Id.* at 8-8. For further discussion of these results, see Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, in *The Geography of Opportunity*, *supra* note 6, at 81, 94-96. HUD has also financed a National Fair Housing Alliance study of racial steering. Nat'l Fair Hous. Alliance, *Unequal Opportunity—Perpetuating Housing Segregation in America: 2006 Fair Housing Trends Report 4* (2006), available at http://www.nationalfairhousing.org/resources/news/Archive/resource_24256802754560627686.pdf (on file with the *Columbia Law Review*). The study estimated that steering to particular neighborhoods based on race occurred in eighty-seven percent of consumer interactions with real estate agents. *Id.* at 9-10.

150. HDS2000 Phase I, *supra* note 9, at 6-1.

151. *Id.*

homeseekers being shown areas with higher minority populations than areas shown to white homeseekers.¹⁵² Class steering is the practice of showing black homeseekers homes in communities of lower socioeconomic status than those shown to white homeseekers.¹⁵³ All of these forms of geographic steering cloud the ability of a buyer to make an informed housing decision among a wide array of available communities.

B. *Nonsegregative Choice or Geographic Steering?*

The most prevalent and camouflaged tool used by real estate agents to steer is editorializing.¹⁵⁴ When agents provide their own positive and negative views about certain communities, they can greatly influence a homebuyer based on their status as experts. These comments tend to be made to white homeseekers as encouragement to select areas with majority white populations and fewer impoverished households.¹⁵⁵ While the impact of agent editorials may be profound, the illegality of this action may be very difficult to determine in light of consumer driven choice.

Within the context of black middle-class communities, where at least a portion of the residents openly admit to choosing the area based on its racial composition, it may be nearly impossible to distinguish the driving factor for this form of segregation. Geographic steering is definitely a force, but so is nonsegregation.¹⁵⁶ Also, an African American's choice not to integrate may be viewed as an exercise of one's fair housing freedom, or a decision based on the limited options made available through steering. If discrimination was involved within the process, the unfortunate truth is that the homebuyer may not even recognize it.¹⁵⁷ These discriminatory and individual preference factors are so intertwined that they cloud the determination of a clear legal standard under the Fair Housing Act's racial steering jurisprudence.

1. *Bellwood v. Dwivedi*. — One of the most influential cases on racial steering, *Village of Bellwood v. Dwivedi*,¹⁵⁸ illustrates the difficulty in distinguishing between steering and consumer preference. Through test-

152. *Id.*

153. *Id.* at 6-1 to -2.

154. *Id.* at 6-16.

155. *Id.*; see also Bo Zhao, Jan Ondrich & John Yinger, *Why Do Real Estate Brokers Continue to Discriminate? Evidence From the 2000 Housing Discrimination Study 20* (Ctr. for Policy Research, Working Paper No. 67, 2005), available at <http://www-cpr.maxwell.syr.edu/cprwps/pdf/wp67.pdf> (on file with the *Columbia Law Review*) (using empirical research to determine that agents are motivated by personal prejudice, as well as prejudice of their white customers, when engaging in racial steering).

156. See Goel, *supra* note 67, at 392-93 (“[I]t may be difficult to distinguish between ‘voluntary’ and ‘involuntary’ segregation. If true, no form of separation should be permissible.” (footnotes omitted)).

157. See Sander, *supra* note 12, at 892 (“[O]vert discrimination is unusual today; when a black [homebuyer] is the victim of discriminatory treatment, he or she is likely to not even know it.”); *infra* note 196 and accompanying text.

158. 895 F.2d 1521 (7th Cir. 1990).

ing, evidence was introduced against a realty company showing that its agents generally directed black homeseekers to integrated areas and white homeseekers to areas where they were the overwhelming majority.¹⁵⁹ In clarifying the legal standard for this case, Judge Richard Posner held that consumer preference serves as a justifiable reason for an agent to steer on the basis of race.¹⁶⁰ Consequently, when real estate agents accommodate the community racial preferences of their clients, they do not discriminate on unlawful grounds. Even when evidence of a discriminatory effect exists, as was the case in *Dwivedi*, the accommodation of consumer preference is a noninvidious justification for this effect.¹⁶¹

Under a disparate impact standard, discrimination can still be found if neutral actions disproportionately impact a group based on their race.¹⁶² Judge Posner dismissed the use of this standard within the context of geographic steering because he felt that real estate agents working within a marketplace cannot control the racial composition of communities in the same manner that an entity such as the government could.¹⁶³

159. *Id.* at 1525.

160. *Id.* at 1530. Posner stated that "the broker who shows a black person houses in an integrated community because that person requests to see houses there is not treating him differently because of race." *Id.* One of the earliest racial steering cases, *Zuch v. Hussey*, also noted this difference between illegal agent steering and buyer expectation. 394 F. Supp. 1028, 1039 n.9 (E.D. Mich. 1975). The court noted that:

[I]n this instance [the court] can enjoin the defendant from attempting to channel prospective buyers into areas which he feels would be better suited to the race of the buyers, but the Court cannot stamp out the expectations of the buyers. The result is that a thin line is drawn between illegal conduct and satisfying the customer, until eventually the two (2) are merged.

Id.

The Supreme Court has also respected the role of private choice in the area of race and segregation. In the school desegregation case of *Freeman v. Pitts*, the Court determined that segregation created by private housing choices was out of its jurisdiction. 503 U.S. 467, 495 (1992). Also, in another school desegregation case, *Missouri v. Jenkins*, Justice Clarence Thomas emphasized that current segregated living patterns may simply be the effect of "voluntary housing choices" or "other private decisions." 515 U.S. 70, 116 (1995) (Thomas, J., concurring).

161. See *Dwivedi*, 895 F.2d at 1533-34; cf. *Leadership Council for Metro. Open Cmty., Inc. v. Rossi Realty, Inc.*, No. 98 C 7852, 2001 WL 289870, at *5 (N.D. Ill. Mar. 15, 2001) (stating that jury in racial steering case "could conclude that Defendants were honestly trying to serve the individual preferences of the customers").

162. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."). The disparate impact standard was first introduced within the context of employment discrimination under Title VII. The Supreme Court has yet to apply this standard to claims under the Fair Housing Act, but every lower circuit court has allowed such claims. See, e.g., *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679-81 (D.C. Cir. 2006) (reviewing development of disparate impact standard within context of Fair Housing Act); see also Schwemm, *supra* note 10, § 10:6, at 10-42 to -52 (describing standard and listing relevant lower court cases).

163. When comparing government and private sector actors, the court noted: It is one thing to require a municipal government to consider the impact of its zoning decisions on the racial composition of the municipality, another to

Based on the *Dwivedi* standard, there is a legal distinction between geographic steering and self steering. Illegal geographic steering is restricting a homebuyer's choice of neighborhoods, or coercing the consideration of certain neighborhoods based on race.¹⁶⁴ It is an action that makes housing "otherwise unavailable" under section 3604(a) of the Fair Housing Act. Self steering, however, is when a consumer expresses interest in certain communities because of race, and the real estate agent meets the desires of the client. The agent is not discriminating against the customer or denying access to a dwelling based on race.¹⁶⁵

The gray area of this standard is when race is never mentioned by the consumer or the agent, but a discriminatory effect still exists.¹⁶⁶ In *Dwivedi*, no evidence was presented that the testers requested specific types of communities based on race, yet the court still allowed the defendants to use customer preference as a defense to the steering evidence.¹⁶⁷ The agent would therefore be assuming a customer's integrative preferences based on the race of that client, or other quality of life factors which may serve as a proxy for race.¹⁶⁸ This action certainly seems like disparate treatment because of race, but the *Dwivedi* court cited several reasons why the case against the real estate agents was weak: the inability of the plaintiffs to provide an explanation for the defendants' discrimination, the existence of real customers who could testify that they were not steered, and the potential harm to black suburban migration if agents are deterred from providing housing in integrated communities.¹⁶⁹ These concerns add to the uncertainty of whether a case of geographic steering can be proved in situations where an agent may either perceive real customer preference for communities of a given racial make-up or merely assume such preferences.

2. *Racial Steering after Dwivedi*. — Since the *Dwivedi* case, there has been very little development of this legal issue by the courts. The Department of Housing and Urban Development (HUD), however, has sought to clarify the role of consumer racial preferences, with somewhat

require an individual broker to consider and take steps to prevent the aggregate impact of many brokers' efforts to give individual customers what those customers want individually, though not collectively.

Dwivedi, 895 F.2d at 1533; see also *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (applying disparate impact standard to municipal government defendant); Sander, *supra* note 12, at 906 ("In the housing field, it is far more difficult to identify a single governmental entity with responsibility for the housing market . . .").

164. *Dwivedi*, 895 F.2d at 1530.

165. *Id.* at 1529–31.

166. See Schwemm, *supra* note 10, § 13:7, at 13-23 to -26 (describing difficulties raised by *Dwivedi* decision).

167. *Dwivedi*, 895 F.2d at 1531.

168. See *id.*; Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 *Yale L.J.* 808, 811–12 (1976) (describing real estate broker assumptions based on race).

169. *Dwivedi*, 895 F.2d. at 1532.

controversial results.¹⁷⁰ In 1996, a real estate agency representing homebuyers wrote a letter to HUD asking what actions may be taken to accommodate the express racial preferences of a client buyer.¹⁷¹ Elizabeth K. Julian, an Assistant Secretary with HUD, replied:

While there is nothing in the [Fair Housing] Act to exclude the actions of a buyer's agent from the Act's coverage, [HUD] concludes that . . . a buyer's agent would not violate the Act merely by mutely accommodating the client's request to limit, on a protected class basis, the search for dwellings.¹⁷²

Citing *Dwivedi*, Julian made the slight distinction between an agent who illegally influences a customer's preference and one who legally addresses a buyer's inquiry into race.¹⁷³ Her conclusion was aligned with existing case law that accommodation to the expressed consumer racial preferences of a buyer was an acceptable business practice. The HUD letter was met with strong protest from fair housing advocates,¹⁷⁴ and was retracted two months later.¹⁷⁵ Based on arguments of ethics, morality, and prudence, Julian's subsequent letters strongly disapproved of agent accommodation to consumer racial preferences, while maintaining that such action is probably legal.¹⁷⁶

170. See Chris Sicks & Stacie Zoe Berg, Fair Housing Loophole or Bad Idea?, Wash. Times, Nov. 22, 1996, at F1 (summarizing debate among housing industry over HUD's letter supporting agent accommodation of consumer racial preference).

171. *Id.*

172. Letter from Elizabeth K. Julian, Assistant Sec'y, HUD, to Jill D. Levine, Legal Counsel, The Buyer's Agent Inc. (Oct. 2, 1996), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent (on file with the *Columbia Law Review*).

173. *Id.* Julian described several examples, including the following:

[I]f a white buyer said to his/her agent, 'I want to live in a white neighborhood,' or 'Don't show me any houses where a lot of minorities live,' the agent would not violate the Act if he/she acted upon his/her client's instruction. On the other hand, the agent would violate the Act if he/she said, 'I don't blame you for wanting to live in a white neighborhood,' 'I would never do that (i.e., show a white homebuyer houses where a lot of minorities live),' or something similar that indicated the agent shared or encouraged the buyer's preference/dispreference.

Id.

174. See Sicks & Berg, *supra* note 170 (quoting disapproving agent who complained that "letter invites agents to cross the line and mistakenly violate the law"); Letter from Aurie A. Pennick, President, Leadership Council for Metro. Open Cmty., to Elizabeth K. Julian, Assistant Sec'y, HUD (undated), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent (on file with the *Columbia Law Review*) ("Your letter to Jill D. Levine . . . was received with shock and dismay by fair housing advocates and many real estate professionals.").

175. Letter from Elizabeth K. Julian, Assistant Sec'y, HUD, to Jill D. Levine, Legal Counsel, The Buyer's Agent Inc. (Dec. 3, 1996), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent (on file with the *Columbia Law Review*).

176. See Letter from Elizabeth K. Julian, Assistant Sec'y, HUD, to Jill D. Levine, Legal Counsel, The Buyer's Agent Inc. (Nov. 8, 1996), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent (on file with

Thus, both HUD and the courts are in agreement that real estate agents may not limit consumer choice in the homebuying process. There is also agreement that consumer preferences to live in certain communities based on race are acceptable under the Fair Housing Act. Yet in between these two legal poles lies an ambiguous zone where geographic steering and consumer choice can be somewhat indistinguishable.¹⁷⁷ For example, a consumer's preference for areas with good schools, low crime, or even diversity can open up opportunities for an agent to guide that buyer to neighborhoods that would perpetuate segregated living patterns.¹⁷⁸

Even if geographic steering can be proven in a case involving customer preferences, determining the impact of this action may still be difficult. For plaintiffs to have standing to bring a steering claim against a real estate agent, they must show that the alleged discrimination has caused them to suffer a "distinct and palpable injury."¹⁷⁹ When a single act of steering occurs, a homebuyer is denied the free choice of living in an available community, regardless of race. This one act, however, may not substantially affect the integrative patterns of a metropolitan region, but rather a "relatively compact neighborhood."¹⁸⁰ Thus, a claim of geographic steering within black middle-class communities must be able to overcome not only a customer preference defense,¹⁸¹ but also a limited determination of injury and potential remedy.

As has been discussed in Part I, the antidiscriminatory provisions of the Fair Housing Act should have removed the walls surrounding the ghetto. In theory, middle-class African American families should be able to integrate majority white suburban neighborhoods, carrying into effect the intent of those who drafted the Fair Housing Act. However, the existence of suburban enclaves dominated by African Americans undermines the Act's vision. Both private choice¹⁸² and undeterred steering contribute to the maintenance of these communities, but these two factors are hard to distinguish and individually address. In light of these challenges, Part IV will propose some suggestions for revamping how fair housing is

the *Columbia Law Review*) ("The fact that Section [3604] (a) of the Fair Housing Act may, under limited circumstances, not prohibit such accommodation does not make it right, does not make it ethical, and it is not the policy of [HUD] to endorse such conduct.").

177. See Schwemm, *supra* note 10, § 13:7, at 13-20 to -31 (noting continuing problems and ambiguities in racial steering law).

178. See Nat'l Fair Hous. Alliance, *supra* note 149, at 12 (exposing use of schools by agents as proxy for racial composition).

179. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

180. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 114 (1979); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982) (supporting *Bellwood* definition of racial steering injury); Schwemm, *supra* note 10, § 13:7, at 13-29 to -30 (interpreting *Bellwood* to mean that "defendants could escape liability if their steering activities were not shown to be significant enough to influence the local housing market").

181. See *supra* Part III.B.1.

182. See *supra* Part II.

envisioned and achieved, in order to accommodate the desires of all Americans.

IV. REVISING THE ROLE OF THE FAIR HOUSING ACT

A structural conflict appears to exist between the Fair Housing Act's dual goals of providing equal and free housing choice and attaining integrated living patterns.¹⁸³ The continued existence of segregated ghettos sustains hopeless conditions for the poor and stigmatizes middle-class African Americans who seek integration.¹⁸⁴ Even members of the black middle class who choose not to integrate face steep costs because of the burdens of their proximity to the ghetto.¹⁸⁵

This Part suggests solutions to these challenges. First, Part IV.A will evaluate the Fair Housing Act and recommend that its effectiveness is limited solely to being a preparatory step for future progressive activity. Then, Part IV.B will analyze what the next steps following the Fair Housing Act were to be, and how these steps would still be effective today in moving the nation toward more integrated living patterns. Finally, Part IV.C will emphasize the importance of continuing to protect the choice not to integrate, even while striving for a goal of integration.

A. *Fair Housing Act Is Only the First Step*

While courts have interpreted the Fair Housing Act to both affirmatively remove discrimination and attain integration,¹⁸⁶ the legislation was only equipped to create the opportunity for all homebuyers to choose the integrative ideal.¹⁸⁷ The law was not designed to be a total solution for the problems of segregation and inequality.¹⁸⁸ After the passage of the Fair Housing Act in 1968, however, the national agenda largely moved away from issues of social equity in housing.¹⁸⁹ As a result, the Fair Housing Act had to take on a much larger role than that originally in-

183. See *supra* Parts I.B–C.

184. See *supra* Part II.A.

185. See *supra* Part II.B.4.

186. See *supra* Part I.C.

187. See *supra* Part I.B.

188. See Cashin, *Failures*, *supra* note 10, at 321 (“Anti-discrimination enforcement, though necessary, is not a sufficient condition for achieving true integration.”); Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, in *The Geography of Opportunity*, *supra* note 6, at 310, 314–15 [hereinafter *Briggs, Politics*] (“[W]e should disabuse ourselves of the notion that mere enforcement of antidiscrimination law is a powerful tool for reducing segregation by race and class in America.”).

189. See Massey & Denton, *supra* note 12, at 4 (“Following the passage of the Fair Housing Act . . . residential segregation dropped off the national agenda.”); Xavier de Souza Briggs, *Introduction*, in *The Geography of Opportunity*, *supra* note 6, at 1, 5 (describing disappearance of equal geographic opportunity from public focus).

tended by its drafters¹⁹⁰ by shouldering most of the weight for achieving integration.¹⁹¹

Discrimination, especially racial steering, is still a major problem within the private housing market.¹⁹² Geographic steering by real estate agents clouds the notion of true choice for both white and black families, thus subverting the Fair Housing Act's statutory aim.¹⁹³ Stronger enforcement of the Act could be a useful tool for eliminating this discrimination, but favorable judicial decisions are not guaranteed, and remedies are still limited by the private choices of consumers.¹⁹⁴ Substantively, the courts may have a problem distinguishing between actual steering practices and the accommodation of consumer preference as hinted in *Dwivedi*.¹⁹⁵ For fair housing agency plaintiffs and the rare individual plaintiffs who actually recognize that they have been steered,¹⁹⁶ remedies may be limited to specific damages for the individual acts of discrimination. These awards may benefit the particular litigants, but nevertheless fail to address the broader problem of geographic steering in the region.¹⁹⁷

The Justice Department is in the best position to address this problem on a broader level, by bringing "pattern and practice" claims¹⁹⁸ in federal court. If race discrimination cases become a priority for the agency,¹⁹⁹ then a litigation strategy aimed at seeking broad relief can

190. See supra Part I.B.3.

191. See supra Part I.C.

192. See supra Part III.A.

193. See supra Part III.B.

194. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1054 (E.D. Mich. 1975) ("This Court cannot compel people of different races to live together in any neighborhood."). The *Zuch* court also noted that racial steering as a legal issue is "complicated by conduct and attitudes of people of the city which cannot be reached by laws or the Court." *Id.* at 1053.

195. See supra Part III.B.1.

196. See Briggs, Politics, supra note 188, at 313 (noting that editorializing by realtors is difficult for racial steering victims to identify); George C. Galster, The Evolving Challenges of Fair Housing Since 1968, *Cityscape: J. Pol'y Dev. & Res.*, No. 3, at 123, 132 (1999) ("The fundamental flaw in The Fair Housing Act is that it relies on the victim to recognize and formally complain about suspected acts of discrimination. Given the subtlety of discrimination . . . there is minimal chance of deterrence." (citations omitted)).

197. See 42 U.S.C. §§ 3612(k), 3613(c) (2000) (authorizing relief of damages and equitable relief for private and administrative claims).

198. See 42 U.S.C. § 3614(a). It states:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

Id.

199. See Nat'l Fair Hous. Alliance, supra note 149, at 23 (declaring that lack of federal funding for fair housing enforcement shows lack of government dedication to integration); Briggs, Politics, supra note 188, at 314 (arguing that federal government resources have never been prioritized for Fair Housing Act enforcement); William Tisdale,

help implement innovative remedies such as affirmative marketing and training for real estate agents. Through a consent decree, a defendant to a Justice Department lawsuit can become an active private sector agent for integration.²⁰⁰ The unfortunate truth, however, is that no remedy to steering can force a white family to live in a neighborhood with an uncomfortably high number of black neighbors.²⁰¹ The eradication of geographic steering does not eliminate white fear and the stereotypes that fuel this sentiment, nor does it eliminate the empowering appeal of nonsegregation.²⁰²

The Fair Housing Act has laid the foundation for encouraging private consumer choice within the housing industry. This was all that it was intended to do, and this may be the limit of its effectiveness.²⁰³ The preparatory step for integration has been in place for nearly forty years, and it is time to emphasize the next steps in the process of meeting the goal of establishing a single integrated nation. Part IV.B will suggest the elements of this next phase.

B. *The Next Steps*

The Fair Housing Act represents Congress's implementation of the first part of the Kerner Commission's recommendations for the reduction of residential segregation.²⁰⁴ Therefore, the additional progressive objectives outlined by the Commission should carry great weight in determining the next steps of integrative policy.²⁰⁵ Antidiscrimination created some access to the suburbs for the black middle class. Enrichment poli-

Fair Housing Strategies for the Future: A Balanced Approach, *Citiescape: J. Pol'y Dev. & Res.*, No. 3, at 147, 147 (1999) ("[R]esidential racial integration has not been high on the national priority agenda. This country has never had a national housing policy . . ."); Sander, *supra* note 12, at 888–90 (describing history of poor Fair Housing Act enforcement).

200. Bill Lann Lee, An Issue of Public Importance: The Justice Department's Enforcement of the Fair Housing Act, *Citiescape: J. Pol'y Dev. & Res.*, No. 3, at 35, 43 (1999). In 1998, the Department of Justice settled a racial steering claim with First Real Estate Corporation, an Alabama company. The resulting consent decree required not only compensatory damage payments, but also the promotion of fair housing in general and the specific integration of its own developments. *Id.* (citing *United States v. First Real Estate Corp., C.A.*, No. CV-98-N1212-S (N.D. Ala. May 14, 1998)).

201. See Bell & Parchomovsky, *supra* note 9, at 1980 ("Law, after all, is not the only incentive affecting human behavior."); Briggs, *Politics*, *supra* note 188, at 314 ("Simply put, reducing bad behavior in the market will not clearly change what people desire, only their ability to realize those desires.").

202. Sander, *supra* note 12, at 902–03; see also Paul Boudreaux, An Individual Preference Approach to Suburban Racial Desegregation, 27 *Fordham Urb. L.J.* 533, 546 (2000) (noting sociological observations that anti-discrimination legislation may do little to alter white preference to not live near black households); Briggs, *Politics*, *supra* note 188, at 314–15 (observing black and white preferences as obstacle to integrated society).

203. See *supra* Part I.B.

204. See *supra* Part I.A.

205. See Calmore, *Race/ism*, *supra* note 46, at 1124–25 (promoting reflection back to Kerner Report in creating present day integration); *supra* Part I.B.3.

cies must now be centered on the ghetto to facilitate socioeconomic equalization for African Americans of all classes.²⁰⁶

Ghetto enrichment is not a directly integrative policy. It does not seek to manage integration or proactively stabilize resegregating communities.²⁰⁷ Alternatively, the direct aims of ghetto enrichment are empowerment and equality. This policy is simply another required transitory step in achieving the integrated living patterns intended by both the Kerner Commission and Congress.²⁰⁸

Enrichment seeks to improve the conditions of ghetto residents within their present environment, improving their quality of life without forcing them to endure the burden of leaving their communities.²⁰⁹ While the ghetto community was initially created through racism and dis-

206. John Yinger, *Sustaining the Fair Housing Act*, *Cityscape: J. Pol'y Dev. & Res.*, No. 3, at 93, 100 (1999) ("A comprehensive program to combat housing discrimination should therefore include not only enforcement activities, but also programs to help eliminate intergroup economic disparities and programs to promote residential integration." (citation omitted)); Sander, *supra* note 12, at 933 (promoting redevelopment of ghetto).

207. Integration maintenance programs seek to encourage white residents to remain in neighborhoods with growing black populations, and may also encourage black residents to move into neighborhoods that are overwhelmingly white. These programs often use financial incentives to influence the housing decisions of residents. See Myron Orfield, *American Metropolitcs: The New Suburban Reality* 125–26 (2002) [hereinafter Orfield, *American Metropolitcs*] (noting effectiveness of financial incentive programs within a plan for managing integration). They may take the form of mortgage subsidies for residents who choose to live in an area where they are the racial minority. See, e.g. Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 37 *Fordham Urb. L.J.* 877, 925–26 (2006) (describing Shaker Heights, Ohio, program which offered low cost mortgage loans to integrating homebuyers). These programs may also seek to provide equity insurance for residents who live in a neighborhood where the large entry of African Americans drives fear of a drop in area property values. See Bell & Parchomovsky, *supra* note 9, 2005–09 (describing how equity insurance may reduce resegregation, but may also reward "the most bigoted" residents of a community); Sander, *supra* note 12, at 930–31 (arguing benefits of equity insurance).

208. Kerner Report, *supra* note 24, at 224 ("Enrichment must be an important adjunct to any integration course[.] . . . a means toward the goal; it is not the goal."); see also Cashin, *Failures*, *supra* note 10, at 305 (noting that enrichment policies of Kerner Report were "largely ignored"); Calmore, *Kerner Commission*, *supra* note 88, at 1488 (recalling enrichment recommendations of Kerner Report).

Alex M. Johnson Jr. has examined the role of transitory phases with regards to school desegregation, and his analysis seems equally applicable in the housing context. See Johnson, *Bid Whist*, *supra* note 125, at 1434–35. There is a present reality, future ideal, and implementing bridge that transitions the reality towards the ideal. See *id.* (citing Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. Rev.* 581, 583 (1977)). The bridge must be a policy that works to empower segregated and impoverished African Americans where they are, so that they might be in a position to integrate in a manner that maximizes their desired quality of life. See *id.* at 1438 ("[O]nly after the process of integration has been accomplished can the ideal of integration be achieved.").

209. See Calmore, *Kerner Commission*, *supra* note 88, at 1495 ("Fair housing must be reconceptualized to mean not only increased opportunity for black[] [residents] to move beyond their socio-territorial disadvantage but also to mean enhanced choice to overcome opportunity-denying circumstances while continuing to live in black communities.").

crimination, social bonds and a legitimate culture have developed under these circumstances, and they must be recognized and respected.²¹⁰ Creating an integrated environment will require strengthening these communities.²¹¹

Federal funding is an appealing source of enrichment, but this option is not aligned with the nation's fiscal and political environment.²¹² Therefore, an effective alternative approach is to utilize regional policy to focus on strengthening the quality of life in critical areas, such as the ghetto and black middle-class communities.²¹³ Many metropolitan areas are divided into municipalities of varying size and wealth, with predominantly minority localities bearing a disproportionate share of the costs stemming from regional poverty.²¹⁴ As these communities seek political empowerment, especially on a state level, they should focus on promoting regional tax base sharing.²¹⁵ Alliances with urban localities and other

210. See Johnson, *Bid Whist*, supra note 125, at 1437 (emphasizing integration that benefits all and not just white Americans to detriment of African Americans). According to John O. Calmore, the failure to recognize the legitimacy of ghetto communities is another form of white domination forcing the dispersal of the ghetto into white America. Calmore, *Kerner Commission*, supra note 88, at 1493. But see Gary Orfield, *The Movement for Housing Integration: Rationale and the Nature of the Challenge*, in *Housing Desegregation and Federal Policy*, supra note 78, at 18, 20 (dismissing ghetto enrichment as costly and politically unpopular). See generally John F. Kain & Joseph J. Persky, *Alternatives to the Gilded Ghetto*, *Pub. Int.*, Winter 1969, at 74 (supporting complete dispersal of black ghetto due to its unfavorable metropolitan position relative to suburbs).

211. Briggs, *Politics*, supra note 188, at 318 (arguing that leveraging enrichment must accompany integration efforts).

In light of recent trends in urban development, it must be noted that enrichment is distinguishable from gentrification. Gentrification has been defined as the process "by which people of higher incomes move into lower income urban areas and seek to change its physical and social fabric to better meet their needs and preferences." J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 406 (2003). It often involves the displacement of the African American residents. See John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 *How. L.J.* 433, 436 (2003) ("Although studies of it often ignore ethnicity and race, gentrification has a very clear racial component. Commonly, higher-income white households replace lower-income minority ones" (footnote omitted)). This process does not represent an empowerment of the ghetto community, but another potential form of resegregation.

212. See supra note 199. In light of the federal government's role in creating segregated communities, this policy trend is unfortunate. See supra note 12.

213. See generally Richard Briffault, *Localism and Regionalism*, 48 *Buff. L. Rev.* 1 (2000) (comparing and contrasting regionalist perspective to municipally local perspective); Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 *Yale L.J. Pocket Part* 203 (2006), at <http://thepocketpart.org/2006/12/11/briffault.html> (on file with the *Columbia Law Review*) (promoting benefits of regional policy perspective).

214. See Cashin, *Middle-Class*, supra note 100, at 774 (noting that affluent suburbs "reap disproportionate benefits in the competition for public and private resources, export some costs to the rest of the region, and undertake few regional burdens").

215. See *id.* at 773 (promoting regionalism as tool "to redress the inequalities that flow from racial and economic segregation").

inner-ring suburbs may be necessary to implement this agenda successfully.²¹⁶ Regionalism will then allow the money generated throughout a metropolitan area to address the costs of maintaining the metropolis equitably. This could help equalize the provision of fiscal services.

Enrichment policy will not only have a direct effect on the opportunities of ghetto residents, but also an indirect effect on members of the black middle class who are tied to the ghetto by stigma and, often, proximity. The service burdens of the ghetto will be distributed among a greater population and will not fall disproportionately on its black middle-class neighbors. Also, the stereotype of the ghetto as a spreading poison to stable communities will be countered with exceptional examples of livable urban environments.²¹⁷ The subsequent stigma attached to integrating middle-class African Americans because of their race could dissolve, thus reducing the probability of white fear and resegregation.²¹⁸ Amid diminishing stereotypes, real estate agents have less economic motivation to steer on the basis of race.²¹⁹ This can reduce incidents of geographic racial steering, especially editorialization, and allow a true marketplace where only private choice guides the racial makeup of communities. Part IV.C will show why this private choice, even the choice not to integrate, must remain protected.

C. *Protecting the Choice Not to Integrate*

Unfortunately, policies to enrich and empower the ghetto may have little effect on the stereotypes that plague middle-class African Americans. The concept of race as a proxy for low quality of life may be a mask for simple racial bias, which may not be eradicated by real examples of desirable predominantly black communities.²²⁰ Also, the legacy of discrimination may be too strong to be offset by limited integrative policies. These challenges support the need for African Americans to be able to choose not to integrate.

216. See Orfield, *American Metropolitcs*, supra note 207, at 175 (arguing importance of collaboration of “at-risk” communities in development of regionalist policy); Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *Geo. L.J.* 1985, 2033–36 (2000) (using example of Minnesota regionalism efforts to argue importance of coalition building in seeking fiscal equity).

217. See Calmore, *Race/ism*, supra note 46, at 1123 (stating difficulty of maintaining stereotypes when African Americans and white Americans “stand on equal footing”).

218. See Pattillo, *Black Neighborhoods*, supra note 8, at 323 (arguing that change in white attitudes is prerequisite to integration); Sander, supra note 12, at 901–02 (“[T]o increase white demand, whites must believe that black entry into their neighborhoods will not culminate in resegregation.”).

219. Cf. supra note 85.

220. See Bell & Parchomovsky, supra note 9, at 1974 (admitting that racial animus remains irrational obstacle to elimination of racial segregation); Calmore, *Race/ism*, supra note 46, at 1071 (“In many ways, racism has simply overwhelmed fair housing.”).

Suburban housing integration is a goal that must be voluntarily chosen. Neither the Fair Housing Act nor any other constitutionally limited policy can force families to live in environments of discomfort or racial subjugation.²²¹ White households have been using free choice to avoid racially uncomfortable communities for decades, and black households have the right to be able to respond accordingly through their own private choices.²²² In an environment of free and equal choice, middle-class African Americans will choose to integrate when the individual benefits of integration outweigh the perceived costs.²²³ Until then, the choice of African Americans not to integrate should yield an equitable ability of middle-class African American consumers to maximize their quality of life.²²⁴

The protection of private choice is not an abandonment of integration as a worthy goal. Interaction among various races is essential to breaking down the stereotypes that plague the opportunities of minorities.²²⁵ Integration in employment, and to a lesser extent in education, have laid foundations for increased interaction among races.²²⁶ By expanding on the first step taken with the Fair Housing Act, policymakers can help Americans to voluntarily embrace integrated living patterns.²²⁷

221. Forcing African Americans to assimilate within a mostly white community negates the legitimacy of the culture and is a practice of racial supremacy. Powell, Living, supra note 51, at 774–78; see also Goel, supra note 67, at 397 (warning that forced integration subverts race consciousness).

222. See Massey & Denton, supra note 12, at 15 (arguing that moral preparedness of white community is prerequisite to integrative change).

223. See Johnson, Bid Whist, supra note 125, at 1418 (“African-Americans will not *choose* to integrate . . . until it is in their interest to do so.”). But see Massey & Denton, supra note 12, at 213–16 (proclaiming that black choice not to integrate is decision of unhealthy human beings). In critique of Massey and Denton, Olati Johnson notes that the two scholars “find little that is valuable or self-affirming about African American community.” Johnson, Apartheid, supra note 91, at 807.

224. Calmore, Kerner Commission, supra note 88, at 1495 (promoting spatial equality even when integration is not present). Such decisions toward nonsegregation will not end stereotypes, but according to Patricia Williams, stereotypes are a “lesser historical evil” than the cultural disappearance caused by assimilation. Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 414 (1987).

225. See Bell & Parchomovsky, supra note 9, at 2027 (emphasizing that racial stereotypes are rooted in lack of information, misconceptions, and prejudices).

226. See Calmore, Kerner Commission, supra note 88, at 1497 (discussing theory of integration leading to interaction, and noting fields where integration has occurred). Calmore does not see integration in these spaces as enough contact to break down stereotypes. See Calmore, Race/ism, supra note 46, at 1122 (“Sharing work space or public space is not enough. Now we must go out of our way to make quality contact . . .”).

227. For arguments that integration can be achieved only by fostering voluntary choice, see Keating, supra note 78, at 4, 222; Goel, supra note 67, at 408.

CONCLUSION

Historical and present discrimination have created the segregated conditions that characterize most metropolitan areas. The first step in addressing this problem was establishing a law prohibiting housing discrimination and protecting private choice. The Fair Housing Act has stood as that first step for nearly forty years, and it is time to use this foundation to move closer to equality, and possibly integration. While still protecting private choice, the next phase must attempt to equalize the quality of life options for historically segregated communities. This will allow a true state of "fair housing," where all communities allow their residents to attain the American dream, with no limits based on race. Integration is a glorious goal, which can be achieved as disparities diminish and for which freedom of choice need not be sacrificed.