Stanford Law Review

Volume 77 April 2025

ARTICLE

Beyond the Perpetrator Perspective on Golden Ghettos: Defending Fair Housing Revisionism with Critical Eyes

Melvin J. Kelley IV*

Abstract. Most fair housing advocates maintain that integration is a core aim of the federal Fair Housing Act of 1968 (FHA). They contend that to achieve that integration, affordable housing must be sited in predominantly white, affluent areas. These advocates often cite legislative sponsors such as Senator Edmund Muskie, who declared that the aim of the FHA was not to provide a revitalized model city area or "golden ghetto" as the solution to the plight of African Americans. Courts have tended to agree.

Challenging this orthodoxy, this Article argues that community development—and not just integration—should be deemed a legitimate tactic under the FHA for redressing the harms of segregation. It asserts that legislative history is of limited utility in resolving current debates on remedial tactics because liberal civil rights advocates of the 1960s were operating under a "perpetrator perspective," viewing racial discrimination solely as the misguided conduct of individual actors rather than as a form of structural injustice. Taking the perspective of the victim rather than the perpetrator reveals that the preeminent purpose of the FHA was to expand the housing options that are available to historically oppressed populations.

* Associate Professor at Northeastern University within the School of Law and the D'Amore-McKim School of Business. J.D., Columbia Law School; B.A., College of the Holy Cross. The author thanks Professors Greg Alexander, Lisa Alexander, Margaret Burnham, Henry Chambers Jr., Rashmi Dyal-Chand, Anika Singh Lemar, Kristin Madison, Audrey McFarlane, Aman McLeod, Meghan Morris, Rachel Rosenbloom, Joe Singer, and Laura Underkuffler for their helpful comments. Additional appreciation is owed to the organizers, participants, and facilitators of the Association for Law, Property, and Society 13th Annual Meeting at Southampton University in May 2023, the virtual Progressive Property Workshop in May 2023, and the Langston Scholars Workshop at Northwestern University Pritzker School of Law in June 2024. The feedback on this project through those venues was instrumental. Special thanks to the Center for Law, Equity, and Race (CLEAR) for financial and scholarly support as a faculty fellow. Finally, a tremendous debt of gratitude is also due to the editorial staff of the *Stanford Law Review*. This Article is dedicated to persons who are current or former residents of public housing, particularly Pinnacle Heights (PHP), Corbin Heights, Oval Grove formerly known as Malikowski Circle ("The Circle"), and Mount Pleasant ("Hilltop" or "The 7714") of New Britain, Connecticut. All errors, missteps, and oversights are the author's own.

Combining insights from textualism, the evolution of antidiscrimination doctrine, and critical legal theory, this Article excavates choice—free of interlocking race and class constraints—as the FHA's chief concern. This approach sheds new light on the federal government's obligation to affirmatively further fair housing with clear implications for both the role of revitalization initiatives in urban planning as well as the operation of the Housing Choice Voucher program.

Table of Contents

Introduction 928

I. Perpetuating the Perpetrator Perspective 942
  A. To Trade Place or Change Space? 944
  B. A Congressional Mandate to Integrate? 949
  C. A Critical Defense of Fair Housing Revisionism 957
    1. Two ways to view racial justice 958
    2. The legitimation of integration 962
    3. Constructing civil rights claims in colorblind courts 965

II. Interpreting Fair Housing with Critical Eyes 970
  A. Fair Housing Choice Amid Race & Class Oppression 973
    1. The right to live wherever a white man can live 974
    2. A duty to avoid status causation 979
  B. Lessons for Affirmatively Furthering Fair Housing 986
    1. Building two-way bridges to opportunity 987
    2. Paving a one-way street for housing choice vouchers 997

Conclusion 1007

Introduction

One would be hard pressed to deny that Title VIII of the Civil Rights Act of 1968, known as the federal Fair Housing Act (FHA), was designed to respond to the nation's enduring legacies of race-based discrimination in residential real estate transactions.[1] But this assertion may mark the outer boundaries of a consensus on the legislation's purpose, even among scholars and activists who otherwise share a commitment to furthering racial justice.[2] In particular, a hotly contested controversy among fair housing advocates and community development activists continues to brew over the method by which housing policies should promote upward mobility for marginalized households—namely, whether it should be accomplished by cultivating pathways to leave disadvantaged communities or by investing in distressed neighborhoods.[3] This unresolved division has deep historical and political underpinnings, but its contemporary implications are erupting in sociolegal fissures both in and out of courtrooms.[4] Recently, organizations and scholars who have questioned the primacy of integration as the remedial cornerstone of the FHA have been deemed incendiary "fair housing revisionists" who must be challenged and refuted.[5] But the import of the clash reverberates beyond the confines of law review pages.

---

1. 114 CONG. REC. 3,421 (1968) (statement of Sen. Walter Mondale) (explaining that housing segregation stemmed from both "overt racial discrimination" as well as "[o]ld habits" that became "frozen rules"); Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604); *see also* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 575 (2015) ("The Fair Housing Act expressly banned many of the public actions and private practices that had evolved over the years to deny blacks' access to housing.").

2. *See, e.g.*, Edward G. Goetz, *The Fair Housing Challenge to Community Development*, *in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 145, 145-47 (Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale & Maia S. Woluchem eds., 2021) (providing an overview of contrasting positions between the fair housing and community development movements, which involve disagreements over housing policy as well as how to achieve racial equity more broadly).

3. George Galster, *People Versus Place, People and Place, or More? New Directions for Housing Policy*, 27 HOUS. POL'Y DEBATE 261, 261-62 (2017) ("[F]or decades the discourse on [housing policy for low-income families] has become increasingly factionalized, with policy advocacy positions calcifying between the increasingly insulated poles of people-based and place-based housing strategies.").

4. Goetz, *supra* note 2, at 152-60 (explaining recent litigation, executive actions, and local policy responses).

5. *See, e.g.*, Myron Orfield & William Stancil, *Challenging Fair Housing Revisionism*, 2 N.C. C.R. L. REV. 32, 33, 43 (2022) (stating that according to "fair housing revisionists," the FHA "was only ever intended to address individual acts of discrimination, typically taking place during private market sales" and "affordable housing can be sited anywhere, even if doing so mirrors some of the most notoriously segregative policies of past decades"); Walter F. Mondale, *Afterword: Ending Segregation: The Fair Housing*

footnote continued on next page

The roiling dispute in *Noel v. City of New York*[6] is one such manifestation that reveals the terrain of a rift over the meaning of fair housing. As it stands, the plaintiffs and defendants in the case are avatars for the competing perspectives undergirding the spatial justice debate on how to best redress the uneven distribution of resources across the nation.[7] *Noel* continued a longstanding dispute in which New York City (NYC) had been defending against a federal lawsuit alleging that the municipality's longstanding practice of giving neighborhood residents preference in affordable housing had discriminatory effects.[8] In outlawing discrimination on the basis of specific prohibited characteristics, the FHA recognizes two distinct theories of discriminatory-effect liability: (1) disparate impact and (2) segregative effect.[9] The first framework is implicated when the allegation entails "harm to a particular group of persons by a disparate impact," while the second concerns "harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."[10] Both causes of action are implicated in *Noel*.[11]

In *Noel*, NYC had leveraged several tactics, including "tax incentives, loans, and zoning density bonuses," to subsidize housing projects that were completed by private developers.[12] Many of the affordable units generated through these initiatives were then subject to an application process that provided an advantage to current residents of the neighborhood.[13] NYC asserted that the policy was designed to mitigate the risks of potential displacement for vulnerable, low-income populations and ensure that at least some residents would be able to stay in place and enjoy the benefits that the investments are likely to spur with respect to new services and amenities.[14] Accordingly, NYC

Act's Unfinished Business, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 291, 294 (Gregory D. Squires ed., 2018) (claiming that any interpretation of the FHA "that frustrates integration is anathema to its purpose").

6. No. 15-CV-5236, 2023 WL 3160261 (S.D.N.Y. Apr. 28, 2023).

7. *See* EDWARD W. SOJA, SEEKING SPATIAL JUSTICE 54-55, 62 (2010).

8. *Noel*, 2023 WL 3160261, at *1-2.

9. *See e.g.*, Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357, 366 (2d Cir. 2003); Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 916-18 (5th Cir. 2019) (Davis, J., concurring in part and dissenting in part).

10. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11469 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

11. *Noel*, 2023 WL 3160261, at *1.

12. *Id.*

13. *Id.* at *1-2.

14. *Id.* at *12; Michelle Cafarelli Kabat & Harry Kelly, *Settlement of New York City Fair Housing Case Leaves Legality of Local Resident Preferences Unresolved*, NIXON PEABODY (Jan. 30, 2024), https://perma.cc/WT77-SKV6.

can be said to have adopted a revitalization or place-based approach for redressing the persisting remnants of discrimination.[15] This framework generally entails the infusion of resources into distressed neighborhoods to enhance the overall quality of life for residents therein and increase residents' access to opportunities conducive to upward socioeconomic mobility.[16] A range of tactics fall under this umbrella, including the promotion of affordable housing and the preservation thereof for current residents in communities transitioning due to gentrification,[17] which was a key concern for NYC.[18] In a place-based model, these endeavors are supplemented with programs designed to further education, promote child and family well-being, augment health care, develop financial literacy, foster entrepreneurship, or secure employment training and placement.[19]

However, the plaintiffs in *Noel* subscribed to a mobility or people-based paradigm,[20] which calls for maximizing the movement of households to disrupt historical patterns of segregation by enabling access to neighborhoods that are comparatively richer in resources.[21] Indeed, the plaintiffs were represented by leading fair housing attorneys who were working in collaboration with a distinguished academic.[22] While the trial court found that the disparate-impact claim could not be substantiated under the facts at hand, it did find the segregative-effect cause of action would move forward, as there

15. *See* EDWARD GLENN GOETZ, THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES 16 (2018); Kabat & Kelly, *supra* note 14.

16. Galster, *supra* note 3, at 262.

17. *Id.*

18. Kabat & Kelly, *supra* note 14.

19. *See* Andrew Foell & Kyle A. Pitzer, *Geographically Targeted Place-Based Community Development Interventions: A Systematic Review and Examination of Studies' Methodological Rigor*, 30 HOUS. POL'Y DEBATE 741, 742-43 (2020); CARL GRODACH & RENIA EHRENFEUCHT, URBAN REVITALIZATION: REMAKING CITIES IN A CHANGING WORLD 9-10 (2016). For an explanation of the spatial approach to desegregation, see GOETZ, note 15 above, at 9-10.

20. *See* No. 15-CV-5236, 2023 WL 3160261, at *3 (S.D.N.Y. Apr. 28, 2023) ("Plaintiffs assert that the [City's Community Preference] Policy is unlawful under the FHA and [NYC Human Rights Law] because the Policy operates to perpetuate racial segregation in the City and causes Plaintiffs to suffer a race-based disparate impact on their opportunity to compete for affordable housing."); *see also* Kabat & Kelly, *supra* note 14 (comparing NYC's claim that the policies are necessary to protect from gentrification with the plaintiffs' claim that the policies make it more difficult for minorities to move into more diverse parts of the city).

21. *See* Galster, *supra* note 3, at 262.

22. *Noel*, 2023 WL 3160261, at *1 & n.1 (identifying the plaintiffs' counsel and expert witness); *see also Cuti Hecker Wang LLP*, BLOOMBERG, https://perma.cc/UQ5Y-33A2 (archived Feb. 14, 2025) (showing that the plaintiff's law firm specializes in housing discrimination claims, among others).

were indications that NYC's practice inhibited integration in violation of the FHA.[23] Settlement talks ensued thereafter, and the parties resolved the matter, in part, by agreeing to a substantial reduction in the number of units in a new affordable housing development that could be subjected to the residency preference.[24] But the absence of a judicial opinion providing guidance on reconciling the tensions between the contrasting spatial justice visions is reverberating with national repercussions.[25] To be sure, the controversy that played out in *Noel* is far from unique—examples abound of municipalities from coast to coast that are struggling with how best to respond to histories of racialized disinvestment while ensuring that historically marginalized groups are the beneficiaries of targeted revitalization plans.[26]

---

23. *Noel*, 2023 WL 3160261, at *8.

24. Press Release, Anti-Discrimination Ctr., NYC's Outsider-Restriction Policy in Affordable Housing Lotteries Sharply Curbed in Landmark Resolution of Long-Litigated Fair Housing Case (Jan. 22, 2024), https://perma.cc/8N85-4ZT7; Stipulation & Order of Settlement & Dismissal at 2-3, *Noel*, No. 15-CV-05236 (S.D.N.Y. Jan. 22, 2024), ECF No. 1002.

25. *See* Kabat & Kelly, *supra* note 14 ("A judicial resolution of the *Noel* case certainly would have provided government officials, developers, and other housing advocates around the country with guidance about how to reconcile development policies that promote new affordable housing and the FHA's goal of ending segregation based on protected classes."); Noah M. Kazis, Essay, *Fair Housing, Unfair Housing*, 99 WASH. U. L. REV. ONLINE 1, 8, 11-13 (2021) (discussing the historical underpinnings of spatial justice debates and how "[t]his history haunts the contemporary conversation about AFFH" in the absence of a political, scholarly, or judicial consensus on the meaning of the provision); Olatunde C.A. Johnson, *The Missing Half: Revisiting Monetary Remedies to Redress Racial Segregation*, 59 HARV. C.R.-C.L. L. REV. 278, 322, 329-31 (2024) (recounting enduring scholarly debates on mobility versus place-based approaches and offering a "redress" framework that situates segregation as requiring a spectrum of remedies, in part, to help mediate the "age-old struggle" between these reparative visions).

26. *See, e.g.*, City of Phila. & Phila. Hous. Auth., Assessment of Fair Housing 47 (May 27, 2022) (draft report), https://perma.cc/6VR3-SVDM (revealing that interviewed stakeholders rejected gentrification as a form of integration because of the associated threat of displacement but also rebuked traditional mobility strategies for failing to disrupt undue concentrations of resources); James Jennings, *Fair Housing and Zoning as Anti-Gentrification: The Case of Boston, Massachusetts*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 93, 99-101, 111-13 (2021) (describing a range of new zoning initiatives designed to respond to the pressures of gentrification and displacement on communities of color in Boston neighborhoods such as Chinatown, East Boston, Roxbury, Mattapan, and parts of Dorchester); Jeffrey D. Jones, *Workforce Housing and Housing Preference Policies Under the Fair Housing Act*, 24 LEWIS & CLARK L. REV. 1413, 1420 (2020) ("Portland is also attempting to address the displacement of African-Americans due to urban renewal projects by trying to create programs for African-Americans to remain in or return to their former neighborhoods."); Tim Iglesias, Essay, *Threading the Needle of Fair Housing Law in a Gentrifying City with a Legacy of Discrimination*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 51, 57-62 (2018) (summarizing the conflict and eventual compromise between San Francisco and the U.S. Department of Housing and Urban Development over whether the city's neighborhood resident housing preference could be applied to a

footnote continued on next page

Without fail, scholars and attorneys in both the place-based and people-based camps turn to legislative history to shore up their contention about the remedial prescriptive that was envisioned or otherwise best comports with the purposes of the FHA.[27] For example, integrationists often reference Senator Walter Mondale, a key sponsor of the legislation, who asserted that the FHA was designed to replace racially concentrated poverty with "truly integrated and balanced living patterns."[28] Similarly, Senator Edmund Muskie is marshaled for his declaration that the aim of the FHA was not to provide a revitalized model city area or "golden ghetto" as the solution to the plight of African Americans.[29] Others suggest too much weight is placed on these remarks because, for instance, Senator Mondale had also characterized the bill as only calling for the "elimination of discrimination in the sale or rental of housing," rather than mounting an integration campaign.[30] This Article contends that any such attempt to wade through legislative history to resolve an evolving debate on the propriety of competing spatial justice stratagems under the FHA is a deeply flawed endeavor.[31]

Regrettably, the legislation born out of the Civil Rights Movement of the 1960s was largely designed to respond to the problem of racial discrimination as understood from the "perpetrator perspective."[32] This framework became the prevailing model for evaluating the harms that civil rights reforms should be calibrated to redress.[33] In this conception, race was viewed as a set of phenotypical characteristics stemming from a person's genetic heritage, and

federally subsidized complex for seniors in the predominantly Black community of Western Addition).

27. *See, e.g.*, GOETZ, *supra* note 15, at 92-95 (reviewing congressional debates and finding support for his contention that the law only outlawed discriminatory conduct).

28. 114 CONG. REC. 3,422 (1968) (statement of Sen. Walter Mondale); *see, e.g.*, Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 125, 127 n.18 (2011); Orfield & Stancil, *supra* note 5, at 38-39.

29. *See* 114 CONG. REC. 3,253 (1968) (statement of Sen. Edmund Muskie); Orfield & Stancil, *supra* note 5, at 60.

30. 114 CONG. REC. 4,975 (1968) (statement of Sen. Walter Mondale); *see also* GOETZ, *supra* note 15, at 94 (quoting Michael R. Tein, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1467 n.23 (1992)).

31. *See infra* Parts I-II.

32. *Introduction*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xiv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (observing that the "reigning contemporary American ideologies about race were built in the sixties and seventies" and the ensuing adoption of the perpetrator perspective, which viewed racism as "irregular" and of "limited significance," meant "liberal race reform thus served to legitimize the basic myths of American meritocracy").

33. *See id.*

racism was the irrational and immoral mistreatment of an individual on the basis of their race.[34] Thus, the blueprint for solving race discrimination became centered on "color-blindness," or the neutralization of the biased behaviors undertaken by specific offenders.[35] The systemic dimensions of race operating as a filter for access to opportunities and material wealth then receded from consideration.[36] In accord, there was a substantial cohort who surmised that the antidiscrimination mandate embedded in the FHA was therefore an effective solution to segregation.[37] Since people of color would no longer face racial barriers in access to housing, it followed that balanced demographics across neighborhoods would soon take root.[38] When this lens is employed, Senator Mondale's arguably incongruent remarks referenced above are entirely in sync with the colorblind rubric that characterizes the perpetrator perspective.[39] In effect, his formula presupposes integrated neighborhoods via removing bad actors from the housing market.[40]

By contrast, victims of sociopolitical and economic subjugation are acutely aware of the objective conditions of their existence as manifested in deprivations of various resources conducive to stability and upward mobility.[41] Unlike the victim's point of view, the perpetrator perspective is not

34. *See id.* at xv.

35. *See id.* at xiv-v; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053-54 (1978).

36. *Introduction*, *supra* note 32, at xiv-vi.

37. *Id.* at xv-vi; Walter F. Mondale, Opinion, *Walter Mondale: The Civil Rights Law We Ignored*, N.Y. TIMES (Apr. 10, 2018), https://perma.cc/KG9N-PZRN (asserting that the drafters of the FHA viewed its antidiscrimination provisions as furthering integration because the legislation "was informed by the history of segregation, in which individual discrimination was a manifestation of a wider societal rift").

38. *Cf.* ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 2 (1996) (discussing how racial integration predicated on civil rights laws yielded notable improvements but failed to generate the racial equality that was envisioned in terms of dignity and empowerment for African Americans across housing, education, employment, and voting).

39. *See* Freeman, *supra* note 35, at 1053, 1057 (explaining that the perpetrator perspective is focused on what the perpetrators are doing and stopping their conduct rather than addressing the overall lived reality of the victims in the wake of oppressive conditions).

40. Rezarta Bilali & Johanna Ray Vollhardt, *Victim and Perpetrator Groups' Divergent Perspectives on Collective Violence: Implications for Intergroup Relations*, POL. PSYCH., Feb. 2019, at 75, 82 ("One way in which members of perpetrator groups can protect their group's positive identity and distance themselves from harm-doing is to place responsibility for the harm on only a few individuals within the ingroup.").

41. Freeman, *supra* note 35, at 1052-53; *see also* Bilali & Vollhardt, *supra* note 40, at 85 ("[I]n many contexts the historically targeted group remains in a position of lower power and continues to experience discrimination and other adverse outcomes. In these cases, the past is not over, and the suffering is ongoing. However, the link between historical

footnote continued on next page

concerned with these material repercussions but rather focuses on the particular harms inflicted by specific individuals.[42] Thus, the remedial implications only necessitate negating the conduct outlawed by antidiscrimination legislation.[43]

Instead of looking to misguided legislators for guidance, this Article offers a novel intervention in the passionate exchanges between the community development and mobility camps by interrogating fair housing jurisprudence through a critical theory lens. This framing helps demonstrate some of the superior theoretical and pragmatic dimensions of enrichment tactics. Further, this approach sheds new light on the federal government's responsibility to affirmatively further fair housing with instrumental lessons for both the role of revitalization initiatives in urban planning as well as the operation of the Housing Choice Voucher (HCV) program.

The author has previously touched on this topic, but not to weigh in on the normative dimensions of the contending policy perspectives.[44] This previous undertaking was designed to offer a potential roadmap for public officials and housing providers as they navigate between these competing spatial stratagems against the backdrop of discriminatory-effect liability under the FHA.[45] Though the Supreme Court clearly envisioned a zone of discretion for pertinent actors to select between place-based and people-based tactics, detailed guidance on best practices for avoiding discriminatory-effect liability has not been forthcoming.[46] Specifically, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Court explained that it "would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable."[47] The Court made clear

---

victimization and present-day conditions is often not acknowledged by members of the perpetrator group or other majority group members.").

42. Freeman, *supra* note 35, at 1053.

43. *Id.* at 1053-54.

44. *See generally* Melvin J. Kelley IV, *Trading Spaces or Changing Places? At the Crossroads of Defining and Redressing Segregation*, 54 CONN. L. REV. 845 (2022) (suggesting that rerouting resources to majority-minority communities raised the specter of perpetuating or exacerbating segregation in violation of the FHA under current doctrine and offering an alternative conception of the claim that required co-extensive assessment of a region's demographics alongside its geography of opportunity).

45. *Id.* at 855-56.

46. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015) ("[I]t seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa.").

47. *Id.* at 541.

that the "FHA does not decree a particular vision of urban development."[48] Thus, the majority acknowledged that courts must carefully examine any assertion that a siting decision for an affordable housing project runs afoul of the FHA.[49] Yet, no overarching framework or specific factors were identified to ground judicial resolution of such disputes.

This vacuum leaves no clear basis for defending place-based community development against the specter of segregative-effect liability, as this theory of liability only calls for the evaluation of local census data in substantiating an allegation that a policy or practice perpetuates segregation.[50] As *Noel* demonstrates, because revitalization initiatives are typically designed to bring resources to majority-minority communities with minimal impacts on residential patterns, they are almost always vulnerable to segregative-effect claims.[51] If the Court is indeed inclined to leave place-based projects on the menu of legally viable options, a course correction in doctrine seems appropriate.[52]

In the interim, even associated regulations promulgated by the U.S. Department of Housing and Urban Development (HUD) have not squarely resolved these tensions.[53] Over and above its antidiscrimination provisions, the FHA further directs all federal agencies administering programs that relate to housing and urban development to "affirmatively . . . further the [legislation's] purposes."[54] Meaningful federal action to enforce the affirmatively furthering fair housing (AFFH) provision was not taken until the Obama administration passed a milestone regulation via HUD in 2015.[55] The 2015 AFFH Regulation required recipients of federal funding to conduct an assessment of fair housing impediments in their region and certify a commitment to an action plan that would both reduce segregation and ameliorate racially or ethnically

48. *Id.* at 542.

49. *Id.* at 543; *see* Kelley IV, *supra* note 44, at 855.

50. *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir. 1988) (detailing the town's demographics).

51. *See* No. 15-CV-5236, 2023 WL 3160261, at *12 (S.D.N.Y. Apr. 28, 2023) (highlighting NYC's justifications of the preferential housing policy); *see also Huntington Branch*, 844 F.2d at 937-38 (explaining the district court ought to have considered "the segregative effect of maintaining a zoning ordinance that restricts private multi-family housing to an area with a high minority concentration," as here the court would have "recognize[d] that Huntington's zoning ordinance" prevents "integration by restricting low-income housing needed by minorities to an area already 52% minority").

52. *See* Kelley IV, *supra* note 44, at 853-54.

53. Raphael W. Bostic, Katherine O'Regan, Patrick Pontius & Nicholas F. Kelly, *Fair Housing from the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, *in* FURTHERING FAIR HOUSING, *supra* note 2, at 74, 88-89.

54. 42 U.S.C. § 3608(d)-(e).

55. Bostic et al., *supra* note 53, at 74-75.

concentrated poverty.[56] While the Trump administration abruptly rescinded the rule in 2020,[57] another swift shift ensued as the Biden administration sought to finalize a new rule that would reinstate and expound upon the 2015 AFFH Regulation.[58] The Biden proposal will never come to pass.[59] Predictably, the Trump administration has wasted little time in once again switching gears with an interim rule that purports to "cut[] costly red tape" and "protect[] America's suburbs" by removing mandated planning processes.[60] Fair housing advocates have vowed to take action to resist this rollback, which will push the purported American Dream further out of reach of traditionally oppressed populations and leave the nation's legacy of nightmares imparted by housing discrimination intact.[61]

Nevertheless, it is worth noting that even the progressive, groundbreaking 2015 AFFH Regulation bears the imprint of a tumultuous exchange on the merits of community revitalization. On this front, the development of the 2015 AFFH Regulation was so contentious that it was known among HUD staff as "the Civil War Project."[62] When the dust finally settled, HUD opted to "remain neutral in the mobility or people-based versus place-based debate" by directing grantees to target both segregation and racialized disinvestment.[63] Notwithstanding this result, several integrationist scholars and lawyers

56. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42277 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

57. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47901-02 (Aug. 7, 2020) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (replacing the Obama administration's 2015 interpretation of the AFFH rule with the Trump administration's interpretation).

58. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8517-18 (proposed Feb. 9, 2023), *withdrawn by* Affirmatively Furthering Fair Housing: Withdrawal, 90 Fed. Reg. 4686 (Jan. 16, 2025) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

59. Affirmatively Furthering Fair Housing: Withdrawal, 90 Fed. Reg. 4686, 4686-87 (Jan. 16, 2025) (codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

60. Press Release, U.S. Dep't of Hous. & Urb. Dev., Secretary Scott Turner Cuts Red Tape by Terminating AFFH Rule, https://perma.cc/N273-BAEE (archived Mar. 25, 2025); *see also HUD Issues Interim Final Rule Revising AFFH Regulations*, NAVIGATE (Feb. 26, 2025), https://perma.cc/P5WN-BHEW; Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11020, 11020-22 (Mar. 3, 2025) (taking effect on April 2, 2025).

61. Press Release, Nat'l Fair Hous. All., National Fair Housing Alliance Responds to HUD's Withdrawal of Affirmatively Furthering Fair Housing Rule (AFFH) (Mar. 5, 2025), https://perma.cc/H6CF-KRA6; *see also* Natasha S. Alford, *Trump's HUD Secretary Cuts a Key Fair Housing Rule; Advocates Warn of Deeper Segregation*, THE GRIO (Mar. 11, 2025), https://perma.cc/3GQ6-KRXM.

62. Bostic et al., *supra* note 53, at 77.

63. *Id.* at 89.

continue to condemn community development as a form of "neo-segregation."[64]

This Article's defense of revitalization proceeds in two Parts. Part I builds a contention that antidiscrimination doctrine, including fair housing jurisprudence, was captured by a perpetrator perspective that continues to fixate on integration at the expense of directly addressing the spatial injustices that contribute to diminished life chances for people of color.[65] This contention is supported by reference to developments in Title VII which outlawed discrimination in employment.[66] Notably, when explicitly asked to weigh in on the definition of race and racism as understood under Title VII, the Eleventh Circuit held that Title VII's historical context evinced an understanding of race as biologically grounded rather than socially constructed.[67] Although the court declined to alter this prevailing definition, suggesting the task was better suited to the legislative branch,[68] some courts, including the U.S. Supreme Court, have been willing to effectively update Title VII's provisions to better reflect a modern understanding of its terms.[69]

Specifically, in *Bostock v. Clayton County*, the U.S. Supreme Court held that Title VII's ban on sex discrimination also applied to gender identity, gender

64. *See, e.g.*, Myron Orfield & Will Stancil, *Neo-Segregation in Minnesota*, 40 MINN. J.L. & INEQ. 1, 53-54 (2022) (arguing that affordable housing developers do not build in white, affluent areas because they follow the path of least political resistance and thereby contribute to deepening the status quo such that they should be considered neo-segregationists); *see also* Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After* Inclusive Communities, 24 GEO. MASON L. REV 663, 700 (2017) ("The FHA was not passed to promote 'separate but equal' as a second-best solution in housing policy."); Rigel C. Oliveri, *Disparate Impact and Integration: With* TDHCA v. Inclusive Communities *the Supreme Court Retains an Uneasy Status Quo*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 267, 281, 284 (2015) (cautioning that enrichment should be understood as an adjunct or interim strategy and that "truly sustainable long-term solutions will be elusive if local governments fail to make the hard choices necessary to foster integration").

65. *Infra* Part I; *see also* Kelley IV, *supra* note 44, at 881-82.

66. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e).

67. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021, 1026-30 (11th Cir. 2016).

68. *Id.* at 1030, 1035.

69. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1752, 1754 (2020) (finding that the broad language of Title VII necessarily prohibits employment discrimination based on sexual orientation, gender expression, and gender identity); Hively v. Ivy Tech Cmty. Coll. Of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (concluding that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and collecting cases from district courts that likewise found protections for sexual orientation under Title VII); *see also, e.g.*, Parr v. Woodmen of the World Life Ins., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

expression, and sexual orientation.[70] While the majority opinion reached this conclusion by grounding its review in a textualist framework, Justice Alito observed in dissent that the majority's theory of statutory interpretation would revise dated statutes to better reflect the sentiments of modern society.[71] *Bostock* thus reveals the dangers of undue reliance on congressional records to support a construction of civil rights legislation that might be more robustly and effectively responsive to present injustices.[72] In all fairness, it's a strenuous reach to suggest that the legislators who cast their votes in 1964 intended to outlaw employment discrimination based on gender identity, gender expression, and sexual orientation.[73] As such, a legislative history approach would have been ill-equipped to justify the expansion of Title VII's protections to gender identity, gender expression, and sexual orientation[74] and similarly is not the most helpful lever for resolving a question about the contemporary remedial implications of the AFFH mandate in Title VIII.

Part II considers the blueprint proffered by *Bostock* to undertake a critical interpretation of the FHA's text that could yield a more potent and comprehensive response to our nation's enduring legacy of racial residential segregation. Judicial interpretation of the provisions outlined in Title VIII via reference to Title VII has been a longstanding hallmark of antidiscrimination

70. *Bostock*, 140 S. Ct. at 1754.

71. *Id.* at 1755-56 (Alito, J., dissenting) ("Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*. It indisputably did not.").

72. Other scholars have offered cautionary tales about drawing lessons from the past to decipher best practices for redressing persisting spatial inequality. *See, e.g.*, Olatunde C.A. Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647, 1665 (2016) ("Structuring middle-class space through public and private actions depended on generating spatial inequality, which endures. If that is the case, as a matter of both narrative and implementation, the past may provide a limited guide for the future. The challenge is to develop regulatory and policy regimes that remedy the failures of the past, while responding to an evolving economic and racial order."). This Article attempts to set out a formula for cultivating the latent, reparative potential of the FHA by recentering the legislation's purpose and text.

73. *Bostock*, 140 S. Ct. at 1755-56 (Alito, J., dissenting); *see also* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72-73 (2021) (conceding that there is a plausible textualist defense of the conclusion that gender identity discrimination is protected under Title VII but maintaining this is not true for sexual orientation, and suggesting that this desirable outcome is better reached via a pluralist approach that draws on many factors to facilitate statutory interpretation).

74. *Bostock*, 140 S. Ct. at 1754 (conceding that "Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected").

jurisprudence.[75] Both laws rely on similar text and structures to advance civil rights, albeit in housing and employment respectively.[76] Thus, courts have often transplanted developments in one setting to the other by virtue of the statutory canon of construction known as *in pari materia*.[77] Given this interplay, insights gleaned from the realm of employment discrimination are instructive.[78]

The FHA's commands indicate that the legislation is primarily concerned with autonomy and access to desirable communities, unimpeded by protected class status.[79] Professor Richard Ford has examined developments under Title VII to argue for recasting the civil rights of the 1960s in a new light.[80] Ford ultimately argues that we should abandon unresolvable conceptual disputes over "discrimination" in favor of focusing on the extent of the employer's affirmative duty to avoid decisions and policies that needlessly injure members of underrepresented or stigmatized groups.[81] While Ford's contributions provide a critical foundation for reorienting civil rights as erecting duties of care, to complete the blueprint for legislative interpretation

75. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184-85 & n.2 (8th Cir. 1974) (buttressing the conclusion that discriminatory-effects claims were cognizable under Title VIII by harkening back to judicial interpretation of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

76. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530-31, 533-35 (2015); Johnson, *supra* note 72, at 1657 ("As a matter of interpretive methodology, Justice Kennedy's opinion for the [*Texas Department of Housing and Community Affairs*] majority also read the FHA to achieve coherence with other civil rights statutes, like Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, which the Court had long interpreted to include disparate impact claims.").

77. Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 182 (2020) ("When a court concludes that two statutes are *in pari materia*, or (translating the Latin) 'on the same subject,' the court then treats the two statutes as though they were one. Provisions within the two statutes must thus be harmonized." (quoting Erlenbaugh v. United States, 409 U.S. 239, 243-44 (1972) (footnotes omitted)); *see, e.g.*, Lindsay v. Yates, 578 F.3d 407, 414-15 (6th Cir. 2009) (evaluating a housing discrimination claim under a modified burden-shifting paradigm that had been formulated for reviewing allegations under Title VII).

78. Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Housing Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301, 303, 362-63, 369 (2019) (arguing that intersectional discrimination cases under Title VII indicate a need to revamp fair housing advocacy and justifying the connection, in part, by relying on the shared jurisprudential underpinnings of the corresponding civil rights laws).

79. Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. L. REV. 491, 543 (1979).

80. Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2944-45 (2014).

81. *Id.* at 2950-51, 2959.

it is also necessary to provide cogent parameters around the substance of the injury that must be avoided.[82] To this end, Professor Noah Zatz has also mined employment discrimination jurisprudence to identify and advance a common thread unifying the various causes of action that have been construed from the text of both Title VII and the Americans with Disabilities Act (ADA), including claims of disparate treatment, systemic disparate impact, non-accommodation, and disparate impact.[83] While each theory of liability may have its distinct governing and methodological standards for judicial evaluation thereof, they are all designed to address "status causation," which occurs when an individual suffers harm because of their membership in a protected class.[84]

Part II continues to synthesize and readapt the collective insights of Ford and Zatz to the fair housing context, where the text of Title VIII has likewise been held to authorize several causes of action.[85] Zatz identifies two classifications of status causation: internal and external.[86] Internal status causation refers to processes whereby housing providers or other pertinent actors consider a prohibited characteristic either purposefully or perhaps unconsciously to the detriment of protected persons.[87] External status causation captures moments where a person's circumstances are influenced or correlated with a protected trait such that they are vulnerable to harms from an otherwise generally applicable rule or policy.[88] Discriminatory-effect claims fall within the ambit of external status causation and rely on group-based statistics rather than a specific individual's qualitative experience.[89]

This framing helps explain why discriminatory-effect claims under Title VIII are acutely focused on the availability and location of affordable housing since class is heavily correlated with the protected trait of race, which itself operates as the structural linchpin in the nation's socially stratified neighborhoods.[90] Zatz's model provides a theoretical and statutory basis for

82. Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1379 n.96 (2017).

83. *Id.* at 1360-61.

84. *Id.* at 1359-61.

85. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530-31, 533-35 (2015).

86. Zatz, *supra* note 82, at 1375-76.

87. *See id.* at 1375.

88. *Id.* at 1370, 1376.

89. *Id.* at 1380, 1385.

90. Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROBS. 1, 8 (2020) ("Owing to ongoing racial segregation, rising class segregation, growing income inequality, and the resultant geographic concentration of both affluence and poverty, African Americans and Hispanics experience high levels of neighborhood poverty and low concentrations of affluence compared to whites and Asians.").

distilling the injuries that discriminatory-effect claims are designed to redress,[91] thereby providing a path to a more robust formula for excavating the race and class nexus to which Title VIII speaks.

Part II goes on to mobilize this analytical perch to compare the efficacy of people-based and place-based strategies as tools for remediating racialized external status causation. It argues that the mobility paradigm is not a panacea to external status causation since this approach accepts resource hoarding in predominantly white neighborhoods and permits households of color to take advantage of opportunity moves only for a brief period before exclusionary practices foreclose additional affordable housing in these communities.[92] Part II proceeds to explain the ways in which mobilizing a definition of fair housing that entails redressing external status causation at the intersection of race and class informs the federal government's unparalleled obligation to AFFH. This approach has clear implications for the federal government's presently voluntary HCV program, wherein low-income households procure a subsidy to facilitate rentals in the private market.[93] When at least 48% of HCV recipients are Black and 18% are Hispanic, the federal government is assuredly perpetuating and exacerbating status causation by permitting housing providers to opt out of accepting prospective tenants solely because a portion of their rent is paid for with public assistance.[94]

To shore up this contention, Part II considers lessons from a split among federal courts of appeals on whether ensuing economic disadvantage stemming from a medical condition is a cognizable basis for an individual with a disability to request a reasonable accommodation to a housing provider's income screening policies or practices.[95] The FHA also provides rights for a

91. Zatz, *supra* note 82, at 1399, 1408, 1410.

92. Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1178, 1186, 1192 (2019).

93. The HCV program, commonly known as Section 8, is funded by HUD but administered by state and local housing authorities. Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 900 (5th Cir. 2019). Thereunder, rental subsidies are paid to landlords on behalf of admitted low-income households. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUS. & URB. DEV., https://perma.cc/4MNS-595J (archived Feb. 19, 2025); 24 C.F.R. § 982.1(a) (2017); *see also, e.g.*, *Lincoln Prop.*, 920 F.3d at 895, 900.

94. Abby Vesoulis, *'A Mask for Racial Discrimination.' How Housing Voucher Programs Can Hurt the Low-Income Families They're Designed to Help*, TIME (Feb. 20, 2020, 7:28 AM EST), https://perma.cc/UZ8K-9RW7.

95. *Compare* Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1274 (11th Cir. 2019) (concluding "that a plaintiff's financial state . . . could be unrelated, correlated, or causally related to [their] disability and that, in some cases, an accommodation with a financial aspect—even one that appears to provide for a preference—could be 'necessary to afford [an] equal opportunity to use or enjoy a dwelling' within the meaning of the [Fair Housing] Act" (second brackets in original)), *and* Giebeler v. M & B

footnote continued on next page

person with a disability when they seek to address their disability-related needs to enable equal use and full enjoyment of a dwelling.[96] To this end, such individuals can request either a reasonable accommodation in policies, practices, or services, or they can request a reasonable modification to physically alter the premises.[97] As it stands, non-accommodation claims also raise an issue of external status causation because it is not the person's disability status per se that is at issue rather than a question of how their disability influences other characteristics that are implicated under a policy or practice.[98] Situating intersecting race and class impediments in the framework of external status causation highlights this important parallel to the realm of disability rights. Professor Kimani Paul-Emile's observations shed light on why the economic repercussions of a protected trait have garnered more explicit consideration when it concerns persons with disabilities.[99] In her account, race jurisprudence under the federal Constitution is comparatively inhibited by its focus on intent and adherence to colorblindness, while disability law requires disability-consciousness and provides a concrete mechanism to allocate the costs of changes to redress disability-related needs.[100] When viewed from the vantage of this bridge connecting race and disability, it seems clear that the federal government's AFFH obligation precludes empowering housing providers to turn away HCV participants on the basis of their lawful source of income.[101]

I. Perpetuating the Perpetrator Perspective

The pursuit of racial justice in the United States has been inextricably interwoven with the recognition and enforcement of property rights since the

Assocs., 343 F.3d 1143, 1144-45 (9th Cir. 2003) (reaching the same conclusion), *with* Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301-02 (2d Cir. 1998) (finding an accommodation of economic circumstances to categorically fall beyond the scope of a reasonable accommodation even if the person's socioeconomic status was a direct result of their disability), *and* Hemisphere Bldg. Co. v. Vill. of Richton Park, 171 F.3d 437, 441 (7th Cir. 1999) (same).

96. *See* Fair Housing Act of 1968, Pub. L. No. 117-103, § 804(b), 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604(f)(3)(A)-(B)).

97. 42 U.S.C. § 3604(f)(3)(A)-(B).

98. *Cf.* Zatz, *supra* note 82, at 1399 (discussing racial disparities).

99. Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 297 (2018).

100. *Id.* at 297, 318-20.

101. Landlord participation in the HCV program is voluntary unless state or local law provides otherwise. *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 900 (5th Cir. 2019).

inception of the British imperial project that gave rise to this nation state.[102] Following the Civil War and the abolition of chattel slavery, the Civil Rights Act of 1866 emerged as the nation's first federal fair housing law. But it proved of limited consequence.[103] First, it placed the onus of enforcement on individuals who not only had just been freed from the bondages of slavery but were also besieged by an environment that was deeply, indeed violently, hostile to the plight of African Americans.[104] Second, judicial interpretation left the law impotent to address private conduct under a limited construction of congressional authority pursuant to the Reconstruction Amendments that was not disturbed until 1968.[105] The foregoing observations reveal that a deeper historical analysis is appropriate to decipher the meaning of racial justice in housing, which is taken up in Part II.[106]

This Part nonetheless focuses on the immediate sociopolitical context leading up to and culminating in the nation's second fair housing law.[107] Specifically, this Part considers whether legislative history can indeed reveal a clear vision for racial redress that was embedded in the FHA and, if so, whether such a perspective ought to inform our sense of how to interpret the FHA's provisions in the context of contemporary debates. This Part begins by setting up the terrain of the debate then proceeds to recount key arguments that have cited legislative history to defend both integration and community revitalization. Specifically, this Part places associated statements from congressional records in full context to assess their probative value. Next, developments in Title VII jurisprudence are considered to interrogate whether legislative history is always the best tool for resolving modern disputes. Finally, insights from Critical Legal Studies (CLS) and Critical Race Theory

102. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716 (1993) ("[O]nly Blacks were subjugated as slaves and treated as property. Similarly, the conquest, removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of whites in Native American land. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights.").

103. Wade Henderson, *Foreword: The Legacy of a Movement*, *in* THE FIGHT FOR FAIR HOUSING, *supra* note 5, at xviii, xviii-ix (discussing the dynamics that rendered the Civil Rights Act of 1866 ineffective).

104. *Id.*

105. *Infra* Part II.A.1.

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

107. *See also, e.g.*, Etienne C. Toussaint, *Dismantling the Master's House: Toward a Justice-Based Theory of Community Economic Development*, 53 U. MICH. J.L. REFORM 337, 392 & n.296 (2019) (noting that one's strategy for addressing racial divisions is informed by one's definition of racial justice, and finding traces of today's disagreements in debates between Booker T. Washington and W.E.B. Du Bois on how to empower emancipated slaves).

(CRT) are leveraged to offer a cautionary tale about the import of relying on the perspectives of liberal civil rights advocates during the 1960s.

A. To Trade Place or Change Space?

Given the shared normative commitment of fair housing proponents and community economic development practitioners, commentators have questioned whether it's appropriate to present them as distinct camps with conflicting policy paradigms.[108] Indeed, this bird's eye view reveals a considerable consensus among these advocates on both the genesis as well as the continuing causes and consequences of race-based residential segregation in housing.[109] It is not disputed that segregation is a state-sanctioned and state-condoned system of racialized control erected en masse in the aftermath of slavery to perpetuate the oppression and exploitation of African Americans.[110] The tools for its facilitation and enforcement have encapsulated violence, land use planning, restrictive covenants, and discrimination in the sale, rental, financing, construction, maintenance, demolition, and insurance of residential

108. *See, e.g.*, Anika Singh Lemar, Essay, *Building Bridges and Breaking Down Walls: Taking Integration Seriously in CED Practice*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 207, 210 (2019) (arguing that "resource provision and integration are inextricably linked"); Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 558 (2008) ("Fair housing and community development are two sides of the same coin. They grew out of the need to address the twin evils of Jim Crow: separate and unequal."); Galster, *supra* note 3, at 264 ("[F]ormer adversaries should find common cause in merging elements of both approaches into a synthetic, place-conscious strategy that capitalizes on programmatic comparative advantages of both approaches . . . ."); *see also* john a. powell, *Moving (Both People and Housing) to Opportunity*, *in* THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY IN THE TWENTY-FIRST CENTURY 282, 283 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019) (advocating for an "opportunity-based approach" which "does not always recommend a mobility strategy over a place-based approach, but rather directs attention to communities of opportunity").

109. *See, e.g.*, Lemar, *supra* note 108, at 207-08 (discussing scholarship documenting local governments' use of "segregation as a mechanism to ensure that investment disproportionately benefited white people").

110. *See id.*; GOETZ, *supra* note 15, at 24 (acknowledging that fair housing and community development activities do not contest the "severe and persistent urban inequalities that follow color lines and neighborhood boundaries" or the "role of public policies in producing and abetting these inequalities"); Melvin J. Kelley IV, *Interpreting Equal Protection Clause Jurisprudence Under the Whiteness-Bell Curve: How Diversity Has Overtaken Equity in Education*, 21 J. GENDER, RACE & JUST. 135, 157-59 (2017) (discussing antebellum-era cases in Connecticut and Massachusetts involving segregation in education to demonstrate this system's origins in northern jurisdictions that had already outlawed slavery); MARGARET A. BURNHAM, BY HANDS NOW KNOWN: JIM CROW'S LEGAL EXECUTIONERS, at xiii (2022) (contending that although Jim Crow was "closely correlated with life in the postbellum South," it was also "pervasive in northern spaces" because it constituted a national project "that endorsed and sustained a missionary commitment to a future of perpetual white rule").

property.[111] Segregation's persistence is not merely due to woeful inaction; rather it is consistently reinforced through private acts and public policies that operate to ensure white dominance.[112] This conceptual common denominator also yields agreement on the compounding intergenerational and contemporary harms of segregation.[113]

In accord with the undergirding purpose of majority-minority communities, residents of these historically disinvested areas are subjected to a host of interlocking dynamics that collectively operate to diminish their prospects for health, safety, stability, agency, achievement, and upward mobility.[114] Distressed municipalities and marginalized neighborhoods historically have lacked the capital to supply robust public services, resulting in under-resourced schools and inferior transportation in addition to poor infrastructure such as degraded buildings, sewers, and roads.[115] Moreover, these areas are simultaneously marked by both undue exposure to environmental hazards, such as pollution, and fewer environmental amenities, including parks, coasts, or forests.[116] Private-sector investment in these regions is also sparse, thereby limiting retail and commercial prospects with several adverse consequences—spanning from impaired access to healthcare and high quality food to reduced employment opportunities.[117] Racially stratified concentrations of poverty also provide the backdrop for predatory lending,

111. Kelley IV, *supra* note 44, at 882-87 (recapping the "root and branches" of historical race-based residential segregation (capitalization altered)).

112. See Lori Latrice Martin & Kenneth J. Varner, *Race, Residential Segregation, and the Death of Democracy: Education and Myth of Postracialism*, 25 DEMOCRACY & EDUC., no. 1, 2017, at 1, 7 (calling for a framework known as "segregatory realism," which among other claims, asserts that "[r]esidential segregation is in line with the design and the demands of the society" as it manifests the desire of most "White people, who control the economic and social structures in the United States"); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 3 (2018) ("[W]hite homeowners have backed a succession of maneuvers to keep their property interests and public benefits insulated from change . . . . The result has been segregation by design." (emphasis omitted)).

113. GOETZ, *supra* note 15, at 24 ("That American urban areas reflect a highly biased distribution of life chances and experiences is not an item of contention.").

114. *Id.* at 19-20.

115. *See* TROUNSTINE, *supra* note 112, at 99-103, 117-18.

116. Isabelle Anguelovski, *New Directions in Urban Environmental Justice: Rebuilding Community, Addressing Trauma, and Remaking Place*, 33 J. PLAN. EDUC. & RSCH. 160, 160-61 (2013).

117. GOETZ, *supra* note 15, at 19-20; *see also* Peter Abraham et al., *The Roots of Structural Racism in the United States and Their Manifestations During the COVID-19 Pandemic*, 28 ACAD. RADIOLOGY 893, 894-96 (2021).

suppressed real estate value, political marginalization, criminal victimization, and discriminatory police practices.[118]

These conditions cast a bleak shadow over racially and economically segregated communities that chokes the potential of residents and distorts their life trajectories.[119] Even before the global pandemic disproportionately ravaged poor communities of color, lower life expectancy and premature death by residential segregation were already established facts.[120] Courts have verified such findings and awarded "lost housing opportunit[y]" damages when a victim of housing discrimination is effectively precluded from moving out of a neighborhood marred by clustered poverty, poor performing schools, and higher rates of crime.[121] The push for white dominance is no longer buttressed by a critical mass of supporters who publicly adhere to white supremacist ideology,[122] but the concurrence in maintaining the status quo is far from

118. GOETZ, *supra* note 15, at 19-20; *see also* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 728 (2020) (reviewing research indicating that white neighborhoods generally experience an absence of police while there is a substantial police presence in Black and Latinx communities, but police and private security protect the "racialized economic value" of white spaces in gentrifying areas or Black and Latinx neighborhoods adjacent to white suburbanites); Massey, *supra* note 90, at 10-11 (discussing discrimination in real estate and banking, racialized exposure to violence, and divergent lifetime earnings); Michael T. Light & Julia T. Thomas, *Segregation and Violence Reconsidered: Do Whites Benefit from Residential Segregation?*, 84 AM. SOCIO. REV. 690, 692-93 (2019) ("[B]y concentrating criminogenic structural factors in black (but not white) neighborhoods, prior research implicates segregation as playing a key, if not defining, role in explaining the comparatively high rate of violence within the black community." (citations omitted)); Tyler Haupert, *New Technology, Old Patterns: Fintech Lending, Metropolitan Segregation, and Subprime Credit*, 14 RACE & SOC. PROBS. 293, 293-94, 304 (2022) (observing disparate fintech, subprime, and traditional lending practices in segregated communities).

119. *See* Martin & Varner, *supra* note 112, at 1, 7-9.

120. *Id.* at 1; *see also* Benedict I. Truman, Man-Huei Chang & Ramal Moonesinghe, *Provisional COVID-19 Age-Adjusted Death Rates, by Race and Ethnicity—United States, 2020-2021*, 71 MORBIDITY & MORTALITY WKLY. REP. 601, 602-04 (2022) (cautioning that continued vigilance to thwart race-based health disparities is warranted even as concerted efforts narrowed—but did not eliminate—these disparities in the context of COVID-19 deaths); Abraham et. al, *supra* note 117, at 894-96 ("The health ramifications of dilapidated and unsanitary housing in segregated neighborhoods are well described."); Ioana Popescu, Erin Duffy, Joshua Mendelsohn & José J. Escarce, *Racial Residential Segregation, Socioeconomic Disparities, and the White-Black Survival Gap*, 13 PLOS ONE e0193222, at 1, 10 ("Our study underscores that White-Black disparities in survival remain sizeable, driven by residential segregation and socioeconomic inequality.").

121. *E.g.*, United States v. Hylton, 944 F. Supp. 2d 176, 197 (D. Conn. 2013) (making this finding and collecting cases).

122. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACIST: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL EQUALITY IN AMERICA 2 (5th ed. 2018) (recounting how the inferior status of Black people was explained as a function of their innate biology and morality under Jim Crow, yet asserting that this conventional narrative shifted after

footnote continued on next page

irrational.[123] Predominantly white communities have and continue to employ exclusionary "social closure" tactics, meaning methods of subordination to close off opportunities for oppressed groups and achieve or preserve a monopoly on resources such as power, prestige, education, and material wealth.[124]

Fair housing and community development activists do not seem to disagree on the foregoing; rather the question that gives rise to divergent perspectives is how to best intervene and remediate the harms of segregation.[125]

To diffuse these purported tensions, scholars and activists have responded that we simply need to do both.[126] Indeed, community development practitioners have noted that even when pursuing enrichment, their plans must consider the risk of gentrification to ensure that the infusion of resources into a historically disinvested community does not trigger displacement and erect a new pattern of segregation.[127] In accord with these observations, a new technique known as "opportunity-based housing" has been proposed, which calls for "both pursuing housing policies that create the potential for low-income people to live near existing opportunity and pursuing policies that tie opportunity creation in other areas to existing and potential affordable housing."[128] Similar insights have been considered in contemplating how public officials and housing providers might defend enrichment tactics against

---

the demise of de jure segregation and now many contemporary accounts posit that inequality is a byproduct of market dynamics or cultural deficiencies).

123. *See* Martin & Varner, *supra* note 112, at 8 (arguing that "[e]conomic imperatives are the driving force" behind oppression through segregation in housing and schools); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849-52 (1994) (undertaking an economically grounded structural analysis to reveal that "even in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism").

124. *See* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2384-87 (2021) (leveraging social closure theory to unveil oppressive power dynamics in access to education).

125. GOETZ, *supra* note 15, at 24 (observing a "split" between fair housing and community development activists regarding future policies).

126. *E.g.*, Lemar, *supra* note 108, at 208 ("Fair housing and enrichment are not divergent paths that require us to choose one and toss the other. They are related goals, and they can work in concert."); Galster, *supra* note 3, at 264 ("[T]he punchline echoed by all authors here is: People-based *or* place-based housing policy? *Both/and*! And so much more.").

127. *See* Galster, *supra* note 3, at 263.

128. john a. powell & Stephen Menendian, *Opportunity Communities: Overcoming the Debate Over Mobility Versus Place-Based Strategies*, *in* THE FIGHT FOR FAIR HOUSING, *supra* note 5, at 207, 219 (quoting john a. powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L., 188, 189 (2003)).

allegations of improperly entrenching segregated patterns in violation of the FHA.[129] Nonetheless, time and time again, fair housing advocates raise objections whenever there is a plan to site affordable housing in poor Black and Brown communities.[130]

The U.S. Supreme Court surprisingly upheld discriminatory-effect liability in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, but it cautioned that "it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa."[131] Despite this disinclination to limit the potential viability of revitalization projects, fair housing scholars have contended that "the only principled reading of the opinion is that Justice Kennedy *assumes* any policy approach selected would remedy racial isolation" and therefore "his opinion must be read to require that local policy choices be exercised in furtherance of the FHA's integration command."[132] Such sentiments underscore a grave sense of imbalance in the academic literature about the relative merits of people-based versus place-based strategies.[133] Notwithstanding the deeper historical and

129. *See* Kelley IV, *supra* note 44, at 902-03.

130. GOETZ, *supra* note 15, at 5; *see e.g.*, *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 5-6, 16 (N.J. Super. Ct. App. Div. 2004); Complaint at 5, Metro. Interfaith Council on Affordable Hous. v. City of Minneapolis, Nos. 05-15-0006-6, 05-15-0006-9 (filed Mar. 30, 2015).

131. 576 U.S. 519, 542, 545-46 (2015). *Inclusive Communities* represents the Court's most recent pronouncement on the continued salience of discriminatory-effects claims under the FHA. However, there are troubling signs suggesting that the tides may yet turn in the years ahead. *See, e.g.*, Students for Fair Admissions v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175, 2188 n.4 (2023) (striking down two race-conscious college admissions programs under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 because they "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points"). Even still, Justice Kennedy's majority in *Inclusive Communities* opinion took pains to clarify that "disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions." 576 U.S. at 540. Moreover, courts have so far been willing to cabin the reach of *Students for Fair Admissions* in other contexts when notable differences are present. *See, e.g.*, Ossmann v. Meredith Corp., 82 F.4th 1007, 1019-20 (11th Cir. 2023) (explaining that *Students for Fair Admissions* had no bearing on a white male employee's "run-of-the-mill" employment discrimination claim under 42 U.S.C. § 1981); Singleton v. Allen, 690 F. Supp. 3d 1226, 1318 (N.D. Ala. 2023) (finding that *Students for Fair Admissions* was irrelevant in resolving a challenge to a redistricting plan because the educational policies at issue there were designed to achieve racially balanced outcomes, whereas the Voting Rights Act only guarantees equal opportunity).

132. Seicshnaydre, *supra* note 64, at 701.

133. GOETZ, *supra* note 15, at 15 ("[T]here is nothing in the literature that specifically provides a comprehensive response to the critiques of community development by fair housing advocates or an alternative to the integrationist argument.").

sociopolitical dimensions of the debate,[134] the FHA has been imbued with the mainstream interpretation of scholars, activists, and judges who insist that the legislation prioritizes integration.[135] Against this backdrop, moderate calls for a balanced approach carry laudable objectives that are often ephemeral in application.[136] While few would object to the premise that the dual pursuit of both policies is appropriate as part of a long-term vision to promote racial and economic justice, when conflicts arise—particularly in a world of socially constructed scarcity—decisions must be made and the scales are tipped toward integration.[137] This Article joins other comments to question the normative implications of unduly discrediting enrichment as a viable tactic for redressing the harms of segregation.[138]

B. A Congressional Mandate to Integrate?

One would search the statutory text of the FHA in vain to divine whether the legislation was chiefly concerned with promoting an integrationist

134. *See, e.g.*, Alexander von Hoffman, *The Origins of the Fair Housing Act of 1968*, *in* FURTHERING FAIR HOUSING, *supra* note 2, at 47, 55-59 (discussing Black Power challenges to the open housing movement during the 1960s, which disavowed "anti-ghetto policies" and emphasized empowering predominantly Black neighborhoods).

135. *See, e.g.*, Schwemm, *supra* note 28, at 126-28 (situating integration as a key purpose of the FHA); Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 820-21 (3d Cir. 1970) ("Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."); Otero v. New York Hous. Auth., 484 F.2d 1122, 1124-25 (2d Cir. 1973) (validating the housing authority's decision to deny relocation back to a redeveloped site for some displaced families because of its obligation "to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons"); RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 140-41 (2018) (situating how much integration has been achieved as the "real test" of the FHA's effectiveness and raising concerns about the potential problem of neighborhood tipping or resegregation to ensure that conditions are conducive to preserving integration).

136. *Compare* Julian, *supra* note 108, at 573 ("[F]air housing/civil rights and community development/affordable housing advocates should come together and begin to build their respective movements anew on a foundation that respects and supports the other's core values."), *with* GOETZ, *supra* note 15, at 5 ("[T]he harmony between desegregation and affordable housing is, in reality, only a long-term alignment, a conviction that ultimately the pursuit of affordable housing cannot be undertaken without regard to effects on patterns of segregation, and in turn, that integration cannot be pursued at the expense of meeting affordable housing needs.").

137. GOETZ, *supra* note 15, at 5-6 ("Though there may be agreement about long-term balance and the need to provide affordable housing options everywhere, the day-to-day challenges of affordable housing development produce repeated conflict between these two ideals.").

138. *Id.* at 15-16.

agenda.[139] No definition of "fair housing" is forthcoming, nor is there any reference to "segregation" or "integration."[140] This is precisely why the arguments primarily rely on the context surrounding the passage of the FHA, including the Act's legislative history.[141] Accounts find credence in the primacy of integration by referencing congressional records, where it seems "floor debates in the Senate in 1968 were very focused on allowing Blacks to move to the suburbs."[142] Supporters of the legislation emphasized the need to enable the Black middle class to escape the ghetto and drew on the personal experiences of Black professionals who were precluded from housing opportunities in the suburbs.[143]

Title VI of the Civil Rights Act of 1964 outlawed discrimination on the basis of race, color, or national origin in programs receiving federal funding.[144] However, Senator Edward Brooke bitterly complained of HUD's failure to pull this lever, stating: "Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed."[145] Debates on a national fair housing law had commenced two years prior when President Lyndon Johnson sent Congress his proposal for an omnibus civil rights bill,[146] but efforts to pass legislation were unsuccessful in 1966 and 1967.[147] In the August 1967 Senate hearings, Senator Mondale asserted that the bill would respond to the problem of "black cities and white suburbs."[148] For years, critics of enrichment derisively referred to these policies as "gilding the ghetto."[149] Senator Mondale seemed to have

139. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604).

140. *Id.*; *see also* GOETZ, *supra* note 15, at 92.

141. *See e.g.*, Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 371-73 (2007); Schwemm, *supra* note 28, at 130.

142. Roisman, *supra* note 141, at 385 (citing 114 CONG. REC. 2,703-07 (1968)).

143. MARA S. SIDNEY, UNFAIR HOUSING: HOW NATIONAL POLICY SHAPES COMMUNITY ACTION 30-33 (2003).

144. Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d-2000d-4).

145. 114 CONG. REC. 2,527-28 (1968) (statement of Sen. Edward Brooke).

146. The Johnson administration's proposal was forthcoming in two identical bills, S. 3296, 89th Cong. (1966), and H.R. 14,765, 89th Cong. (1966).

147. Rigel C. Oliveri, *The Legislative Battle for the Fair Housing Act (1966-1968)*, *in* THE FIGHT FOR FAIR HOUSING, *supra* note 5, at 28, 28-29, 32-34.

148. *Fair Housing Act of 1967: Hearing on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking & Currency*, 90th Cong. 28 (1967) (statement of Sen. Walter Mondale) [hereinafter *1967 Senate Hearings*].

149. GOETZ, *supra* note 15, at 28.

enough of that tact, decrying the notion: "We might talk about helping you in your ghetto, but we are not going to help you get out of it."[150] Instead, he posited that the bill would replace "the ghetto" with "truly integrated and balanced living patterns."[151]

For their part, community development supporters have responded that the FHA is still riddled with ambiguities that extend to the legislative history.[152] First, while the antidiscrimination mandate in the statutory text is clear, this framework does not necessarily clarify that "affirmatively furthering fair housing" requires the siting of affordable housing in predominantly, white affluent areas.[153] At least one statement from Senator Mondale is argued to embody this ambivalence because he specified that, "[w]ithout doubt, [the FHA] means to provide for . . . . the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean."[154] However, it seems clear that he was specifically responding to a concern raised by his colleague about the import of the phrase "provide for fair housing throughout the United States," wherein it had been suggested that the term "provide" could be misconstrued to require the federal government to guarantee housing for all.[155] As such, the remark does not strike as incompatible with his broader pronouncements.[156]

Second, the statute does not provide guidance on how to navigate potential conflicts between its antidiscrimination provision and an integration agenda,[157] if indeed the latter is an aim of the legislation. Since the passage of the FHA, some public housing authorities have undertaken redevelopment endeavors and opted to limit preferences for previous residents to avoid

150. *1967 Senate Hearings*, *supra* note 148, at 28.

151. 114 CONG. REC. 3,422 (1968) (statement of Sen. Walter Mondale); *see also* Orfield & Stancil, *supra* note 5, at 58-61 (citing the remarks of senators who supported the FHA in 1968 and espoused its integrative ambitions).

152. GOETZ, *supra* note 15, at 93 ("Still, there is ambiguity in the statute and in the congressional record. There is reason to believe that the ambiguity in Title VIII is purposeful, the result of legislators' unwillingness to grapple with a difficult issue of defining exactly the boundaries of fair housing."); McFarlane, *supra* note 92, at 1180 (arguing that the FHA's legislative history reveals that its drafters adopted a "less than radical definition of integration" that was unduly predicated on individualism while failing to take on structural racism and declining to address the plights of Blacks that would be left in the ghetto even though they were acutely aware of this problem).

153. GOETZ, *supra* note 15, at 92, 95.

154. 114 CONG. REC. 4,975 (1968) (statement of Sen. Walter Mondale); *see also* GOETZ, *supra* note 15, at 92-95 (discussing Senator Mondale's inconsistent statements).

155. 114 CONG. REC. 4,975 (1968) (statements of Sens. George Murphy and Walter Mondale).

156. Orfield & Stancil, *supra* note 5, at 46-47.

157. GOETZ, *supra* note 15, at 93.

resegregation.[158] Thus, these cases raised the question of whether it was permissible to intentionally discriminate against racial minorities to promote integrated residential patterns.[159] While restrictions have been placed on these practices, courts have generally held that the integration objective can trump the principle of antidiscrimination.[160] On this front, some community

158. In *Otero v. New York City Housing Authority*, the New York City Housing Authority (NYCHA) completed an urban renewal project but declined to follow its own tenant screening regulations that would have given priority to former occupants of the site. 484 F.2d 1122, 1124 (2d Cir. 1973). NYCHA contended that the previous residents were largely persons of color and that permitting them to return would impart a "tipping factor" that would trigger white flight, resulting in a non-white "pocket ghetto." *Id.* The Second Circuit overturned the district court's determination that such conduct was impermissible. *Id.* at 1125. Instead, it held that integration did not operate as a "one-way street" and that the promotion of racial integration could come at the expense of non-white persons because the ensuing benefits redounded to the benefit of the community as a whole. *Id.* Thus, NYCHA was permitted to defer to the discriminatory preferences of whites and disregard the interests of racial minorities who were not inherently opposed to living in communities with a higher proportion of households of color. *See id.*; Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203, 1207-08 (6th Cir. 1987). *See generally* Hale v. U.S. Dep't of Hous. & Urb. Dev., No. C-73-410, 1985 WL 11179 (W.D. Tenn. Aug. 23, 1985) (issuing a consent decree ordering annual review of racial and family composition within all projects under the purview of the Memphis Housing Authority for a period of six years to facilitate integrative transfers).

159. *See, e.g.*, Zachary C. Freund, Note, *Perpetuating Segregation or Turning Discrimination on Its Head: Affordable Housing Residency Preferences as Anti-Displacement Measures,* 118 COLUM. L. REV. 833, 860-61 (2018) (discussing several potential challenges under the FHA, such as discriminatory-effect liability, that residential preferences could be vulnerable to even when they are designed to benefit oppressed populations).

160. After *Otero*, the Second Circuit adopted a three-prong test for evaluating the validity of similar race-conscious integration plans. United States v. Starrett City Assocs., 840 F.2d 1096, 1101-02 (2d Cir. 1988) (permitting institutional policies that employ racial distinctions if they are (1) temporary in duration; (2) respond to a history of racial discrimination or imbalance within the entity; and (3) increase or ensure minority participation rather than limit access through ceiling quotas). While the court established limitations on frustrating the FHA's antidiscrimination provisions, it did not disturb its underlying conclusion in *Otero* that integration objectives can be furthered to the detriment of racial minorities. *See id.* at 1103. Although there has been variance in the governing criteria, other courts that have considered the tension of the FHA's integration imperative and antidiscrimination mandate have generally concurred that the former can prevail over the latter—at least under some circumstances. *Compare, e.g.*, *Jaimes*, 833 F.2d at 1207-08 (permitting de facto racial quotas to foster integration until the objective was achieved, noting that "the concept of identifying a ratio representing the racial mix of both those currently residing in the [housing units] and those on the waiting list is both permissible and desirable as a goal for integration"), *with* Burney v. Hous. Auth. of Beaver Cnty., 551 F. Supp. 746, 770 (W.D. Pa. 1982) (finding that a housing authority's tenant selection procedure violated the FHA because a less discriminatory procedure could eliminate tipping). While the Court's recent decision in *Students for Fair Admission* casts a further shadow on the viability of such race-conscious balancing in housing, such efforts may remain possible. *See* 143 S. Ct. 2141, 2165-66 (2023) (concluding that the consideration of race in two

footnote continued on next page

development supporters have responded that the FHA's legislative history is insufficient to support these judicial determinations favoring integration even at the expense of the housing needs of poor people of color.[161] To this end, it has been posited that the record lacks "a definitive statement that privileges integration over equal access, or evidence that Congress envisioned the sacrifice of choice for individual members of minority groups in order to serve integrationist goals."[162]

Yet back in 1966, HUD Secretary Robert Weaver was questioned about the import of language in the proposed legislation, which contained many of the fair housing provisions passed in 1968.[163] Specifically, he was asked how he would interpret the requirement to "affirmatively further" the purposes of the law and responded:

> If there were several alternative proposals that came in for a given development, as far as housing is concerned, I think the one that would lend to open occupancy patterns of some permanence and the other would perpetuate the existing patterns, we would certainly give preference to the one that would lend itself to open occupancy patterns.[164]

In accord, there is at least some indication in the record to suggest that the FHA was not only designed to promote integration, but actually could and indeed should be advanced as the imminent policy objective even when it arguably contradicted its antidiscrimination provisions.[165] Nonetheless, it still seems fair to say that the question of tradeoffs was not particularly prevalent in the congressional debates.[166] Even Secretary Weaver's remarks do not

---

college admissions programs was constitutionally impermissible, in part, because the policies were not temporary and had "no end in sight").

161. GOETZ, *supra* note 15, at 96-97; McFarlane, *supra* note 92, at 1181; Norrinda Brown Hayat, *Urban Decolonization*, 24 MICH. J. RACE & L. 75, 86, 98-99 (2018) (acknowledging the integrative thrust of legislative history but calling for the expansion of fair housing "to include spatial equity through the democratization of redevelopment"); John O. Calmore, *Spatial Equality and the Kerner Commission: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1493-95 (same); PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 139, 179 (2013) (discussing the historical context surrounding the FHA's passage and ensuing spatial justice debates, but ultimately calling "for direct and sustained investments in poor urban neighborhoods").

162. GOETZ, *supra* note 15, at 96.

163. Orfield & Stancil, *supra* note 5, at 54-55.

164. H.R. REP. NO. 1678 at 1367 (1966); *see also* Orfield & Stancil, *supra* note 5, at 55 (discussing this exchange).

165. *See* Orfield & Stancil, *supra* note 5, at 55.

166. GOETZ, *supra* note 15, at 96 ("What the record lacks is a definitive statement that privileges integration over equal access, or evidence that Congress envisioned the sacrifice of choice for individual members of minority groups in order to serve integrationist goals.").

directly acknowledge a tension between the FHA's antidiscrimination provisions and its purported integrationist aims in reaching the conclusion that the pursuit of the latter would best comport with the mandate to affirmatively further fair housing.[167]

Although it is a contested point, some have suggested that the legislative history is relatively sparse.[168] However, the circumstances at hand also provided the context for reaching a speedy resolution to the deeply controversial matter of outlawing discrimination in residential real estate transactions.[169] For all their work in 1968, the supporters of the FHA seemed on track to come up short of the necessary votes, just as they had for the past two years, until the fateful day that Dr. King was assassinated on April 4, 1968, and uprisings ignited across the country.[170] Just one short week later, both chambers passed and hastily signed into law the 1968 Civil Rights Bill, Title VIII of which has hence come to be known as the FHA.[171] Accordingly, one can fairly infer that Congress was primarily motivated to ameliorate the seething sentiments fueling rebellions in the nation's cities rather than pass carefully crafted landmark legislation.[172] Extensive compromise left the final

167. *Compare* Orfield & Stancil, *supra* note 5, at 55 ("Weaver's answer is incompatible with the idea that the Fair Housing Act is neutral or agnostic on integration."), *with* Rubinowitz & Trosman, *supra* note 79, at 561-62 ("[T]he language of section 804 and other provisions of Title VIII on its face seems to preclude integration initiatives that exclude some minority families because of their race, even if the purpose is to achieve or maintain integration.").

168. *E.g.*, Otero v. New York City Hous. Auth., 354 F. Supp. 941, 953 (S.D.N.Y. 1973) ("[T]here is only one source which can cast any light on the issue of Congressional intent: That is the expression of Congress itself. The legislative history is unfortunately sparse considering the importance of the subject."); GOETZ, *supra* note 15, at 91 ("The record of legislative debate on the bill is not extensive. In fact, there is little in the congressional debates that can be used in retrospect to divine the intent of Congress on several specific and important issues."). *But see* Orfield & Stancil, *supra* note 5, at 58 ("Both the Trump Administration and Goetz argue that there is little legislative history to inform the meaning of the Fair Housing Act. This claim is obviously false. All told, in 1967, there were 508 pages of Senate testimony about the new fair housing proposal, and an additional 361 pages of Senate debate in 1968." (footnotes omitted)).

169. *See* GOETZ, *supra* note 15, at 91.

170. Roisman, *supra* note 141, at 362-63 (citing 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1629, 1631 (Bernard Schwartz ed., 1970)).

171. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969); *see also* Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 25 and 42 U.S.C.).

172. *See* 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 170, at 1631-32 (opining that "[h]ad the vote not occurred under the shadow of the King assassination, the outcome might well have been different"); Oliveri, *supra* note 147, at 35-36 (noting that "[s]upporters of the bill feared that it would die [in the House], and it might have but for" the assassination of Dr. King, which placed "a renewed urgency" on civil rights).

iteration of the law far weaker than initially conceived,[173] but each senator who gave notable speeches in favor of the bill referenced its integrative intent.[174] Thus, the absence of a discussion centering the tensions between antidiscrimination and integration is quite striking.[175] Indeed, its omission suggests that there was no such discrepancy between these two aims for the bill's supporters .[176]

Senator Mondale espoused this sentiment on the fiftieth anniversary of the FHA in 2018.[177] In response to disagreements on the proper interpretation of the FHA, he chimed in to defend its integrationist priorities: "The act has survived long enough to witness a curious debate over its intent. Some scholars have suggested that its functions can be divided into 'anti-discrimination' and 'integration,' with the two goals working at cross purposes. . . . To the law's drafters, these ideas were not in conflict."[178]

The late senator further explained that Congress could not simply direct residents of the country to integrate en masse.[179] Consequently, the provisions of the law prohibited discriminatory practices in private real estate transactions while requiring all federal executive departments and agencies to go even further through an AFFH obligation in their various programs.[180] In short, given the limited scope of congressional authority, the FHA was designed to "accomplish its goal through a variety of more-detailed provisions, each of which, its authors felt, would facilitate integration."[181]

Prior to the passage of the FHA, Senator Mondale entered the infamous Kerner Commission's report and its proposals for policy intervention into the

173. GOETZ, *supra* note 15, at 91.

174. Orfield & Stancil, *supra* note 5, at 58 ("[S]enators gave major speeches in favor of the bill in 1968: Mondale, Brooke, Dodd, Tydings, Javits, Percy, Hart, Proxmire, Case, Mansfield, Muskie, Gruenig, Dirksen, Kennedy (MA), and Kennedy (NY). Each testifier referenced the integrative intent of the bill." (footnotes omitted)).

175. *Cf.* Rubinowitz & Trosman, *supra* note 79, at 562 ("In order to support an integration interpretation of the affirmative mandate in the face of this prohibitory language, it would be necessary to find a counterthrust in the language of section 3608(d)(5) or in the legislative history. There is no such language in the affirmative mandate, nor is there any legislative history—with respect either to the mandate or to the rest of the statute—that clearly supports the integration view.").

176. *See id.* (arguing that the integration mandate is a hope or expectation flowing from allowing minorities free choice in the marketplace).

177. Mondale, *supra* note 37.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

Congressional Record on March 1, 1968.[182] Manifestations of social unrest in Black communities were simmering throughout the early 1960s, reaching a peak of over a hundred racial rebellions in the Long Hot Summer of 1967, prompting President Lyndon B. Johnson to convene the Kerner Commission to identify their root causes.[183] The Kerner Commission's final report was released on February 29, 1968,[184] and the document unequivocally observed that white Americans had relegated Blacks to impoverished neighborhoods devoid of opportunities with catastrophic implications such that the Nation was "moving toward two societies, one black, one white—separate and unequal."[185] Senator Mondale, who had served on the commission, declared that the FHA was bolstered by the Kerner Commission,[186] which recommended that enrichment of minority neighborhoods "be no more than an interim strategy" because the "primary goal must be a single society, in which every citizen will be free to live and work according to his capabilities and desires, not his color."[187]

More recently, the late Senator Mondale made it a point to publicly celebrate the Second Circuit's decision in *Otero v. New York City Housing Authority*,[188] where a public housing authority was permitted to limit the number of racial minorities seeking to return to a housing development following redevelopment of the site.[189] The court proclaimed that "integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing," as "[t]he purpose of racial integration is to benefit the community as a whole, not just certain of its members."[190] Mondale condemned the "cynical arguments made by civil rights skeptics" who had contributed to clouding the understanding that "the FHA was imbued with the principles of integration."[191] Thus, even amid tensions, the antidiscrimination

182. Orfield & Stancil, *supra* note 5, at 63 (citing 114 CONG. REC. 4,834 (1968) (statement of Sen. Walter Mondale)).

183. OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1, 15, 19-21, 66 (1968).

184. Susan T. Gooden & Samuel L. Myers, J., *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, RUSSELL SAGE FOUND. J. SOC. SCIS., Sept. 2018, at 1, 3 tbl.1.

185. KERNER ET AL., *supra* note 183, at 1, 5.

186. 114 CONG. REC. 4,841 (1968) (statement of Sen. Walter Mondale).

187. KERNER ET AL., *supra* note 183, at 10-11.

188. 484 F.2d 1122 (2d Cir. 1973).

189. Mondale, *supra* note 5, at 294 (stating that *Otero* "echoed the true aims of the act"); *see also Otero*, 484 F.2d at 1140.

190. *Otero*, 484 F.2d at 1134.

191. Mondale, *supra* note 5, at 294. As a co-author of the FHA, the impact of Mondale's assertions is hard to understate. *See, e.g.*, Orfield & Stancil, *supra* note 64, at 60-61 (suggesting that interpretations of the FHA that are contrary to the statements of Mondale are inherently flawed).

principle has been hailed as operating in tandem with furthering integrationist objectives.[192] Given the foregoing, should community development activists wave the flag and acquiesce in the primacy of the integration imperative to the extent that the two paradigms diverge?[193] Perhaps such a conclusion is premature given that the unsubstantiated faith that antidiscrimination laws would yield substantial integration in residential patterns is deeply emblematic of the perpetuator perspective that tainted the ability of liberal civil rights advocates to accurately grapple with the full dimensions of race and racial segregation.[194]

C. A Critical Defense of Fair Housing Revisionism

While conceding that legal outcomes are often quite predictable and therefore many matters ultimately play out as essentially routine, CLS nevertheless maintains that law is not entirely distinct from the realm of political affairs because legal texts require human interpretation.[195] Such interpretation is influenced by cultural context and frequently entails balancing competing social values, which creates a considerable measure of uncertainty or indeterminacy in judicial opinions.[196] CLS adherents,

192. The district court in *Otero* wrestled with NYCHA's argument that it could not stick to prioritizing former site occupants under its statutory obligation to pursue integration and the plaintiffs' response that this was a "distorted reading of the law." Otero v. New York City Hous. Auth., 354 F. Supp. 941, 952 (S.D.N.Y. 1973). Ultimately, Judge Lasker concluded that "it would be ironical in the extreme to construe an Act of Congress, intended to make housing available to members of minority groups, in such a way as to deprive them of that very commodity." *Id.* at 953. Even the Second Circuit in *Otero* recognized that NYCHA's efforts to prevent racial concentration "whether or not labelled a 'benign' quota, [could] constitute a form of unlawful racial discrimination in violation of . . . constitutional rights." *Otero*, 484 F.2d at 1136. The Second Circuit therefore stated that NYCHA's actions would be approved only if they could bear the burden of producing evidence to demonstrate the danger of "eventual ghettoization." *Id.*

193. *See* Lemar, *supra* note 108, at 210 (arguing that community economic development is "the effort to build ladders to opportunity for everyone," but its success is contingent on racial desegregation because "[b]uilding those ladders requires the dedication of resources by empowered majorities").

194. *See* Freeman, *supra* note 35, at 1118-19 (attributing the disconnect between antidiscrimination law and the continued subordination of racial minorities to an undue focus on the conduct of perpetrators rather than the conditions of victims imparted by systemic oppression).

195. *See* Dennis M. Davis & Karl Klare, *Critical Legal Realism in a Nutshell*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 27, 29 (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019).

196. *Cf. id.* at 32-33 (highlighting that even the decision of whether or not to apply precedent to a given case depends on discretionary decisions concerning whether the case is "on point").

sometimes referred to as "crits," are acutely concerned about how this zone of indeterminacy provides a pathway to erect and entrench legal rules that are "systemically biased in favor of economically and socially privileged elites."[197] Similarly, the late Professor Alan David Freeman argued that by imbuing antidiscrimination doctrine and equal protection jurisprudence with the perpetrator perspective, legal actors helped sustain structural white dominance.[198]

This Subpart introduces and recaps Freeman's perpetrator perspective with an aim toward revealing its underlying logics as part and parcel of the colorblind ideology that has risen as the staple for advancing racial equality. It then proceeds to demonstrate how the adoption of these frameworks truncated the capacity of liberal civil rights advocates to properly conceive of race as a systematically ingrained, sociopolitical conduit that filtered access to opportunity. In accord, this Subpart contends that the legislative reforms of the 1960s, including the FHA, rested on flawed conceptual premises. Given this faulty foundation, this Subpart concludes by reviewing the current state of antidiscrimination jurisprudence to chart a path toward resuscitating the vitality of the FHA as tool to combat modern injustices. Ultimately, in light of cues from recent doctrinal developments, this Subpart contends that centering the Act's text as well as its broader purpose holds the most promise for realizing the untapped potential of the FHA.

1. Two ways to view racial justice

In Freeman's account, the concept of "racial discrimination" was subject to different interpretations depending on whether one adopted the perspective of the victim or the perpetrator.[199] In the former frame of reference, the material and psychological consequences of being subjected to racial domination are paramount.[200] By contrast, the perpetrator's assessment is chiefly concerned with the regrettable actions of specific individuals who have intentionally injured others.[201] In this framing, the historical and contemporary scaffold of policies and practices that operate to uphold racialized privileges for the benefit of whites and to the detriment of African Americans is rendered invisible and irrelevant.[202] Indeed, if not for the bad actors who irrationally

197. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 746 (1994).

198. Freeman, *supra* note 35, at 1052-57.

199. *Id.* at 1052.

200. *Id.* at 1052-53.

201. *Id.* at 1053.

202. *Id.* at 1054.

discriminated on the basis of race, then the current system predicated on equality of opportunity would properly allocate valued resources without untoward racial disparities.[203] If bad actors were eliminated, any remaining correlations between deprivation and racial background would not require subsequent action as they would be the product of deficiencies in merit.[204] Thus, those who found themselves in dire straits would only have themselves to blame.[205] Each mode of analysis carries its own remedy, with the victim perspective seeking remediation of unjust circumstances and the perpetrator perspective calling only for the identification of racially biased actors and the termination of their discriminatory behavior.[206]

For Freeman, the perpetrator perspective played a pivotal role in substantively shaping the American ideologies on race and racism that gained dominance during the sixties and seventies.[207] Historian Iclus A. Newby once observed that ideas "do not exist in a vacuum" but rather "are expressions of social forces, and explanations or rationalizations of observed phenomena."[208] As such, an ideology represents "the broad mental and moral frameworks . . . that social groups use to make sense of the world, to decide what is right and wrong, true or false, important or unimportant."[209] Freeman described the perpetrator perspective as a "legal ideology" that subjects "all of contemporary society to its gaze," and to the extent that it is received, its frames and modalities of thought also infiltrate the views of society writ large.[210] As a CLS

203. *Id.*

204. *Id.*

205. *See id.*

206. *Id.* at 1053-54.

207. *See id.* at 1077-82 (providing examples); *see also Introduction*, *supra* note 32, at xiv.

208. ICLUS A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA 1900-1930, at 197 (1965).

209. EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 62 (2001) (emphasis omitted); *see also* Asli Daldal, *Power and Ideology in Michel Foucault and Antonio Gramsci: A Comparative Analysis*, REV. HIST. & POL. SCI., June 2014, at 149, 158 ("Ideology is real, it determines the way a human being acts, thinks, produces. That is the reason why ideology is 'material'; it is directly linked to the production process. It is the moral, mental incitement of men to produce in a certain fashion."); *cf.* MICHAEL GEORGE HANCHARD, ORPHEUS AND POWER: THE *MOVIMENTO NEGRO* OF RIO DE JANEIRO AND SÃO PAULO, BRAZIL, 1945-1988, at 4 (1994) ("'[R]ace' operates as a shuttle between socially constructed meanings and practices, between subjective interpretation and lived, material reality."). *But see* JOHN B. THOMPSON, STUDIES IN THE THEORY OF IDEOLOGY 3-4 (1984) (observing that the term "'ideology' is employed by many authors" to neutrally capture systems of thought, belief, or symbolic practices which pertain to social conduct or political pursuits, while others mobilize a critical conception where "ideology is essentially linked to the process of sustaining asymmetrical relations of power").

210. Freeman, *supra* note 35, at 1053 n.16.

scholar, Freeman undertook an extensive review of Supreme Court jurisprudence concerning education, employment, and voting.[211] His aim was to excavate the judiciary's role in leveraging law's indeterminacy to cement racial inequities.[212] The Court's approach served to morally justify gross disparities under the pretext of equal treatment for all.[213] Thus, these decisions legitimized a status quo warped by a legacy of race-based oppression.[214] The Court accomplished these ends by holding out a promise that antidiscrimination doctrine could provide liberation but continually refraining from delivering on it.[215]

Specifically, Freeman identified four eras over the history of modern antidiscrimination doctrine, each of which was marked by a distinct set of tactical frames that the Court mobilized to ultimately inculcate and enshrine the perpetrator perspective as the vehicle for detecting and remedying racial discrimination.[216] Of course, any set of rules benefits from a convincing rationale that speaks to all members of the target audience, if its aim is to legitimize a current social arrangement.[217] Thus, the eras collectively embody a tale of an aspirational intervention that purports to mark a turning point with America's sordid racial past, but such proverbial peaks of progress are soon followed by periods of retreat and surrender.[218] Yet, this cyclical process leaves embers of hope smoldering, fueled by the seeming potential of "civil rights" to finally deliver justice.[219] Ultimately these features offer illusory prospects of progress toward a racially just society, even enabling the nation-state to proclaim moments of triumph and celebrate milestones, all while leaving racialized structural injustices undisturbed.[220]

Freeman's analysis of antidiscrimination doctrine concluded in 1989, but Professor Mario Barnes has more recently sought to extend this framework and methodology to contend that the perpetrator perspective remains a salient

211. *Id.* at 1079-82.

212. *Id.* at 1050-52.

213. Mario L. Barnes, "*The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043, 2044 (2016).

214. *See* Freeman, *supra* note 35, at 1050 ("[F]or as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.").

215. *Id.* at 1052.

216. Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1413-14 (1990).

217. *See* Freeman, *supra* note 35, at 1052.

218. Freeman, *supra* note 216, at 1413-14.

219. *See id.*

220. *Id.*

paradigm for explaining how the Court's jurisprudence continues to undermine racial equality.[221] Barnes identified a new era of modern civil rights jurisprudence, beginning as early as 1993, that was marked by the Court's mobilization of two counternarratives to delegitimize the propriety of race as a basis for state action.[222] First, indications of progress in a nation-state that had formally repudiated its white supremacist underpinnings demonstrate that race no longer operates as a vehicle for subordination.[223] Second, given a history of race-based oppression, we should extrapolate a lesson that the concept is far too volatile to be mobilized even if for purportedly benign purposes.[224] For Barnes, the key reason that Freeman's analyses regrettably "remain germane is that at this point in U.S. history, a significant portion of America has embraced the desire to transcend race."[225]

Indeed, while the precise tools and techniques may have varied across the eras, the proliferation of the perpetrator perspective is at bottom fueled by a steadfast adherence to the principle of "colorblindness."[226] The widespread adoption of this paradigm operates to obscure and conceal the sociopolitical and economic repercussions of racial oppression that the victim perspective would otherwise be attuned to. Thus, the legislative formulation and subsequent judicial interpretation of civil rights laws rests on a defective understanding of race and racism. This grave deficiency cautions pause before deferring to the visions of racial progress as articulated by congressmen in the 1960s. Further still, this observation suggests that the annals of legislative history do not provide the key to unlocking the full remedial potential of the FHA.

---

221. *See* Barnes, *supra* note 213, at 2048, 2100.

222. *Id.* at 2072-74, 2078 (situating *Shaw v. Reno*, 509 U.S. 630 (1993), as squarely falling in a new "Era of Incredulity" because there the Court did not deny that race matters, but still "decide[d] that an apportionment plan built upon concerns about minority representation is nearly per se violative of the Constitution").

223. *See id.* at 2069-70. Barnes highlights *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (plurality opinion), and *Shelby County v. Holder*, 570 U.S. 529 (2013), as examples of this counternarrative. Barnes, *supra* note 213, at 2070. In *Parents Involved*, the Court struck down racial integration plans in K-12 institutions, in part, because "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." 551 U.S. at 748 (plurality opinion). In *Shelby County*, the Court concluded that section 4 of the Voting Rights Act of 1965 is outdated and improper because "[c]overage today is based on decades-old data and eradicated practices." 570 U.S. at 551.

224. Barnes, *supra* note 213, at 2089-90 (citing *Parents Involved*, 551 U.S. at 747).

225. *Id.* at 2049.

226. Freeman, *supra* note 216, at 1412.

2. The legitimation of integration

The perpetrator perspective mobilizes a colorblind rubric that views the topic of race without a concrete grounding in the nation-state's history of white supremacy. Thus, it situates every person as an individual with an ethnic background that should be equally entitled to protection against discrimination.[227] The abstraction provides a principle to reject race-conscious remedial endeavors on the basis that they permit "reverse discrimination" against innocent persons and institutions who bear no fault for any unfortunate disparities because they did not intentionally discriminate against anyone.[228] Colorblindness gained dominance as a sociopolitical ideology in the United States during the 1960s and permeated legal interventions not just in the judiciary, but in the legislative and executive arenas as well.[229] In this schema, race was understood to consist of a set of phenotypical attributes such as skin color or hair texture, and racism entailed the irrational imposition of meaning on these traits giving rise to bias and prejudice.[230] According to Gary Peller, these worldviews were dialectically developed because "mainstream ways to think about race in America are both produced in, and help to produce, particular cultural conflicts and struggles."[231] Gunnar Myrdal's influential and unprecedented study of African Americans in the United States, titled *An American Dilemma*, is emblematic of the intellectual exchange that birthed this new consensus in civil rights discourse.[232]

In Myrdal's account, white Americans were simultaneously rationalistic and moralistic in accord with a set of Enlightenment ideals that now constituted the "American Creed."[233] Myrdal's assessment of America's race problem was "in line with popular thinking"[234] when it adopted the perspective that the matter was "ultimately a moral dilemma that raged in the heart of White Americans as they struggled with an internal conflict between their prejudices and their broader values predicated on principles of freedom and equality."[235] Although Myrdal acknowledged that "practically all the

227. *Id.*

228. *Id.*

229. *See Introduction*, *supra* note 32, at xiv-vi.

230. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 768 (1990).

231. *Id.* at 822.

232. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

233. *Id.* at xlvi-ii.

234. *Id.* at l.

235. Melvin J. Kelley IV, *Retuning Bell: Searching for Freedom's Ring as Whiteness Resurges in Value*, 34 HARV. J. RACIAL & ETHNIC JUST. 131, 156 (2018) (citing MYRDAL, *supra* note 232, at lxxi-iv).

economic, social, and political power is held by whites," he nonetheless contended that the solution was to promote "[s]cientific truth-seeking and education" to rectify the erroneous beliefs held about African Americans.[236] This in turn would lead white Americans to cease their discriminatory behaviors as they adjusted their treatment of African Americans to comport with their egalitarian principles.[237]

Myrdal's account helps shed light as to why the perpetrator perspective fixates on intentional discrimination as the sine qua non of a civil rights violation since this orientation reflects an understanding that racism is rooted in "individual consciousness, in prejudice and bias."[238] So understood, the solution is to eradicate irrational conduct predicated on myths and stereotypes by promoting reason through the adoption of colorblindness.[239] The pursuit of this objective is fueled by an assumption that once we do away with intentional race-consciousness, society can proceed with distributing access to valued resources in accord with neutral, rational, and objective social practices yielding institutional forms based on merit.[240] This enlightened consensus posed the following formula for advancing racial justice: "Once we remove prejudice, reason will take its place; once we remove discrimination, neutrality will take its place; and once we remove segregation, integration will take its place."[241] Indeed, since the prior regime of de jure segregation was built on the foundation of white supremacist ideology, then it was assumed that equal access to opportunity under a ban on intentional discrimination would yield integrated institutions.[242] This is why Senator Mondale and other integrationist legislators failed to take note of any tensions between an antidiscrimination mandate and an integration agenda: They "believed the two would go hand in hand."[243]

Running along this narrative that cast colorblind integrationists as benign yet misguided actors is a deeply disconcerting dimension pertaining to their role in discrediting the Black Nationalist and Black Consciousness movements that were gaining renewed momentum in the fifties and sixties.[244] In the

236. MYRDAL, *supra* note 232, at xlix, li.

237. *See id.* at xlix.

238. *See* Peller, *supra* note 230, at 816.

239. *Id.*

240. *Id.* at 778, 816.

241. *Id.* at 773.

242. *Id.* at 769-70.

243. *Id.* at 770; *see also* Kelley IV, *supra* note 44, at 890.

244. *See* GOETZ, *supra* note 15, at 94; Nichole Nelson, *Fractures Within Fair Housing: The Battle for the Memory and Legacy of the Long Fair Housing Movement*, 50 J. URB. HIST. 1356, 1357, 1371 (2024) (describing fissures and factions within the fair housing movement and suggesting that the goals of Progressive and Black Nationalist groups were unfulfilled

footnote continued on next page

nationalist analysis, neo-colonialism best captured the dynamic between African Americans and Euro-Americans, as the former were a colonized and exploited people dispersed and displaced throughout North America via the Transatlantic slave trade.[245] Rather than establishing a colonial empire in Africa, the United States had imported the system and established a form of "domestic colonialism" in the South.[246] Even after the abolition of slavery, the political and economic subjugation of African Americans continued as Jim Crow became an official national policy.[247] Thus, nationalists insisted on a historically rooted understanding of race centered on its sociopolitical and economic repercussions.[248] With this understanding, a more radical disruption of the status quo was necessary before African Americans and Euro-Americans could relate on just terms, which in turn rendered community control and a transfer of resources pursuant to enrichment policies more appropriate.[249]

In the integrationist account, Black communities should not even exist because they are the product of state-enforced segregation, and therefore devoting resources to their eradication was more fitting than taking steps to improve these neighborhoods.[250] Color consciousness was fundamentally at odds with the integrationist perspective, and both white supremacists and Black Nationalists were deemed irrational racists.[251] There is direct evidence that Senator Mondale was a colorblind integrationist, as he condemned the American government's role in promoting racial living patterns which resulted in "the alienation of good people from good people because of the utter irrelevancy of color."[252] However, there is also some indication that this policy paradigm was primarily adopted to resist the demands of nationalist advocates.[253] Senator Mondale observed "that one of the biggest arguments that we give to the black racists is the existence of ghetto living."[254] Yet he

during the 1960s because they lacked the same funding, media attention, and mainstream influence as moderates).

245. Peller, *supra* note 230, at 810.

246. *Id.* at 809 (quoting HAROLD CRUSE, REBELLION OR REVOLUTION? 76 (1968)).

247. *See, e.g.*, DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954, at 3 (2005) (describing a range of techniques, including extralegal measures that northern states employed to maintain segregated schools and neighborhoods, in support of a broader contention that Jim Crow was not just a southern phenomenon).

248. *See* Peller, *supra* note 230, at 808.

249. *See id.* at 806-09.

250. *See id.* at 796.

251. *See id.* at 790.

252. 114 CONG. REC. 2,278 (1968) (statement of Sen. Walter Mondale).

253. GOETZ, *supra* note 15, at 94.

254. *1967 Senate Hearings*, *supra* note 148, at 28.

simultaneously acknowledged that the FHA would have a limited effect on integration because many African American families lacked sufficient financial means to move into white suburbs.[255] Instead, the policy was designed to stoke some hope that African Americans would be "free—if they have the money and the desire—to move where they will."[256] Regardless of whether these legislators were merely misinformed or willfully sought to undermine the prospect of more radical systemic transformation, their perpetrator perspective has now set the benchmark for evaluating civil rights violations.[257]

3. Constructing civil rights claims in colorblind courts

Case law has confirmed that 1960s antidiscrimination legislation carried a truncated, biological definition of race in accord with the perpetrator perspective.[258] In *EEOC v. Catastrophe Management Solutions*, the EEOC filed suit on behalf of a Black woman whose job offer was rescinded after she refused to cut her locs per the defendant-employer's grooming policy.[259] At the time, the grooming policy set forth that the hairstyles of all personnel "should reflect a business/professional image" and "[n]o excessive hairstyles or unusual colors are acceptable."[260] In advancing an allegation of disparate treatment on the basis of race, the EEOC contended that race "is a social construct and has no biological definition," and further "is not limited to or defined by immutable physical characteristics."[261] In this way, the EEOC set up its argument that locs were culturally significant to persons of African ancestry and thus constituted a racial characteristic subject to protection from discrimination under Title VII.[262] The Eleventh Circuit noted that race was not defined in the statute and in such an absence, the prevailing "ordinary, contemporary, common

255. 114 CONG. REC. 3,422 (1968) (statement of Sen. Walter Mondale) ("There will not be a great influx of all the [African Americans] in ghettos into the suburbs—in fact, the laws of supply and demand will take care of who moves into what house in which neighborhood.").

256. *Id.*

257. *See* Nelson, *supra* note 244, at 1371-72 (contending that "the policy of moving Black people to white-dominated suburbs reflects the legacy and continued influence of the moderate faction of the Fair Housing Movement," which ultimately "won the battle for visibility and historical memory, [yet] it lost the battle for the ability to effect more meaningful change"); *see also Introduction*, *supra* note 32, at xiv; GOETZ, *supra* note 15, at 94.

258. *See e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1027 (11th Cir. 2016).

259. *Id.* at 1020-22.

260. *Id.* at 1022 (quoting the employer's policy).

261. *Id.* (quoting the EEOC's allegations).

262. *Id.* at 1023.

meaning" would guide interpretation of the term.[263] While acknowledging that competing definitions were percolating in the 1960s, the court concluded that "'race,' as a matter of language and usage, referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time."[264] Thus, from a legal standpoint, Congress in the 1960s was enshrining this biological framing of race in civil rights legislation, which the courts have hence understood as only insulating "immutable" traits derived from birth.[265] In keeping with this line of reasoning, the court held that while discrimination on hair texture would be impermissible, taking adverse action on the basis of a hairstyle, even if culturally significant, would not violate the tenets of Title VII.[266]

While the Eleventh Circuit further acknowledged that today many understand race to be a social construct, it declined to import those views into Title VII.[267] Rather, the court suggested, determining "what 'race' means (or should mean) in Title VII" should be resolved "through the democratic process."[268] Nonetheless, the biological framing embedded in 1960s civil rights legislation is utterly untenable.[269] Even during the 1960s, scholars had already begun positing that the diversity of humanity could not be explained as simply a byproduct of genetic heritage.[270] Instead, it was a reflection of a reciprocal

263. *Id.* at 1026 (quoting Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014)).

264. *Id.* at 1026-27.

265. *Id.* at 1027-28; Fagan v. Nat'l Cash Reg. Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973) ("Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color, or sex classification."); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) ("[D]istinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity in violation of [Title VII].").

266. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

267. *Id.* at 1033.

268. *Id.* at 1035. In light of such limitations, many state and local jurisdictions have opted to expand protections for employees by prohibiting discrimination on the basis of hairstyles that are associated with or perceived to be associated with racial identity. *See, e.g.*, Megan Mitchell, *A Deep Dive into the Crown Act, Stopping Hair Discrimination One Strand at a Time*, 61 HOUS. L. 12, 12-14 (2023) (discussing a trend that has seen more than twenty states and other local jurisdictions pass legislation for "Creating a Respectful and Open World for Natural Hair").

269. *Cf.* Osagie K. Obasogie, *Race & Science: Preconcilation as Reconciliation*, *in* RACIAL RECONCILIATION AND THE HEALING OF A NATION: BEYOND LAW AND RIGHTS 49, 57-59 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2017) (contending that federal administrative agencies should employ race impact assessments to ensure delegitimatized notions of biological race are not used to perpetuate and justify future harms against the descendants of historically marginalized populations).

270. *See, e.g.*, PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 66-67 (1966).

process wherein people are shaped through their interactions with their environments, encapsulating both the natural landscape as well as a specific sociocultural order, "which is mediated to [persons] by the significant others who have charge of [them]."[271] Such insights mirror Freeman's critique of the perpetrator perspective's role in legitimizing the nation's racial inequities. These contributions provided key building blocks for critical race theorists to articulate the law's role in constructing racial meanings.[272] Critical race theorists posit that racial categories are generated in a process known as "racial formation" or "racial fabrication," whereby the dominant group distinguishes itself from others by noting differences in actual or perceived characteristics or attributes that are then deemed inferior.[273] This technique provides both a psychological justification as well as a pragmatic blueprint for implementing racialized maldistributions of valued resources for the benefit of the dominant group and to the detriment of the oppressed group.[274]

Since "[r]aces are social products," it is hardly surprising that "legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race."[275] The Kerner Commission itself noted that white institutions created, maintained, and condoned "[s]egregation and poverty," thereby subjecting poor Blacks to "a destructive environment totally unknown to most white Americans."[276] Given this backdrop, policies and practices predicated on white supremacist ideology are no longer necessary to entrench the racial inequities already embedded in historically disinvested spaces and their privileged counterparts.[277] Simply doing nothing to disturb the material status quo will more than suffice to ensure that white dominance remains the hallmark in the nation's geopolitical landscape.[278] The purview of antidiscrimination doctrine, as informed by the perpetrator perspective, is generally oblivious to the victim's conditions as

271. *Id.* at 66.

272. *See* Barnes, *supra* note 213, at 2101-02.

273. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 55-56 (2d ed. 1994); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27-28 (1994).

274. *See* Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2282-83 (2001).

275. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 78 (Richard Delgado & Jean Stefancic eds., 10th rev. ed. 2006).

276. KERNER ET AL., *supra* note 183, at 1.

277. Ford, *supra* note 123, at 1844.

278. *Id.* at 1844-45.

long as no identifiable actor or institution can be pinpointed as intentionally causing the harm.[279]

Yet *Catastrophe Management Solutions* cautions that requests for judicial updates on the operating definitions of race and discrimination are unlikely to gain traction.[280] Despite demonstrating a measure of sympathy and even finding some credence with EEOC's contentions, the Eleventh Circuit ruled it was bound by prior case law evincing a consensus that Title VII only covered immutable characteristics.[281]

For those interested in pursuing a more expansive interpretation of civil rights legislation, the question surfaces of how one might plot a path toward judicial incorporation of the victim perspective and its comparative focus on material conditions.[282] Here, another development in Title VII jurisprudence is instructive. In *Bostock v. Clayton County*, the U.S. Supreme Court held that Title VII's ban on sex discrimination also provided protection for sexual orientation, gender identity, and gender expression.[283] The Court reviewed three cases arising in the Eleventh, Second, and Sixth Circuits where employees had alleged discriminatory discharges on the basis of their sexual orientation or gender identity and expression.[284] In granting certiorari, the Court sought to resolve the ensuing circuit split as to whether Title VII's ban on sex-based discrimination had import for homosexual and transgender persons.[285]

While the parties in *Bostock* disagreed on the scope of the term "sex" as devised by Congress in 1964, the majority's analysis proceeded on the assumption that it only captured biological distinctions between males and females based on reproductive anatomy rather than any socioculturally-imposed connotations.[286] The majority opinion authored by Justice Gorsuch also conceded that Congress in the 1960s was unlikely to expect that this legislation would forbid employers from taking adverse action against employees or prospective job applicants on the basis of their sexual orientation, gender identity, or gender expression.[287] Indeed, deducing congressional intent in this context entailed another layer of obscurity given that there are some tales that the introduction of sex as a protected class may

279. *See id.* at 1845.

280. *See* 852 F.3d 1018, 1034-35 (11th Cir. 2016).

281. *Id.* at 1033-35.

282. Delgado, *supra* note 274, at 2289.

283. 140 S. Ct. 1731, 1754 (2020).

284. *Id.* at 1737-38.

285. *Id.* at 1738.

286. *Id.* at 1739.

287. *Id.* at 1750, 1754.

have been motivated by a desire to derail passage of Title VII altogether.[288] Eschewing a legislative purpose approach, the Court explained that "[o]urs is a society of written laws" and therefore, "[j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."[289] The Court found that in construing the text, discriminating against a person because of their sexual orientation, gender expression, or gender identity necessarily entailed sex discrimination.[290] Discrimination on the basis of sexual orientation incorporated consideration of that person's sex and the sex of the person they are attracted to, and for trans persons it entailed adverse action against a person whose assigned sex at birth did not define their identity.[291]

To be sure, Justice Alito's dissenting opinion bitterly rejected the propriety of the majority's analysis, claiming: "The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation . . . that courts should 'update' old statutes so that they better reflect the current values of society."[292] In his account, the question of interpretation boiled down to whether Congress in 1964 outlawed discrimination on the basis of sexual orientation or gender identity, and it was overwhelmingly clear it did no such thing.[293]

As it were, at that time, homosexuality was a deemed a mental disorder subject to moral reprobation and criminal sanctions, while gender identity was not even a concept that had yet entered common public discourse.[294] Ultimately, it is clear that legislative history would have offered no aid in supporting the majority's expansive reading of Title VII's ban on sex discrimination.[295] Civil rights activists should heed this lesson in search of an

288. *Id.* at 1752. *But see* Kelley IV, *supra* note 78, 314-15 & n.73 (arguing that the myth that sex was added as a protected class under Title VII by opponents of the bill seeking to derail it is "entirely unfounded"). For additional consideration of deciphering legislative intent, compare *Palmer v. Thompson*, 403 U.S. 217, 225 (1971), where the Supreme Court found that "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," with the critique in *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989), where the district court stated that though "[t]he Supreme Court has never expressly overturned *Palmer*," it "has all but done so. Time and again over the past two decades, the Court has held that facially neutral laws may run afoul of the Equal Protection Clause if they are enacted or enforced with discriminatory intent."

289. *Bostock*, 140 S. Ct. at 1754.

290. *Id.* at 1741-42.

291. *Id.* at 1741-43.

292. *Id.* at 1755-56 (Alito, J., dissenting).

293. *Id.* at 1756.

294. *Id.* at 1769, 1772.

295. *Id.* at 1770-72.

interpretation of Title VIII that lends itself to more robust race-conscious remedial interventions.[296] Part II uses *Bostock* as a foundation for shifting fair housing jurisprudence beyond the confines of the perpetrator perspective's integration imperative.

II. Interpreting Fair Housing with Critical Eyes

To the extent that critical theory has proven insightful, the question for Part II is how to leverage these lessons for advocacy. On this front, it is first necessary to unpack the import of a schism between CLS and CRT. Crits were acutely focused on disrupting the engineered perception that the current sociolegal world order was the product of neutral reasoning rather than a reification of privileged predilections.[297] In this manner, our collective imagination could be unshackled from the confines of traditional legal thought, thus paving the road to an array of alternative conceptions of human organization that might be more conducive to equity.[298] To this end, Freeman and other crits mobilized "trashing," or the rigorous deconstruction of legal doctrine, to demonstrate the internal inconsistences and sociohistorical contingencies of the law.[299] The merits of trashing were rooted in a sense that the members of society had been lured into a false consciousness—in effect, liberal legal ideology was a siren's call marching humanity to its doom.[300] Scholars should commit to "negative, critical activity" designed to delegitimize the current legal rules and thereby awaken minds to the prospects of an alternative future that would be built with substantive justice as the guiding principle for its blueprint.[301]

However, what the crits failed to consider is that African Americans, as well as other historically oppressed racial groups, were not similarly situated

296. *Cf.* Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y. L. SCH. L. REV. 1053, 1064-65 (2005) ("History, as well as current events, calls for realism in formulating racial tactics and strategies. We must recognize that while landmark decisions may be designed to address and hopefully resolve deeply divisive social issues; they must be framed in language that appears to do justice, without unduly upsetting large groups whose non-compliance could frustrate relief efforts and undermine judicial authority.").

297. Harris, *supra* note 197, at 746-47.

298. *Id.* at 747; *see also* Alan D. Freeman, Comment, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230-31 (1981) (arguing for scholars to take up rigorous "trashing" as a means to disrupt legal consciousness and open up possibilities for a re-imagined social order).

299. *See e.g.*, Freeman, *supra* note 298, at 1230-31.

300. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988).

301. Freeman, *supra* note 298, at 1230-31.

since the legal order had been constructed on a foundation of white supremacy.[302] Despite his nuanced legal analyses, even Freeman failed to fully analyze the role of racism in subjecting African Americans to a regime of domination and exploitation without their consent and for the benefit of others.[303] Indeed, the crits' framework seemed to suggest that the predicament of African Americans primarily reflected an inability to transcend internalized constraining belief structures.[304] Yet, to the contrary, even Myrdal concluded that "[a]ll our attempts to reach scientific explanations of why [African Americans] are what they are and why they live as they do have regularly led to determinants on the white side of the race line."[305]

Given the foregoing, a new intellectual movement gained traction that became known as CRT, which sought in part to stage a race intervention into CLS and in so doing, rebuff the crits' vigorous dismissal of the utility of engaging in rights discourse.[306] Here again, Myrdal's insights offer an informative window into the contemporary reverberations of this divergence in thought and tact. His assessment provided:

> [African Americans], as a minority, and a poor and suppressed minority at that, in the final analysis, has had little other strategy open to him than to play on the conflicting values held in the white majority group. In so doing, he has been able to identify his cause with broader issues in American politics and social life and with moral principles held dear by white Americans. This is the situation even today and will remain so in the foreseeable future. In that sense, "this is a white man's country."[307]

Similarly, critical race theorists cautioned that trashing the existing rights doctrine would be of limited utility to African Americans who had to challenge the ideological pillars that had been erected to justify their oppression.[308] As a practical matter, these efforts would require an infiltration of the logics that were wielded to exclude them on the basis of an ascribed racialized stigma.[309] Such tactics run the risk of reinforcing some aspects of the dominant ideology, even though the end game is to reveal a contradiction that must be redressed through reforms.[310]

---

302. Crenshaw, *supra* note 300, at 1356-58.

303. *Id.* at 1356.

304. *Id.* at 1357.

305. MYRDAL, *supra* note 232, at li.

306. *Introduction*, *supra* note 32, at xix, xxiii-iv.

307. MYRDAL, *supra* note 232, at lii.

308. Crenshaw, *supra* note 300, at 1358-59; *see also* Ford, *supra* note 123, at 1914 (arguing that "[b]ecause a truly neutral system is impossible, we must rewrite the laws to favor, rather than to obstruct, racial and class desegregation").

309. Crenshaw, *supra* note 300, at 1359.

310. *Id.*

The civil rights movement was emblematic of this approach, as protestors largely embraced the pretense of American citizenship and demanded that they be afforded due rights as official members of the body politic rather than using the contradiction between the promised ideals of citizenship and the reality of racial subordination "to suggest that American citizenship itself was illegitimate or false."[311] Threatening the current sociolegal order's legitimacy gives rise to the prospect of shifting the status quo, while simultaneously marking the outer boundaries as the system adjusts to mitigate the crisis and reassert its authority.[312]

In the CRT account, African Americans are thus caught "between a rock and a hard place" since "there are risks and dangers involved both in engaging in the dominant discourse *and* in failing to do so."[313] Thus, "[w]hat subordinated people need is an analysis which can inform them how the risks can be minimized, and how the rocks and the very hard places can be negotiated."[314] The strategy has been termed "reconstruction jurisprudence" both to signify a distinction between the deconstructionist tendencies of the crits and to denote CRT's project of engaging with "white-dominated legal rules, reasoning, and institutions" to bend "existing jurisprudence and political theory" toward racial emancipation.[315] This Part attempts to answer the call for a jurisprudence of reconstruction by charting a path for interpreting the FHA that sits wells within the confines of its text and largely squares with judicial interpretation thus far, yet simultaneously maximizes its efficacy for improving the life chances of racially subordinated groups.

To this end, Part II first mines CRT for additional insights to demonstrate why civil rights advocacy must be fixated on substantively improving the lot of subordinated groups rather than merely enforcing formal equality under antidiscrimination doctrine.[316] Then, this Part leverages early scholarship on the FHA to indicate that its provisions were geared toward protecting the exercise of choice in residential settings even if there was an unwarranted assumption that it would yield integrated housing patterns.[317] Next, this Part distills the meaning of fair housing choice by reviewing contributions from scholars who have undertaken critical examinations of Title VII and the ADA to assess the scope of employers' duty to current and prospective employees as

311. *Id.* at 1367-68.

312. *Id.*

313. *Id.* at 1369.

314. *Id.*

315. Harris, *supra* note 197, at 765-66.

316. *Infra* Part II.A.

317. *Infra* Part II.A.1; Rubinowitz & Trosman, *supra* note 79, at 543.

well as the nature of the harm that protected individuals must be shielded from.[318]

Finally, this Part turns to lessons that can be gleaned for guiding the federal government's unique duty to affirmatively further fair housing choice.[319]

A. Fair Housing Choice Amid Race & Class Oppression

Critical race theorists have found it puzzling that despite Freeman's focus on antidiscrimination doctrine and general awareness of racism, his analysis failed to pointedly engage with white supremacy as a key ideological linchpin structuring the nation-state's hierarchy of humanity.[320] However, it seems likely that he erroneously conflated racial and economic domination, thereby missing the complexity within and among these distinct yet interacting modalities of oppression.[321] Nonetheless, his Article identifying and coining the perpetrator perspective as the primary lens distorting the interpretation of civil rights legislation is still considered a key writing in the foundation of CRT, even as further modification was necessary.[322] Freeman's work, in conjunction with the reconstructionist agenda of race crits, suggests that we need to chart a path toward imbuing the eyes responsible for reading and deciphering the FHA's text with the victim perspective.[323]

To help illuminate the import of the contrasting paradigms, Freeman offered that the "victim/perpetrator dichotomy may be recast starkly as the difference between equality of results and equality of opportunity, between de facto and de jure segregation, between substantive and formal equality."[324] Professor Kimberlé Crenshaw critiqued and revamped Freeman's contributions by elaborating on how civil rights reforms might yield substantive racial equality.[325] In her account, bans on discriminatory conduct

318. *Infra* Part II.A.2.

319. *Infra* Part II.B.

320. *E.g.*, Crenshaw, *supra* note 302, at 1360-61.

321. *Id.* at 1363-64.

322. Barnes, *supra* note 213, at 2064-65, 2097 n.294.

323. *See* Freeman, *supra* note 216, at 1411 ("The victim perspective focuses on the persistence of conditions traditionally associated with racist practice. . . . [F]our examples are once again illustrative: Racism as traditionally practiced led to discriminatory exclusion from employment, from 'white' neighborhoods, from politics, and from government contracts. Those conditions are presumptive violations. If those same conditions exist in virtually identical form after antidiscrimination laws have prohibited racial discrimination, the law has yet to be effective.").

324. *Id.* at 1413.

325. Crenshaw, *supra* note 302, at 1360-61, 1377-78, 1385-87.

were particularly successful in addressing the symbolic manifestations of discrimination in the form of explicitly designated public spaces for whites and Blacks respectively.[326] While the expulsion of symbolic oppression benefited all Blacks, there were some who "benefited more than others."[327] This is because racial oppression also consisted of "material subordination," or "the ways that discrimination and exclusion economically subordinated Blacks to whites and subordinated the life chances of Blacks to those of whites on almost every level."[328]

In light of these successful removals of symbolic manifestations of discrimination, neoconservatives contended that the endgame of the civil rights movement—formal equality to racial minorities—had been achieved and therefore any push for deeper societal transformation was improperly tied to the legislation secured through that sociopolitical campaign.[329] However, Crenshaw countered that this account carried assumptions and viewpoints that were intermeshed with political preferences, rendering the conflict unresolvable by reference to some neutral principle.[330] Instead, at a fundamental level, antidiscrimination discourse was deeply ambiguous and capable of accommodating both liberal and conservative views of racial equality.[331] This Part attempts to take up the "ongoing ideological struggle" so as to "harness the moral, coercive, consensual power of law"[332] toward the victim perspective so that fair housing jurisprudence can be responsive to the residual harms of material subordination.

1. The right to live wherever a white man can live

A temporally wider view is informative in deciphering the import of the FHA's statutory provisions given that it marks a second swing at a federal fair housing law. As it stands, the genesis of modern antidiscrimination law can be traced back to aftermath of the Civil War and the subsequent abolition of slavery under the Thirteenth Amendment.[333] While persons of African ancestry were now free, their legal status was otherwise undefined in this new era.[334] Seizing on the federal vacuum, several states passed a host of legislative

326. *Id.* at 1378.

327. *Id.*

328. *Id.* at 1377-78.

329. *Id.* at 1334.

330. *Id.* at 1335.

331. *Id.*

332. *Id.*

333. GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 6 (2013).

334. *Id.* at 30.

enactments that became known as the Black Codes.[335] Collectively, these statutes operated to circumscribe the rights of newly emancipated persons in an attempt to resuscitate the regime of antebellum chattel slavery.[336] In response, Congress sought to exert its new power under section 2 of the Thirteenth Amendment to enforce the ban on involuntary servitude—save as a punishment for a crime—with "appropriate legislation."[337]

This backdrop provided the scaffold for the Civil Rights Act of 1866, which was designed to systemically respond to the Black Codes by providing birth citizenship to persons of African ancestry while banning racial discrimination in the scope of rights that states afforded to citizens: the right to contract, to own property, to access the courts as a litigant or witness, and to the application of state-sanctioned punishment.[338] The 1866 Act effectuated these ends by declaring that these substantive and procedural rights must be forthcoming on the same terms as "enjoyed by white citizens."[339] The language partly reflects federalism concerns by striking a balance between prohibiting race-based discrimination while otherwise acknowledging a state's authority to dictate the underlying substance of these rights within its territorial boundaries.[340] Nonetheless, the benchmark embedded in the 1866 Act continues to reverberate across the annals of antidiscrimination jurisprudence.[341]

Despite its radical potential to grant autonomy, agency, and sociopolitical and economic power to newly emancipated slaves, the 1866 Act was rendered virtually irrelevant for a century.[342] Deep-seated white supremacist sentiments undergirded constricting judicial interpretations of civil rights initiatives like the 1866 Act at the end of Reconstruction.[343] Further still, the practical utility

335. William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865-1915*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 78, 84, 96 n.22 (Alexander Tsesis ed., 2010) (listing the pertinent states but drawing a distinction between those that adopted comprehensive codes from the others that only enacted "fragmentary bits of legislation that were common in the Black Codes of the Deep South").

336. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II, at 53 (2008).

337. U.S. CONST. amend. XIII, § 2.

338. Ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982); Wiecek, *supra* note 335, at 86.

339. Civil Rights Act of 1866 § 1.

340. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statements of Sens. Reverdy Johnson, Lyman Trumbull, and William Fessenden).

341. Kelley IV, *supra* note 78, at 362-63.

342. *Id.* at 350-51.

343. *See* Henderson, *supra* note 103, at xviii-ix.

of any causes of action that remained was nullified by unabated domestic terrorism that operated to systematically disenfranchise African Americans.[344]

Notably, *The Civil Rights Cases* held that Congress was powerless to address private discrimination under its Fourteenth Amendment enforcement powers, and it could not prohibit race discrimination with its Thirteenth Amendment enforcement powers.[345] It would not be until June 1968, two months after passage of the FHA, that the U.S. Supreme Court would reverse course in *Jones v. Alfred H. Mayer Co.*[346] In that dispute, a married couple, consisting of an African American man and a white woman, brought suit when a real estate company refused to sell the husband a home because of his racial identity.[347] The cause of action stood on the modern incarnation of the 1866 Act, as partly codified in 42 U.S.C. § 1982.[348] Thus, the Court was once again called upon to evaluate whether this legislation could capture private discriminatory conduct in the housing market.[349]

The Court construed section 2 of the Thirteenth Amendment as authorizing Congress to target the "badges and incidents" of slavery with appropriate legislation and found that Congress had operated in accord when passing the 1866 Act.[350] Per the Court's assessment, the Black Codes had been a proposed substitute for slavery.[351] Moreover, following their reversal pursuant to the 1866 Act, mandated racial segregation "became a substitute for the Black Codes" and therefore, "it too is a relic of slavery."[352] As such, the Court held:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[353]

Much like the language enshrined in the statute itself, the Court's holding situated antidiscrimination law as mandating parity between historically

344. *Id.*

345. 109 U.S. 3, 11, 24-25 (1883) (invalidating the Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335, 336).

346. 392 U.S. 409 (1968).

347. *Id.* at 412; Jones v. Alfred H. Mayer Co., 379 F.2d 33, 35 (8th Cir. 1967).

348. *Jones*, 392 U.S. at 412; Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982).

349. *Jones*, 392 U.S. at 412.

350. *Id.* at 439 (quoting *Civil Rights Cases*, 109 U.S. at 20).

351. *Id.* at 441-43.

352. *Id.* at 442-43.

353. *Id.* at 443.

oppressed racial minorities and their white counterparts.[354] In the realm of housing, this parity meant agency, autonomy, and the freedom to make choices that could impact a household's quality of life.[355]

While the statements of senators who supported the FHA have been read to greenlight integration, their analysis of racial residential segregation was rooted in the perpetrator perspective.[356] Mondale's widely cited assertion that the FHA was designed to foster "truly integrated and balanced living patterns" is seldom placed in the full context of his statement speculating the anticipated effect of the legislation:

> There will not be a great influx of all the [African Americans] in the ghettos into the suburbs—in fact, the laws of supply and demand will take care of who moves into what house in which neighborhood. There will, however, be the knowledge by [African Americans] that they are free—if they have the money and the desire—to move where they will; and there will be the knowledge by whites that the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns.[357]

Thus, Senator Mondale was articulating an aspiration that outlawing racial discrimination in real estate transactions would promote fair housing choice, which in conjunction with market dynamics would yield comparatively integrated communities.[358] To this end, the FHA also outlawed "blockbusting" practices wherein brokers stoked racial fears to encourage whites to sell their homes and leave their neighborhoods at the prospect of a deluge of African American newcomers.[359] The perpetrator perspective accounts for the conflation of antidiscrimination and integration, but at their core, both the FHA and the 1866 Act were designed to broaden the choices that African American households were entitled to make.

Accordingly, echoing down across generations, the call for civil rights resounds as a recognition of racialized privileges and the need to dismantle

354. *See* Kelley IV, *supra* note 78, at 363; *see also* Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1466 (2021) ("It seems almost too obvious to state that nonwhite people do not have the same right to enjoy their communities as enjoyed by white people.").

355. Leong, *supra* note 354, at 1462-66; *see also* Andrew Wiese, *Neighborhood Diversity: Social Change, Ambiguity, and Fair Housing Since 1968*, 17 J. URB. AFFS. 107, 109 (1995) (distinguishing between camps of fair housing activists who supported antidiscrimination coupled with freedom of choice and those that were pro-integration); Nelson, *supra* note 244, at 1369-70 (crediting the National Fair Housing Alliance with subscribing to a progressive, choice-based model whereby African Americans can opt to stay put pursuant to reinvestment policies or decide to move predominantly white neighborhoods).

356. *See supra* Part I.C.

357. 114 CONG. REC. 3,422 (1968) (statement of Sen. Walter Mondale).

358. Rubinowitz & Trosman, *supra* note 167, at 538 n.178.

359. *Id.* at 507.

them by equalizing access to opportunities that are conducive to flourishing. Ford has similarly concluded that civil rights laws are best understood as erecting duties of care, which are mediated through their respective bans on race-based discrimination.[360] These obligations are conceptually akin to our collective social responsibilities to avoid causing nuisances or committing torts.[361] Therefore, statutory requirements to refrain from discrimination practically entail adherence to a standard of conduct that individuals and institutions must meet to avoid liability for failure to adequately aid in disrupting patterns of segregation and hierarchy.[362] Unfortunately, this reality is obscured because courts set a defendant's duty of care through indirect ideological struggles over the meaning of discriminatory intent and causation.[363]

In support of his contention, Ford offers an assessment of *Price Waterhouse v. Hopkins*.[364] There, Ann Hopkins had been passed over for partnership at an accounting firm in part because of a perceived deficiency in interpersonal skills, but also because of gendered stereotypes.[365] So the key question was whether the sex-based considerations had "caused" the outcome.[366]

The plurality opinion in *Price Waterhouse* held that "Title VII [was] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[367] Ford argues that this is not at all anchored in causation, but simply establishes a rule that "any consideration of the forbidden ground at the time of the challenged decision triggers liability."[368] By contrast, Justice O'Connor's concurrence would only find liability when sexist attitudes arise during part of a formal or discrete decision-making procedure and form a substantial basis for the employer's decision.[369] But this paradigm cannot be adequately explained under the prism of "causation" because sexism permeates our social fabric—including the workplace—and Justice O'Connor's approach does not capture the myriad avenues through which the protected trait may have still played a role in the adverse outcome.[370] Instead, "causation" is operating as a shroud for divergent policy analyses that are attempting to

360. Ford, *supra* note 80, at 2950-51.

361. *Id.* at 2951.

362. *Id.* at 2950-51.

363. *Id.*

364. 490 U.S. 228 (1989); Ford, *supra* note 80, at 2952-56.

365. *Price Waterhouse*, 490 U.S. at 234-35 (plurality opinion).

366. *Id.* at 241.

367. *Id.*

368. Ford, *supra* note 80, at 2954 (emphasis omitted).

369. *See Price Waterhouse*, 490 U.S. at 276-77 (O'Connor, J., concurring in the judgment).

370. Ford, *supra* note 80, at 2955-56.

balance "the goal of reducing illegitimate workplace segregation and hierarchy with legitimate employer prerogatives."[371] Ultimately, Ford concludes that the stakes should be candidly and openly acknowledged, thereby enabling the articulation of a standard that can be enforced through the imposition of liabilities or fines.[372]

These insights are transferable to the context of fair housing advocacy. Indeed, the history of the 1866 Act as supplemented by Ford's observations helps orient Title VIII as erecting a duty of care to protect households of color in exercising a meaningful choice about where to live so they might thrive through the same opportunities that have been afforded to their white counterparts.[373] Pursuant to its anti-discriminatory provisions:

> [The FHA] outlawed the refusal to rent or sell to someone because of race; it prohibited racial discrimination in the terms and conditions of rental or sale; it barred discrimination in real estate advertising; it banned agents from making untrue statements about a dwelling's availability in order to deny access to blacks; and it enjoined real estate agents from making comments about the race of neighbors or in-movers in order to promote panic selling.[374]

Yet revealing the essence of civil rights as a set of obligations designed to foster egalitarian goals is only part of the equation in resolving what the FHA actually requires in terms of protecting and promoting fair housing choice.[375] To that end, it is also necessary to review antidiscrimination jurisprudence to glean insight into the nature of the injury that must be avoided.[376]

2. A duty to avoid status causation

Like Ford, Zatz also envisions antidiscrimination law as embodying "a simple liberal ideal: nobody should enjoy lesser freedom because she is black rather than white, a woman rather than a man, and so on."[377] This principle is facilitated through a range of theoretical claims, each with its distinct modality for targeting status causation, including individual disparate treatment, non-accommodation, systemic disparate treatment, and discriminatory effect.[378]

371. *See id.* at 2956.

372. *Id.* at 2959.

373. For a fuller discussion on contemporary developments in causation standards under the modern incarnation of the 1886 Act as codified in 42 U.S.C. §§ 1981, 1982, as well as Title VII and possible reverberations in Title VIII, see Robert G. Schwemm, *Fair Housing and the Causation Standard After* Comcast, 66 VILL. L. REV. 63, 66-70 (2021).

374. Massey, *supra* note 1, at 575-76.

375. *Cf.* Ford, *supra* note 80, at 2959 (discussing *Price Waterhouse*'s "attempt to balance anti-discrimination goals" in the Title VII context).

376. Zatz, *supra* note 82, at 1379 n.96.

377. *Id.* at 1359.

378. *Id.* at 1359-60.

Disparate treatment is sometimes "misleadingly" referred to as intentional discrimination.[379] However, the concept broadly captures scenarios where a person's protected trait is consciously or unconsciously considered in a decision to take adverse action against them.[380] In Zatz's account, disparate treatment entails internal status causation because the defendant's own processes or procedures were tainted by the intentional or implicit consideration of a protected trait, thereby injuring a prospective plaintiff who would otherwise have been in a better position.[381]

As noted previously, the FHA also provides rights for persons with a disability when they are seeking to address their disability-related needs to enable equal use and full enjoyment of a dwelling.[382] The legislation empowers such individuals to request reasonable accommodations in policies, practices, or services and reasonable modifications to physically alter the premises.[383]

These matters would constitute examples of external causation under Zatz's rubric.[384] This is because it is not the protected trait per se that is at issue in the housing provider's assessment but more precisely how a person's specific predicament, albeit interconnected with their disability status, will impact either the standing practices or maintenance of the home.[385] Perhaps more succinctly, disability status affects other traits and those corresponding characteristics are then taken into account.[386] For example, a person with a mobility impairment might require an assigned parking space to ensure they can safely exit and enter their unit such that the housing provider has to alter their application of the first-come policy that otherwise applies in the parking lot.[387]

Conceptually, this point of nuance between internal and external variations of status causation may matter little to a victim of housing discrimination who has otherwise suffered harm. However, there are three pivotal pragmatic repercussions that warrant distinguishing the two. First, this distinction dislodges antidiscrimination doctrine from the throes of the

379. *Id.* at 1360 (citing Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 45-48 (2011)).

380. *See id.* at 1376.

381. *Id.* at 1375.

382. *See* 42 U.S.C. § 3604(f).

383. *Id.* § 3604(f)(3)(A)-(B).

384. *See* Zatz, *supra* note 82, at 1376.

385. *See id.*

386. *Id.*

387. U.S. DEP'T OF JUST. & U.S. DEP'T OF HOUS. & URB. DEV., JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 6 (2004).

perpetrator perspective's fixation on intent since rooting out the unlawful effects of a protected trait is the common denominator between redressing internal and external status causation.[388] Deliberate discrimination is surely an affront to equality because of its injury to a protected person, but this is just one mechanism that facilitates such harms, as evinced by the alternative routes embedded in external status causation.[389] Second, courts have not been willing to outright update the definition of race to reflect its social fabrication as a tool to facilitate oppression,[390] but unveiling external causation provides a textually grounded vehicle for capturing the material or consequential repercussions of membership in a historically marginalized population.[391] Finally, vindicated claims of disparate treatment or internal status causation establish both an injury stemming from membership in a protected class as well as the defendant's responsibility for improperly considering unlawful criteria in a real estate transaction.[392] However, non-accommodation claims under the ADA and Title VIII separate these queries because a defendant is only liable for any ensuing injuries if the request for an accommodation or modification does not constitute an undue financial or administrative burden.[393] When an owner or manager's resources are limited, the costs of the accommodation are quite high, and the benefits to the requester are minimal, the housing provider may be able to deny the specific proposal without repercussion for that decision.[394] This is also true where a person with a disability is seeking assistance that is beyond the scope of the amenities and services that the housing provider generally offers as part of its operations at the site.[395] From this foundation of internal and external status causation, conceptual bridges can be more readily built to the remaining causes of action concerning systemic disparate and discriminatory effects.[396]

An allegation of disparate treatment under Title VII is typically substantiated with evidence to support how an individual's qualitative experience with an employer warrants an inference of discriminatory conduct.[397] By contrast, the systemic disparate treatment claims that are

388. *See* Zatz, *supra* note 82, at 1361-62, 1365.

389. *See id.* at 1362.

390. *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1026-28, 1035 (11th Cir. 2016).

391. *See* Zatz, *supra* note 82, at 1367-79.

392. *Id.* at 1378.

393. 42 U.S.C. § 12112(b)(5)(A); *see also* U.S. DEP'T OF JUST. & U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 387, at 7.

394. *See* U.S. DEP'T OF JUST. & U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 387, at 7.

395. *Id.* at 8.

396. *See* Zatz, *supra* note 82, at 1378.

397. *Id.* at 1374.

cognizable under Title VII support a plaintiff's claim through a comparison of group-level data, wherein aggregate disparities suggest that unlawful discrimination has transpired.[398] Here, the internal status causation inflicted is not immediately discernable, as an articulated company policy and the mediums of enactment may be so diffuse that it thwarts detection on a case-by-case basis but still results in a pronounced cumulative impact.[399]

For example, in *Bazemore v. Friday*, the plaintiffs purported to demonstrate that Black employees on average earned less per year even after controlling for educational attainment, job title, and tenure in position.[400] Aggregation in this context can thus serve as a powerful tool to uncover en masse internal status causation where each individual may never have been able to otherwise compile sufficient evidence to convince a judge or jury that they were specifically subject to discrimination.[401] Yet this formulation is also grounded in an individualistic orientation because even if specific persons cannot be named there is no denying that internal status causation affected the personnel of a company.[402]

From this perch, discriminatory-effect liability under Title VII and Title VIII is revealed as an attempt to target external status causation—much like non-accommodation claims—but through systemic disparate treatment's group-based evidentiary pathway.[403] Title VIII has two discriminatory-effect theories: disparate impact and segregative effect.[404] The first is implicated when a rule or process yields unwarranted, disproportionate harms to

398. *Id.* at 1380.

399. *Id.* at 1388 ("Actually proving any one individual case is likely to be quite messy because there are many plausible explanations for an individualized, fact-sensitive employment decision. Nonetheless, if disparate treatment regularly occurs, it will cumulate into a disparity visible in aggregate.").

400. 478 U.S. 385, 399-400 (1986) (Brennan, J., concurring in part). A similar tactic has been employed in the fair housing context. *See, e.g.*, Amended Complaint at 6-7, United States v. Hous. Auth. of Ashland, No. 20-CV-01905 (N.D. Ala. June 27, 2022), 2021 WL 10132459, ECF No. 9 ("From at least 2012 to the present, [the Ashland Housing Authority] has engaged in a pattern or practice of race discrimination by steering applicants to housing communities based on race and by maintaining a racially segregated housing program. . . . The degree of racial disparities described above at these five communities is statistically significant and cannot be explained by non-racial factors, such as a potential correlation between race and elderly or disabled status or between race and number of bedrooms or household size.").

401. Zatz, *supra* note 82, at 1388-89.

402. *Id.* at 1392 (explaining that the "statistical comparison of group outcomes is an evidentiary means to an individualistic end").

403. *See id.*

404. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

members of protected classes when compared with their counterparts.[405] The second applies when a policy or practice "creates, increases, reinforces, or perpetuates segregated housing patterns."[406] In order to excavate the external status causation dynamics of these claims, it will be useful to revisit the foundational case of *Griggs v. Duke Power Co.*, which held that disparate impact liability was a tenable claim under Title VII of the Civil Rights Act of 1964.[407] In *Griggs*, the employer maintained a policy that required its manual laborers to both hold a high school diploma and demonstrate proficiency on two intelligence tests.[408] In relevant part, Title VII deemed it an unlawful practice for an employer to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[409] An examination of this language indicated that Congress intended to "proscribe[] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[410] The statute's purpose was to further "equality of employment opportunities" through the removal of barriers that had previously operated to favor whites to the detriment of other racial groups.[411] In accord, the recognition of disparate-impact claims was not only appropriate as a function of Title VII's text, but further served to facilitate its overarching goals.[412]

The logic of *Griggs* was first transplanted to the FHA by a federal appellate court in the matter of *United States v. City of Black Jack*.[413] There, a region in Missouri that was governed by St. Louis County hastily moved toward municipal incorporation to thwart plans for an affordable housing development through its new land use powers.[414] The U.S. Department of Justice brought suit, arguing that the policy had not only been adopted for a racially discriminatory purpose, but was also discriminatory in effect.[415] While there seemed to be ample evidence of racial animus, the Eighth Circuit

405. *Id.*

406. *Id.*

407. 401 U.S. 424, 429-32 (1971).

408. *Id.* at 427-28.

409. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 254, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)).

410. *Griggs*, 401 U.S. at 431.

411. *Id.* at 429-30.

412. *See id.* at 429-31.

413. 508 F.2d 1179, 1184 (8th Cir. 1974).

414. *Id.* at 1182-83.

415. *Id.* at 1181.

held that the city violated the FHA because its policy both disproportionately harmed Black households and perpetuated segregation.[416] Decades later, the Supreme Court similarly concluded that the text of the FHA supported discriminatory-effects liability thereunder.[417]

In *Griggs*, the defendant-employer did not explicitly take race into account, but instead considered educational attainment in its hiring decisions.[418] However, against the backdrop of Jim Crow North Carolina, it was hardly surprising that this criterion operated to the benefit of whites and the detriment of African Americans who had "long received inferior education in segregated schools."[419] Much like a non-accommodation claim, the defendant did not consider the prohibited characteristic, but instead evaluated another trait that was affected or otherwise correlated with the protected classification.[420] However, in the same vein as systemic disparate treatment, group-based statistics were the framework to buttress the cause of action.[421] The status causation injury that is detected here is a manifestation of racialized "dynamics originating in the nominally separate educational sphere."[422] These insights illuminate why the FHA is concerned at all with questions about access to affordable housing as well as the location thereof. "[R]acism is a means by which society allocates privilege, status, and wealth."[423] In turn, "[r]acial hierarchies determine who receives tangible benefits, including the best jobs, the best schools, and invitations to parties in people's homes."[424] Thus, African Americans have inherited an intergenerational legacy of material disadvantage manifesting in pervasive economic inequality when compared to white households.[425]

---

416. *See id.* at 1182-83, 1186-88.

417. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543 (2015).

418. Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).

419. *Id.* at 430.

420. Zatz, *supra* note 82, at 1394.

421. *Id.* at 1393.

422. *Id.* at 1394.

423. Delgado, *supra* note 274, at 2283.

424. *Id.*

425. *See* Crenshaw, *supra* note 300, at 1383 ("The race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass; instead, as we have seen, class disparities appear to be the consequence of individual and group merit within a supposed system of equal opportunity."); ANA PATRICIA MUÑOZ ET AL., FED. RES. BANK OF BOS., THE COLOR OF WEALTH IN BOSTON 2 (2015) ("While white households have a median wealth of $247,500, Dominicans and U.S. blacks have a median wealth of close to zero."); *see also* Delgado, *supra* note 274, at 2283 ("[M]aterial factors are necessary to the analysis of racial discrimination.").

Discriminatory-effect claims under Title VIII target external status causation as manifested in the racialized, economic injuries imparted by historical oppression.[426] With this approach we can avoid unsuccessful attempts to update race as in *Catastrophe Management Solutions* while adhering to the blueprint of *Bostock* by cultivating an expansive interpretation of antidiscrimination doctrine that is rooted in statutory text.[427] In this way, discriminatory-effect theories can operate as channels for uplifting the victim perspective, and thereby redirect the purview of civil rights laws to the material conditions informing the lived realities of impoverished people of color.[428]

However, much like in the accommodation context, the external status causation injury is a separate question from the defendant's liability.[429] While undue hardship provides an escape hatch for any fault stemming from the denial of a reasonable accommodation or modification,[430] here defendants are able to dodge liability when the policy is necessary to achieve a legitimate objective and that interest could not be furthered by a less discriminatory alternative.[431] But there is still one critical difference between Title VII and Title VIII that must be considered here. As it stands, the FHA is unparalleled among civil rights laws because it imposes an affirmative obligation on the federal government as well as grantees under programs related to housing and urban development.[432] This insight provides a new framework for defending community revitalization and a mandatory HCV program. This is because external status causation crystalizes the racialized class and space monopolies on opportunity that the FHA was designed to disrupt and upend. Mobility

426. *See* Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1333-35 (2018) (arguing that only permitting housing developments for the wealthy is not a race-neutral policy because of the racialization of poverty).

427. *See supra* Part I.C.3.

428. *Cf.* Freeman, *supra* note 35, at 1093 (claiming that upholding *Griggs* was "as close as the Court ha[d] ever come to formally adopting the victim perspective").

429. *See* Zatz, *supra* note 82, at 1378.

430. *See, e.g.*, U.S. DEP'T OF JUST. & U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 387, at 7.

431. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) (explaining that "[a] legally sufficient justification exists" if the challenged conduct "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" that "could not be served by another practice that has less discriminatory effect").

432. *See* Heather R. Abraham, *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*, 107 IOWA L. REV. 1963, 1971-72 (2022); *see also* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1364 (2012) (calling for greater attention to the proactive equality directives embedded in implementing regulations of both Title VI of the Civil Rights Act of 1964 and the FHA, but noting that "Title VIII is explicitly affirmative in its statutory mandate").

moves may be one vehicle to pursue this end, but so too is targeted enrichment. Moreover, HUD is complicit in perpetuating external status causation in the HCV program by enabling grantees to issue vouchers in jurisdictions where households can be subject to discrimination based on their source of income.[433] Cases arguing for accommodation requests pursuant to the economic repercussions of a disability have brought to the forefront the question of whether a housing provider has a responsibility to address the financial predicament of a person when it's connected to a protected trait.[434] The lessons for such external status causation claims reverberate for the HCV program when the admitted households thereunder disproportionately consist of racial minorities, a fact that evinces the footprint of cumulative, intergenerational harms.[435]

B. Lessons for Affirmatively Furthering Fair Housing

Given the above, it is not deeply surprising that debates over "causation" are currently surging in the federal circuits in the wake of the Supreme Court's decision to uphold discriminatory-effect liability.[436] As Ford's assessment of *Price Waterhouse* reveals, causation is a placeholder for the scope of a defendant's liability, and these splits amongst circuit courts of appeals reveal diverging views on where to draw the line with respect to external status causation.[437] Yet, unlike Title VII, the FHA does not merely require defendants to abstain from discriminatory conduct.[438] Instead, the federal government and its grantees must abide by the AFFH mandate.[439] Ultimately, the cumulative import of the foregoing analyses indicate that the nation-state is not positioned to claim absolution when external status causation operates to frustrate the choices of African American households who are seeking communities conducive to health, stability, achievement, and upward mobility.[440] The next Subpart considers lessons that should drive the AFFH duty moving forward given a text-based reading of the FHA that centers the fair housing choice of

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

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

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

436. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545-46 (2015); *see infra* Part II.B.2 (discussing and reviewing cases).

437. *See* Kelley IV, *supra* note 44, at 870-72; *see also* Ford, *supra* note 80, at 2959-60.

438. *See* 42 U.S.C. § 3608(d)-(e).

439. *Id.*

440. *See* W. C. Bunting, *In Defense of a Liberal Choice-Based Approach to Residential Segregation*, 88 TENN. L. REV. 335, 389 (2021) ("[U]nder a choice-based approach to residential integration, the responsibility to AFFH must be interpreted as a responsibility to promote fair housing choice . . . .").

African American households: a choice that must be delivered free of internal and external status causation amid a legacy of interlocking racial and economic oppression.[441]

1. Building two-way bridges to opportunity

Leveraging statements from legislators, the judiciary has largely positioned the goal of residential integration as the preeminent national policy animating the FHA.[442] In the early landmark case of *Trafficante v. Metropolitan Life Insurance*, two tenants in an apartment complex alleged that the owner of the development had purposely discriminated against nonwhite prospective renters through a range of tactics including discouraging statements, manipulation of the waitlist, and uneven tenant screening criteria.[443] One of the plaintiffs was white and the other was African American; both claimed, among other injuries, that the owner's practices deprived them of the "social benefits of living in an integrated community."[444] The Court conceded that the legislative history of the FHA was not terribly helpful, but it still found support for HUD's administrative conclusion that the two tenants were "aggrieved persons" within the meaning of the statute.[445] Specifically, the Court relied on Senator Javits's claim that "the whole community" was harmed by discriminatory housing practices and Senator Mondale's now infamous assertion that the law was meant to foster "truly integrated and balanced living patterns."[446] *Gladstone, Realtors v. Village of Bellwood* built on the holding of *Trafficante* to reaffirm the primacy of integration under the FHA.[447] In this subsequent case, a village was likewise granted standing to challenge the discriminatory steering practices of real estate brokers whose conduct was shifting the racial demographics within its jurisdiction toward a higher minority concentration.[448] The ruling was underscored with a

441. *Cf.* Kazis, *supra* note 25, at 4, 7-8, 16 (concurring that the meaning of fair housing is "open-ended" even as mobility and place-based camps offer competing visions, but arguing that one path forward is to target "unfair" housing practices such as large lot sizes for dwellings under local zoning codes).

442. Robert W. Lake & Jessica Winslow, *Integration Management: Municipal Constraints on Residential Mobility*, 2 URB. GEOGRAPHY 311, 318 (1981).

443. 409 U.S. 205, 206-08 (1972).

444. *Id.* at 206, 208.

445. *Id.* at 210-11.

446. *Id.* at 210-11 (first quoting 114 CONG. REC. 2,706 (1968) (statement of Sen. Jacob Javits); then quoting *id.* at 3,422 (statement of Sen. Walter Mondale)).

447. *Gladstone*, 441 U.S. 91, 111-12 (1979).

448. *Id.* at 109-11.

pronouncement that "'[t]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.'"[449]

Despite their integrative thrusts, the results in *Trafficante* and *Gladstone* furthered this objective by expanding the range of choices afforded to African Americans.[450] In *Trafficante*, the apartment complex owner's failure to fairly consider the rental applications of racial minorities gave tenants standing to sue.[451] In *Gladstone*, real estate brokers' attempts to pigeonhole Black households to residing in one community provided standing to the aggrieved households.[452] But rather than removing their barriers to choice, several courts have concluded that restrictions on the options available to racial minorities are also appropriate in pursuit of integration.[453] *Barrick Realty, Inc. v. City of Gary* considered a municipal ordinance that forbade the use of "For Sale" or "Open House" signs on or around homes in residential zones that were available for purchase.[454] Real estate agents had historically operated as gatekeepers of racially segregated neighborhoods—until 1956, their national code of ethics specified that "a realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence would clearly be detrimental to property values in that neighborhood."[455]

However, in periods of potential racial transition, financial incentives flourished for brokers to engage in blockbusting, which entailed inducing white owners to quickly sell to Blacks for fear of imminent shifts in their community demographics with purportedly concomitant implications for the value of their homes.[456] The municipal ordinance was designed to curb this phenomenon of "panic selling," and the court agreed that it was an appropriate measure, even if it would reduce the number of African Americans able to

449. *Id.* at 111 (quoting Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 94 (1977) (brackets in original)).

450. *See* Lake & Winslow, *supra* note 442, at 320.

451. 409 U.S. 205, 211-12 (1972).

452. 441 U.S. at 113-15.

453. *See, e.g.*, Barrick Realty, Inc. v. City of Gary, 491 F.2d 161, 164-65 (7th Cir. 1974); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1124-25 (2d Cir. 1973); Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203, 1207-08 (6th Cir. 1987). *See generally* Hale v. U.S. Dep't of Hous. & Urb. Dev., No. C-73 410, 1985 WL 11179 (W.D. Tenn. Aug. 23, 1985) (ordering the Memphis Housing Authority to provide for an "integrative move-in option").

454. *Barrick Realty, Inc.*, 491 F.2d at 162-63 (quoting IND. CODE § 22-9-1-2(a) (1972)).

455. Amine Ouazad, *Blockbusting: Brokers and the Dynamics of Segregation*, 157 J. ECON. THEORY 811, 812 (2015) (quoting NAT'L ASS'N OF REAL ESTATE BDS., CODE OF ETHICS, art. 34 (rev. 1928) (capitalization altered in original)).

456. *Id.* at 813-14.

move to the city.[457] The "right to open housing" meant more "than the right to move from an old ghetto to a new ghetto," and the collective interest in stable integration outweighed any "inconvenience[s]" to Black families.[458] The FHA not only imposes duties to refrain from disparate treatment or perpetuate unwarranted discriminatory effects, but it further requires that HUD "administer [its] programs and activities relating to housing and urban development in a manner affirmatively to further [fair housing]."[459] Due to the overarching integration imperative, this provision has been validated as a justification for curtailing the discretion of African American households in the name of achieving racially balanced neighborhoods.[460]

The Third Circuit was the first appellate court to interpret this affirmative mandate in the matter of *Shannon v. U.S. Department of Housing and Urban Development*.[461] There, residents of a neighborhood in North Philadelphia challenged HUD's administration of a program to finance a low-income housing complex under an urban renewal plan because they feared that the project would exacerbate the area's already high population of impoverished African Americans.[462] The court found that HUD violated its duty pursuant to the AFFH because it lacked an institutional method for procuring data that would enable it to evaluate the racial ramifications of site selection in its decision-making process.[463] In reaching this conclusion, the court asserted that the "[i]ncrease or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."[464] Three years later, the Second Circuit in *Otero* confirmed that the AFFH duty extends to the grantees of HUD's programs and upheld NYCHA's decision to limit the number of racial minorities who could return to the site of a residential complex in the aftermath of a redevelopment initiative.[465] The court described the obligation as requiring "affirmative steps

457. *Barrick Realty*, 491 F.2d at 163-65.

458. *Id.* at 164-65 (quoting the NAACP's amicus brief).

459. 42 U.S.C. § 3608(e)(5). The FHA also extends this affirmative obligation to "[a]ll executive departments and agencies" with programs or activities related to housing and urban development and mandates cooperation with HUD to fulfill these aims. *Id.* § 3608(d). Collectively, these two provisions are known as the AFFH mandate. Abraham, *supra* note 432, at 1971, 1974.

460. *E.g.*, Otero v. New York City Hous. Auth., 484 F.2d 1122, 1125, 1133-34 (2d Cir. 1973).

461. 436 F.2d 809 (3d Cir. 1970).

462. *Id.* at 811-12.

463. *Id.* at 820-21.

464. *Id.* at 821.

465. *Otero*, 484 F.2d at 1124-25.

to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons."[466]

In the ensuing years, at least seven circuit courts have taken up a question pertaining to the AFFH duty, and with the exception of the Eleventh Circuit's narrower interpretation, a judicial consensus has developed that the mandate requires HUD to proactively consider its impact on racial segregation.[467] Since then, however, the U.S. Supreme Court upheld discriminatory-effect liability under the FHA in *Inclusive Communities* and suggested that a more nuanced approach may be warranted.[468] The matter entailed the Texas Department of Housing and Community Affairs' ("Department") administration of the Low-Income Housing Tax Credit program (LIHTC), which the federal government provides to subsidize the acquisition, construction, and rehabilitation of affordable rental housing.[469] The federally funded initiative requires state agencies, or their designees, to develop and implement a set of selection criteria for distributing the credits among prospective housing developer applicants.[470] The Inclusive Communities Project, a nonprofit that aims to promote racially and economically diverse communities through the expansion of affordable housing opportunities, brought suit alleging that the operation of the program violated the FHA under disparate impact theory because it encouraged the LIHTC projects to be concentrated in predominantly Black neighborhoods in Dallas and away from white suburban areas. [471]

Authored by Justice Kennedy, the majority opinion acknowledged "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[472] Yet the opinion cautioned that "[i]f the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose."[473] "From the standpoint of determining advantage or disadvantage to racial minorities," a deeper analysis was warranted in choosing between people-based versus place-based strategies.[474]

466. *Id.* at 1125.

467. Abraham, *supra* note 432, at 1975-76 & nn.53-55 (collecting cases).

468. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545-46 (2015).

469. *Id.* at 525-26; *see* NAT'L LOW INCOME HOUS. COAL. & THE PUB. & AFFORDABLE HOUS. RSCH. CORP., BALANCING PRIORITIES: PRESERVATION AND NEIGHBORHOOD OPPORTUNITY IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BEYOND YEAR 30, at 5-8 (2018), https://perma.cc/2LQD-YB28 (providing an overview of the LIHTC program).

470. *Inclusive Cmtys.*, 576 U.S. at 525.

471. *See id.* at 526.

472. *Id.* at 522, 547.

473. *Id.* at 544.

474. *See id.* at 542.

HUD regulations under the Obama administration attempted to follow suit in construing the AFFH mandate.[475] Beginning in 2015, HUD contentiously introduced "racially or ethnically concentrated areas of poverty" as a distinct category worthy of attention pursuant to an agenda of advancing fair housing objectives.[476] Building on the Obama-era regulations, Biden's proposed AFFH rule specifically encouraged program participants to pursue a "balanced approach," which was defined to "make clear that both place-based and mobility strategies are part of a balanced approach necessary to achieve positive fair housing outcomes."[477]

Biden's proposal will not come to pass, and Trump has moved to reverse course, but the framing of the Biden approach is still telling, as it recognized that "[w]here a community has been starved of investment, some may want to leave for other communities, while others will want to bring those resources to bear to improve the circumstances of where they live."[478] Even still, lest a grantee opt to couch its revitalization endeavors under a regime of neosegregation, the proposed rule also denotes that a "program participant that has the ability to create greater fair housing choice outside segregated, low-income areas should not rely on solely place-based strategies."[479] The parameters of the balanced approach model are designed to foster "fair housing choice," such that "individuals and families have the information, opportunity, and options to live where they choose, including in well-resourced areas, without unlawful discrimination and other barriers related to race, color, religion, sex (including sexual orientation[,] gender identity, and nonconformance with gender stereotypes), familial status, national origin, or disability."[480] Despite the integrative gloss, if "fair housing means that a person's housing choice should not determine their access to opportunity and

475. *See, e.g.*, Bostic et al., *supra* note 53, at 87-88.

476. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42355 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 590, 574, 576, 903).

477. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8530-31 (proposed Feb. 9, 2023), *withdrawn by* Affirmatively Furthering Fair Housing: Withdrawal, 90 Fed. Reg. 4686 (Jan. 16, 2025) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

478. *Id.* at 8,532; *see also* Press Release, *supra* note 61. The interim regulation under the second Trump administration evinces "a strong desire to eviscerate our nation's fair housing protections by rejecting the letter and spirit of the Affirmatively Furthering Fair Housing mandate" and therefore, is less helpful in an earnest undertaking to distill the spatial justice implications of the FHA. Press Release, *supra* note 61.

479. Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8531.

480. *Id.* at 8,559.

amenities" then by extension, "AFFH means taking steps to eliminate or reduce existing disparities in income, housing and other areas."[481]

This nuanced methodology would uphold the expansion of choice for racial minorities embedded in *Trafficante* and *Gladstone* but would caution against accepting the internal status causation in cases like *Shannon* and *Otero* unless there were countervailing indications that the housing provider or public authority was attempting to quarantine racial minorities to isolated regions. To be sure, even this balanced approach would come under fire in the eyes of the late Senator Mondale.[482] In his account, efforts to improve and revitalize historically disinvested communities without recourse to integration have been underway for over a century and consistently yielded failure.[483] Further, such endeavors violate *Brown v. Board of Education*'s conceptual pronouncement that separate is inherently unequal.[484] Pragmatically, research supports that as a comparative matter, low-income racial minorities who grow up in integrated settings tend to have better educational and employment outcomes when contrasted with their counterparts who reside in resource-deprived majority-minority neighborhoods.[485] But it is also notable that even in such integrated settings, there are wide gaps in achievement between white and Black students due to the underlying effects of navigating a persistently racialized educational terrain.[486] A range of tactics—such as disparate discipline and unequal access to quality curricula through discriminatory tracking or grouping programs—operate to ensure white dominance through systems of internal segregation within diverse educational institutions.[487]

---

481. *See* Abraham, *supra* note 432, at 1975 (quoting Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, *in* THE FIGHT FOR FAIR HOUSING, *supra* note 5, at 189, 193).

482. *See* Mondale, *supra* note 5, at 294-95.

483. *Id.* at 295.

484. *Id.* It is unclear how Mondale tabulates the onset of relevant community development initiatives, but the calculus must extend to endeavors that predate the repudiation of the infamous "separate, but equal" doctrine in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). *See, e.g.*, Alice O'Connor, *Swimming Against the Tide: A Brief History of Federal Policy in Poor Communities*, *in* THE COMMUNITY DEVELOPMENT READER 9, 12-14 (James DeFilippis & Susan Saegert eds., 2007) (tracing federal assistance to poor communities to principles, theories, and programs emanating from the Progressive Era).

485. Mondale, *supra* note 5, at 295; SANDER ET AL., *supra* note 135, at 338-52 (marshalling various case studies to support the proposition that lower Black/white segregation improves outcomes for African Americans with respect to employment, income, education, and health).

486. *See, e.g.*, John B. Diamond, *Still Separate and Unequal: Examining Race, Opportunity, and School Achievement in "Integrated" Suburbs*, 75 J. NEGRO EDUC. 495, 495-98 (2006).

487. Wilson, *supra* note 124, at 2443 (citing Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003)).

Even still, given an apparent dearth of sociopolitically viable options, some scholars and activists have concurred in the necessity of integration as a tool to build a bridge to opportunity on behalf of historically oppressed populations.[488] Confined to the reality of spatial separation and white monopolies on valued resources in conjunction with an enduring interest to retain this position of privilege, communities of color have no reason to believe that an altruistic rerouting of resources will ever be forthcoming while these conditions persist.[489] Therefore, the solution must be to encourage desegregation so that at least some racial minorities might be able to infiltrate these basins of opportunity,[490] even as their number must be capped to avoid triggering a new wave of white flight.[491] Yet even the Second Circuit was forced to pull back from the full brink of *Otero*'s implications in recognition of the flagrant internal status causation embedded in ostensibly benign integration quotas.

In *United States v. Starrett City Associates*, the owners and operators of a large housing complex spanning forty-six high-rise structures with a total of 5,881 units adopted a set of procedures to maintain a racial distribution of 64% white, 22% Black, and 8% Hispanic per apartment building.[492] The Second Circuit recognized that while the quota at issue was supported by congressmen's statements that enforcement of the FHA's antidiscrimination provisions would result in residential integration, it simultaneously contravened the statute's ban on disparate treatment—thus sparking a conflict between the objectives that legislative history could not resolve.[493] Starrett City justified the capping practice as a necessary measure to avoid "tipping," a phenomenon whereby white flight is triggered once a housing development crosses a threshold of racial minorities, thus leaving the area to transition to a predominantly minority community.[494] Rather than overrule *Otero* and the use of racial considerations to promote integration, the court distinguished the policy at issue in *Otero* on the grounds that it was comparatively limited in scope and

488. *See* Lemar, *supra* note 108, at 209-10 (collecting views).

489. *See id.* at 210-11.

490. *Id.*

491. *See* Samuel H. Kye & Andrew Halpern-Manners, *Detecting "White Flight" in the Contemporary United States: A Multicomponent Approach*, 51 SOCIO. METHODS & RSCH. 3, 6 (2022) (discussing speculations that there are "tipping points" that trigger a process of racial turnover (quoting Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOCIO. 143, 182 (1971))). Studies from the 1970s and mid-2000s, with some qualifications, all confirm the continued persistence of white flight. *Id.* (citing prior research).

492. 840 F.2d 1096, 1098 (2d Cir. 1988).

493. *Id.* at 1101.

494. *Id.* at 1099.

duration.[495] In contrast, Starrett City's practice could not stand because "Title VIII does not allow [the housing complex] to use rigid racial quotas of indefinite duration to maintain a fixed level of integration."[496]

However, Professor Audrey McFarlane has astutely observed that the push for mixed-income housing attempts to evade the statutory and constitutional limitations on erecting racial ceilings in accord with the discriminatory preferences of whites by substituting class for race to effectuate these same ends.[497] McFarlane asserts that the prevailing model of mixed-income housing is a form of "discrimination management," which in turn helps explain its mass appeal since it's a reflection of systemic racial animus.[498] Efforts to reduce the concentration of poverty are generally justified by reference to studies documenting that the targeted regions are often afflicted by societal ills, including higher rates of violent crime, ineffective schools, and a dearth of employment prospects.[499] However, these observations are correlational, not causational, and there is ample sociological literature indicating that these conditions are a "symptom rather than a cause."[500] The dearth of services and amenities available to residents of historically disinvested communities of color reflects a set of decisions by private and public actors who are not inclined to send public dollars or operate businesses in these spaces.[501] Rather than directly redressing the myriad manifestations of poverty through redistributing income, improving the affordable housing stock, or providing direct subsidies, the solution has been to ensure that no area is identified as a

495. *Id.* at 1103.

496. *Id.*

497. *See* McFarlane, *supra* note 92, at 1183-86; Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1005-06 (2010) (reviewing inclusionary programs to suggest that their distributive effects are suspect because they primarily operate to benefit middle class suburbanites). *But see* Constantine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFFS. ASS'N 716, 736-37 (2014) (suggesting that inclusionary zoning can counter residential racial segregation, contingent on the initial housing market conditions and the particulars in implementation). S*ee generally* Ruoniu Wang & Sowmya Balachandran, *Inclusionary Housing in the United States: Dynamics of Local Policy and Outcomes in Diverse Markets*, 38 HOUS. STUD. 1068, 1083-84 (2023) (finding that the average affordable housing set-aside across 1,019 inclusionary housing programs from 2018 to 2019 was 16% of all units).

498. McFarlane, *supra* note 92, at 1185.

499. *Id.* at 1190 & n.209.

500. *Id.* at 1191 & n.214-17 (collecting sources).

501. *See id.* at 1194-95 ("[T]o fit into the mainstream economy, to reap the benefits of more affluent Whites being willing to live [in mix-income housing], it is important to keep the low-income populations low. Even if poor people have resources to spend, their resources are devalued socially; they are not the type of customer national businesses want to serve.").

poor Black community by dispersing racial minorities across mixed-income housing where their numbers can be limited.[502]

Thus, any benefits that accrue are dictated by an unspoken consensus predicated on replicating and maintaining white dominance by curtailing the fair housing choices available to African Americans.[503] Meanwhile, the FHA has no import when white households "vote with their feet and exercise the choice to move to a more predominantly white neighborhood at the point when the black population exceeds" their comfort level.[504]

Opportunity hoarders thus can maintain a monopoly on valued resources by opting out without violating the FHA.[505] As this Article has contended, a victim perspective of the FHA reveals that it was designed to expand the housing options that are available to historically oppressed populations.[506] Although "[t]he right to housing choice often is framed as a right to a particular dwelling unit," for the "choice to be meaningful, consumers must be able to choose opportunity."[507] While no city should be able to categorically resist the introduction of affordable housing into its jurisdiction, these circumstances plainly reveal that the revitalization of majority-minority areas must be

502. *Id.* at 1194.

503. *See* Ford, *supra* note 123, at 1849-52.

504. Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 985 (2012); s*ee also* Junia Howell & Michael O. Emerson, *Preserving Racial Hierarchy Amidst Changing Racial Demographics: How Neighbourhood Racial Preferences Are Changing While Maintaining Segregation*, 41 ETHNIC & RACIAL STUDS. 2770, 2784-85 (2018) ("[W]e find that over time respondents say they are more willing to live in diverse neighbourhoods but continue to be unwilling to desegregate."); Peter Q. Blair, *Beyond Racial Attitudes: The Role of Outside Options in the Dynamics of White Flight* 2-3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31136, 2023), https://perma.cc/P9Q9-ZHRV (finding that a household's "outside options" for access to homogeneous communities within the metropolitan region is an increasingly important factor to be considered when ascertaining their tolerance for integrated neighborhoods and asserting "that the availability of preferable outside options sets the cost of acting on racial preferences within the housing market"); Kye & Halpern-Manners, *supra* note 491, at 25 ("What does our multicomponent approach tell us about the stability of diverse neighborhoods and the possibility of reducing residential segregation in the United States? One takeaway is immediately clear: [White flight] may be more common than recent neighborhood-level studies suggest.").

505. *See* Seicshnaydre, *supra* note 504, at 1002 ("[I]t is highly doubtful that a court would consider the pro-segregative choices of white opt-outs to constitute interference under [42 U.S.C.] § 3617.").

506. *See supra* Part II.A; *see also* Seicshanydre, *supra* note 504, at 980-81 ("[T]he FHA protects the choices of the housing consumer in a marketplace in which the housing provider stands as gatekeeper. However, any discussion of housing choice must include not only those whose choices have been historically suppressed, but also those whose particular housing choices have helped perpetuate the ghetto." (footnote omitted)).

507. Seicshnaydre, *supra* note 504, at 1003.

seriously considered as part of a comprehensive, balanced approach to promote fair housing choice.[508]

Fair housing advocates who continue to fixate on integration and racial proportionality sometimes miss that the endgame is to broaden the horizons of racial minorities whose trajectories have been distorted by an uneven geopolitical landscape with enclaves emitting intergenerational reverberations of advantage and disadvantage.[509] With respect to remediating the harms of disparate treatment or internal status causation, courts have used Title VIII to authorize damages for a "lost housing opportunit[y]" to reflect scenarios where a protected household was unlawfully denied access to a dwelling in a neighborhood that was more advantageous when compared to circumstances that were then informing their living arrangements.[510] For example in *United States v. Hylton*, a housing provider relied on protected traits to unlawfully deny a housing opportunity to an African American woman with children.[511] Courts have also centered opportunity analyses in fashioning remedial responses to successful class action lawsuits seeking desegregation of public housing.[512] The propriety of such remedies indicates that the federal government has an ongoing obligation to address external status causation by fostering pathways for African American households to access opportunity.

Rather than solely advancing access to opportunity through mobility moves in a process that requires the discrete infiltration of Blacks into exclusionary communities to avert a risk of white flight, directly rerouting resources to majority-minority communities bears more promise when accompanied by safeguards to ensure that current residents are the beneficiaries of these endeavors.[513] Moreover, without revitalization to

508. *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8527 (proposed Feb. 9, 2023), *withdrawn by* Affirmatively Furthering Fair Housing: Withdrawal, 90 Fed. Reg. 4686 (Jan. 16, 2025) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

509. *See* Seicshnaydre, *supra* note 132, at 700 ("The FHA was not passed to promote 'separate but equal' as a second-best solution in housing policy.").

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

511. Kelley IV, *supra* note 78, at 341-44 (contending that the victim was subjected to intersectional discrimination stemming from concurrent and collective membership in three protected classes including race, gender, and familial status).

512. *See* Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398, 408-09 (D. Md. 2005); *Case:* Thompson v. HUD, NAACP LEGAL DEF. FUND, https://perma.cc/KLL7-7R6C (archived Nov. 12, 2024) (crediting, among others, john powell with providing expert testimony in support of the NAACP Legal Defense Fund's proposed remedy for settling a class action housing discrimination case).

513. *See* Seicshnaydre, *supra* note 132, at 700 ("The need for revitalization of neighborhoods harmed by segregation is beyond doubt. But if concentration of low-income housing in places where minority residents already live has been shown to cause segregation, the continued pursuit of these policies (without more) can be expected to yield the same results, whether we call it 'containment' or 'revitalization.'" (footnote omitted)).

supplement fair housing choice, the integration paradigm accepts that some areas will always be "characterized by such disadvantage" while placing "the burden of moving—and all the disruption and isolation it can cause—on those who have been burdened most already."[514] Recentering the material harms of segregation as a loss of access to opportunity reveals an area in which the FHA can advance both place-based or people-based strategies, as well as a combination thereof.[515] However, to further fair housing choice free of external status causation, navigating these decisions must involve a context-sensitive inquiry that privileges the autonomy and interests of historically marginalized households.[516] Indeed, the debate can and should be mitigated by "amplifying the role that minority groups" will "play in determining the location of government-sponsored affordable housing."[517] This is precisely why Biden's proposed AFFH rule envisioned and mandated "[g]iving underserved communities a greater say in the actions program participants will take to address fair housing issues."[518]

2. Paving a one-way street for housing choice vouchers

While this Article has primarily sought to ground a normative and statutory basis to support community development as a tactic that furthers fair housing, there is one other immediately discernable lesson for the AFFH mandate: All housing providers located within jurisdictions that have opted to administer the HCV program should be required to participate, as long as they rent homes within the territorial boundaries of the state or local grantee. HUD administers the HCV Program also known as Section 8, where federal funds flow to either a state or local public housing authority (PHA), which in turn issues a tenant-based subsidy to an admitted applicant who can then procure rental housing in the private market.[519] The PHA renders payments to landlords each month on behalf of the households, but housing providers are

514. Bostic et al., *supra* note 53, at 88-89.

515. *See, e.g.*, *Hylton*, 944 F. Supp. 2d at 197 (awarding $20,000 in lost housing opportunities to a victim of racial discrimination after expert testimony indicated that the defendant's unlawful conduct denied the plaintiff access to a city with greater prospects for upward mobility and higher achievement); *see also* powell & Menedian, *supra* note 128, at 207, 218-21.

516. *See* Bunting, *supra* note 440, at 378-79.

517. *Id.* at 379.

518. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8517 (proposed Feb. 9, 2023), *withdrawn by* Affirmatively Furthering Fair Housing: Withdrawal, 90 Fed. Reg. 4686 (Jan. 16, 2025) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983).

519. Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 900 (5th Cir. 2019); *see also* 42 U.S.C. § 1437f (HCV program); 24 C.F.R. §§ 982.301, 982.302(a) (PHA program).

not required to participate unless state or local law provides otherwise.[520] Despite the fact that the participants are disproportionately minority households, courts have rejected causes of action advancing discriminatory-effect allegations when property managers and owners decline to accept HCV tenants.[521]

In *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, local housing authorities including the Dallas Housing Authority issued vouchers under the HCV program to a total of 30,745 households in the Dallas-Irving-Plano Metropolitan Division with a racial breakdown of 81% Black, 6% Hispanic, and 10% (non-Hispanic) white.[522] A nonprofit that provided a range of services to support these households alleged that owners and managers of properties in "high opportunity" regions throughout the Dallas metropolitan violated the FHA's prohibition of policies with discriminatory effects by refusing to rent to tenants with vouchers.[523] The nonprofit advanced two claims against the property managers. First, the nonprofit alleged that the refusal to rent disproportionately impacted African Americans, who constituted a higher proportion of voucher holders in the area.[524] This disparity was underscored by observing that the renters without such subsidies, who were therefore not adversely impacted by the defendants' policy, were 19% Black and 53% white.[525] Second, the nonprofit asserted that the defendants' policy perpetuated a segregative effect because the households had to find rental opportunities where their vouchers would be accepted, which generally were "racially concentrated [predominately minority] areas of high poverty that are marked by substantially unequal conditions."[526]

Even though the Supreme Court upheld the availability of discriminatory-effect liability in FHA claims, Justice Kennedy's *Inclusive Communities* majority opinion has been the subject of intense debate because he emphasized that the success of these claims would turn on a plaintiff's ability to prove "robust

520. *See Lincoln Prop.*, 920 F.3d at 900.

521. *Id.* at 909; Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1280 (7th Cir. 1995) ("Owner participation in the section 8 program is voluntary and non-participating owners routinely reject section 8 voucher holders."); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 300 (2d Cir. 1998) ("We think that the voluntariness provision of Section 8 reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords, either as an accommodation to handicap or otherwise."). *But see Lincoln Prop.*, 920 F.3d at 920 (Davis, J., concurring in part and dissenting in part).

522. *Lincoln Prop.*, 920 F.3d at 897.

523. *Id.* at 895-96.

524. *Id.* at 919-20 (Davis, J., concurring in part and dissenting in part).

525. *Id.* at 919.

526. *Id.* at 896-97 (majority opinion) (brackets in original).

causality" by demonstrating a statistical disparity stemming from the defendant's policy.[527] The Fifth Circuit's majority opinion in *Lincoln Property* proceeded to review a circuit split, which revealed contrasting interpretations of the robust causality requirement.[528]

The Eighth Circuit in *Ellis v. City of Minneapolis* required that to establish a prima facie case, the plaintiff point to an "artificial, arbitrary, and unnecessary" policy causing the alleged disparity.[529] In *Reyes v. Waples Mobile Home Park Ltd.*, the Fourth Circuit suggested that a housing policy or practice that has been found to disproportionately harm minority households could support a finding of robust causation.[530] The dissenting opinion in *Reyes* rejected blanket responsibility for racial imbalance stemming solely from the demographics of a given region,[531] and the Eleventh Circuit adopted this approach in *Oviedo Town Center II, L.L.L.P. v. City of Oviedo*.[532]

In *Lincoln Property*, the Fifth Circuit speciously circumvented the Fourth Circuit's internal debate by arguing that liability was proper in *Reyes* because the disparity was imparted by a change in the defendants' tenant screening criteria as opposed to "geographical happenstance."[533] However, under the facts at hand, the Eleventh Circuit's proposition was still relevant to the *Lincoln Property* court because the housing providers could not be accountable for the geographic distribution of racial minorities in the Dallas metro area.[534]

527. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015); *Lincoln Prop.*, 920 F.3d at 903-08 (reviewing different standards on "robust causality" in sister circuits).

528. *Lincoln Prop.*, 920 F.3d at 903-08.

529. 860 F.3d 1106, 1107, 1114 (8th Cir. 2017) (quoting *Inclusive Cmtys.*, 576 U.S. at 543) (upholding municipal enforcement of reasonable housing standards against a challenge brought by for-profit, low-income housing providers alleging that the city's application of these provisions had a disparate impact on the availability of housing opportunities for protected populations).

530. 903 F.3d 415, 429 (4th Cir. 2018); *see also Lincoln Prop.*, 920 F.3d at 906 (reading *Reyes* for the proposition that robust causation may be established by showing that a protected class was adversely impacted "more than others").

531. *Reyes*, 903 F.3d at 434 (Keenan, J., dissenting) (expressing the view that the expansion of an immigration status screening policy from the leaseholder to all adult occupants in a mobile home park area had not "caused" a disparate impact on persons of Latinx ancestry, rather they were just disproportionately represented among the undocumented population at the site).

532. *See* 759 F. App'x 828, 830, 835-36 (11th Cir. 2018) (per curiam) (explaining that "since all the appellants have shown us is that the [housing complex's] residents are disproportionately racial minorities," rather than conduct a city-wide analysis, they failed to make out a prima facie case for their assertion that a municipal rate increase for water and sewage service imparted a disparate impact in violation of the FHA).

533. *Lincoln Prop.*, 920 F.3d at 904, 906 (quoting *Reyes*, 903 F.3d at 434 (Keenan, J., dissenting)).

534. *Id.* at 907.

Moreover, just as in *Ellis*, there were no grounds to suggest that the housing providers' decisions to not participate in the voluntary HCV program were "artificial, arbitrary, and unnecessary."[535] With respect to the segregative-effect assertion, the Fifth Circuit likewise found it untenable but on the contentious ground that private actors should not be straddled with "affirmative housing obligations," thereby frustrating "valid governmental and private priorities" in violation of the cautionary standards announced in *Inclusive Communities*.[536]

Judge Davis concurred in part and dissented in part with the majority's holding in *Lincoln Property*, finding that the dismissal of the disparate impact claim was improper.[537] In his account, fulfilling the element of "robust causation" only entailed identifying a specific policy causing a disproportionate harm, which was accomplished here because the nonprofit was challenging the housing providers' practice of not renting to voucher holders.[538] Because the evidence indicated that the failure to participate in the HCV program operated to exclude the predominantly Black voucher population from the defendants' properties, the disparate-impact claim should be permitted to proceed.[539]

Moreover, Judge Davis eschewed the majority's public-private distinction for the segregative-effect claim, which lacked no basis in fair housing jurisprudence.[540] Instead, he stuck by a straightforward interpretation of the theory's prohibition of actions that create, increase, reinforce, or perpetuate

535. *See id.* (quoting Ellis v. City of Minneapolis, 860 F.3d 1106, 1114 (8th Cir. 2017)) (finding insufficient factual allegations to suggest that the decision to opt of the voluntary HCV program entitled plaintiffs to relief under a disparate impact theory as the housing providers were not responsible for the demographic distribution of residents prior to implementing their policy).

536. *See id.* at 908-09 (quoting Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 544 (2015)) (rejecting a standard that would "effectively mandate a landlord's participation in the voucher program any time the racial makeup of [a] multi-family rental complex does not match the demographics of a nearby metropolitan area" as "contrary to the cautionary standards that the Supreme Court has declared").

537. *Id.* at 912-13 (Davis, J., concurring in part and dissenting in part) (concurring in the dismissal of the disparate treatment and unlawful advertising claims but "strongly" dissenting from the dismissal of the disparate impact claim).

538. *Id.* at 918-19.

539. *Id.* at 919-20.

540. *Compare id.* at 908-09 & n.11 (majority opinion) (finding *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), inapposite because there disparate-impact liability was imposed on a public defendant for the imposition of a zoning ordinance that restricted multifamily housing to a predominantly minority area), *with id.* at 920-22 (Davis, J., concurring in part and dissenting in part) (leveraging *Huntington*, among other cases, to suggest that plaintiffs had plausibly asserted a segregative-effect claim against the private housing providers).

segregation.[541] As such, Judge Davis argued that to prevail in this cause of action, a plaintiff need only demonstrate pre-existing patterns of segregation and that the challenged conduct will perpetuate that segregation, not that it was the root cause thereof.[542] Although the application for rehearing en banc was denied by a vote of nine-to-seven, the seven judges who dissented from the denial praised Judge Davis's dissents in *Lincoln Property,* and likewise asserted that liability is proper when a defendant's actions perpetuate or further existing segregation.[543]

While Judge Davis and his supporters marshalled more convincing arguments, the *Lincoln Property* majority's attempt to carve out additional protections for private actors coheres with the disaggregation of injury and liability when antidiscrimination doctrine is called upon to redress external status causation.[544] The debate between the majority and dissent, as well as among the circuit courts more broadly, thus resounds in the same chord as the contestation over causation in *Price Waterhouse.*[545] At bottom, what is unfolding in the courts is an ongoing disagreement over a defendant's scope of duty given a housing market wherein race has affected the comparative economic standing of African Americans and whites.[546] Nonetheless, whatever the merits of the *Lincoln Property* majority's assessment as it relates to the private owners and managers at issue in that case, surely this same set of contentions cannot stand when marshalled against HUD and its PHA grantees.[547]

---

541. *Id.* at 922 (Davis J., concurring in part and dissenting in part).

542. *Id.*

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

544. Zatz, *supra* note 82, at 1378.

545. *See* Ford, *supra* note 80, at 2955-56; *see also* Schwemm, *supra* note 373, at 67, 109-13 (discussing the potential implications for fair housing enforcement across circuit courts of appeals following *Comcast Corp. v. National Association of African American-Owned Media,* 140 S. Ct. 1009 (2020), wherein the Supreme Court established "but-for" causation as the proper standard for 42 U.S.C. § 1981, the 1866 Act's equal-contract provision, and further, held this standard to be the general "default" position for all other civil rights statutes).

546. *Cf.* Ford, *supra* note 80, at 2959 (using the "duty of care" framework to explain confusion regarding causation in Title VII).

547. In terms of causes of action, courts are split over whether the mandate is enforceable as a private right of action under 42 U.S.C. § 1983. *See* 1 JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:17 & n.11 (2023) (collecting cases). At a minimum, litigants may enforce causes of action against executive agencies under the narrower judicial review authorized by the Administrative Procedure Act. *See* 5 U.S.C. § 706(2); *see also, e.g.,* NAACP. v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 151-52 (1st Cir. 1987) (declining to recognize a private cause of action to enforce the AFFH provision under Title VIII but permitting review under the APA).

A consensus has developed that the AFFH mandate requires federal agencies to promote fair housing objectives and refrain from funding discriminatory grantees, while ensuring that these program participants operate in tandem with advancing equal housing opportunities.[548] The FHA's statutory text situates the protection of equal access and choice as key goals of Title VIII.[549] From this vantage,

> [t]he duty to AFFH must be both a duty to understand in which local communities those in need of affordable housing truly want to live as well as an obligation to expand or modify the set of affordable housing choices to encompass as many of these desired locations as is fiscally feasible.[550]

By operating a program that is voluntary unless state and local grantees deem otherwise, HUD is improperly perpetuating and exacerbating external status causation.

This point is underscored by considering the matter of *Salute v. Stratford Greens Garden Apartments*,[551] which the Fifth Circuit leveraged in *Lincoln Property* to buttress its holding.[552] In *Salute*, two persons with disabilities attempted to use their vouchers at an apartment complex known as Stratford Greens but were turned away because the property manager was reluctant "to get involved with the federal government and its rules and regulations."[553] The applicants alleged that the housing provider violated the FHA by failing to grant a reasonable accommodation to their policy of not participating in the HCV program.[554] However, the court concluded that requiring the defendant to accept voucher holders would constitute an undue burden stemming from additional administrative tasks including maintenance, inspections, audits, and reports.[555] Mandated participation would also necessitate a fundamental alteration of its rental policies, since the leasing program would have to be reworked to accommodate these new requirements.[556] However, *Salute* is not the only case to have considered the question of whether a person with a disability is entitled to an accommodation stemming from the economic

548. Abraham, *supra* note 432, at 1980.

549. Bunting, *supra* note 440, at 339; *see, e.g.*, 42 U.S.C. § 3604(a) (declaring that it shall be unlawful to "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

550. Bunting, *supra* note 440, at 398.

551. 136 F.3d 293 (2d Cir. 1998).

552. Inclusive Cmtys. Project v. Lincoln Prop. Co., 920 F.3d 890, 900 (5th Cir. 2019) (citing *Salute*, 136 F.3d at 300).

553. *Salute*, 136 F.3d at 296.

554. *Id.*

555. *Id.* at 301.

556. *Id.* at 300-01.

repercussions of their protected trait.[557] In contrast to the Second and Seventh Circuits, the Eleventh and Ninth Circuits have more recently concluded that failure to accommodate the economic impacts of a person's disability is a cognizable claim under the FHA.[558]

It is not terribly surprising that this question of addressing the economic elements of a protected trait has explicitly surfaced in the disability context. Notably, Paul-Emile has argued that race jurisprudence would benefit from adopting the frameworks of disability law since evaluation of the claims requires disability-consciousness, and this undertaking is facilitated by specified rules governing the allocation of costs associated with adjustments to redress disability-related needs.[559] Most assuredly, these comparative strengths derive from the explicit contemplation of external status causation that undergirds requests for reasonable accommodations and modifications.[560]

Schaw v. Habitat for Humanity of Citrus County involved a young man named Albert Schaw who had only recently graduated from high school when a wrestling accident "left him completely paralyzed."[561] Schaw's housing arrangement was ill-suited for his disability-related needs, prompting him to contact a nonprofit known as Habitat for Humanity, which "builds new homes for low-income individuals."[562] Unfortunately, the program imposed an annual-income requirement of $10,170, and Schaw's gross annual income from Social Security Disability Insurance was just shy at $9,336, so he was rejected.[563] In response, Schaw requested a reasonable accommodation to Habitat's tabulation of his income so that he could demonstrate his qualification for participation.[564] Specifically, he asked them to include at least one of his two additional sources of monthly financial support: his receipt of supplemental nutrition assistance in the amount of $194 or a confirmed

557. *See e.g.*, Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1263 (11th Cir. 2019).

558. *Compare Schaw*, 938 F.3d at 1274 (recognizing that in some cases, a person can be entitled to a reasonable accommodation under the FHA to address financial circumstances that are either correlated or causally related to their disability), *and* Giebeler v. M & B Assocs., 343 F.3d 1143, 1144-45 (9th Cir. 2003), *with Salute*, 136 F.3d at 301-02 (concluding that economic accommodations are inappropriate, as they are not necessary to afford an equal opportunity to use and enjoy a dwelling given that "impecunious people with disabilities stand on the same footing as everyone else" experiencing a "shortage of money"), *and* Hemisphere Bldg. Co. v. Vill. of Richton Park, 171 F.3d 437, 441 (7th Cir. 1999).

559. *See* Paul-Emile, *supra* note 99, at 325-27.

560. Zatz, *supra* note 82, at 1375-78.

561. 938 F.3d at 1262.

562. *Id.*

563. *Id.* at 1262-63.

564. *Id.* at 1263.

payment from his father of $100.[565] However, Habitat followed HUD guidelines, whereunder his public benefits for food were not considered income, and the monthly family assistance was not a legally enforceable obligation, so Schaw's request was denied.[566]

The district court below relied on *Salute* to grant summary judgment to Habitat because the FHA did not address the "alleviation of economic disadvantages that may be correlated" with disability status.[567] However, the Eleventh Circuit ultimately held that a plaintiff's financial state could be "unrelated, correlated, or causally related to [their] disability and that, in some cases, an accommodation with a financial aspect—even one that appears to provide a preference—could be 'necessary to afford [an] equal opportunity to use or enjoy a dwelling' within the meaning of the [Fair Housing] Act."[568]

Habitat argued that even if an accommodation of financial circumstances might be warranted under some circumstances, Schaw was not able to demonstrate that his economic predicament was caused by his disability.[569] In considering this matter of causality, the Eleventh Circuit contrasted the facts at hand to a key case that had come out of the Ninth Circuit.[570] In *Giebeler v. M & B Associates*, the Ninth Circuit had also agreed that a reasonable accommodation could extend to the economic ramifications of a person's disability status, but in that case the causal connection could not be questioned.[571] The plaintiff in that matter had worked as a psychiatric technician for five years and would have qualified to rent the unit before he was diagnosed with AIDS and became unable to work.[572] With his disability benefits, he no longer had a monthly income of three times the rent per the housing provider's requirement.[573] Despite the housing provider's prohibition of cosigners, the Ninth Circuit found that the plaintiff's request to permit his qualifying mother to rent the unit on his behalf had to be fully evaluated as a plausible accommodation.[574] In *Schaw,* however, there was no clear record of the plaintiff's prior earnings, living arrangement, or renter's history before becoming paralyzed.[575]

565. *Id.*

566. *Id.*

567. *Id.* at 1270 (quoting Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301 (2d Cir. 1998)).

568. *Id.* at 1274 (first brackets in original) (quoting 42 U.S.C. § 3604(f)(3)(B)).

569. *Id.* at 1271.

570. *Id.*

571. 343 F.3d 1143, 1144-45, 1151, 1155 (9th Cir. 2003).

572. *Id.* at 1145.

573. *Id.*

574. *Id.* at 1150-51, 1154-55.

575. 938 F.3d 1259, 1271 (11th Cir. 2019).

Moreover, as a recent high-school graduate, he had not reached his full potential as a participant in the labor market.[576] Thus, the causal connection between his current income constraints and his disability status was not as immediately discernable.[577]

Even still, Schaw was entitled to the court's full consideration in advancing this claim with the endgame of securing a chance "to show an equal income from a different source."[578] Given that the accommodation concerned "only the *form* of funding and not the amount," the Eleventh Circuit characterized Schaw's request as an invitation "to dispense with formal equality of treatment in order to advance a more substantial equality of opportunity."[579] Minority households participating in the HCV program are similarly situated to the plaintiffs in *Giebeler* and *Schaw*. They stand "ready to pay the monthly [rent] in full and to demonstrate a gross annual income exceeding the minimum required level,"[580] albeit through a different route outside of wages or other traditional sources of income. Each is seeking to address the external status causation stemming from a protected trait, although substantiation of the injury proceeds on diverging tracks.[581] While questions of accommodation fixate on an individual's experience, discriminatory-effect allegations mobilize group-based data to verify how a policy or practice adversely impacts members of a protected population.[582]

Reconsidering the outcome in *Griggs v. Duke Power Co.* with the lens of external causation further illuminates why disparate impact has bearing on the operation of the HCV program. In *Griggs*, the Court observed that the operation of a dual school system in North Carolina through the 1960s had imparted a maldistribution of educational opportunities with only 12% of African American men having a high school diploma compared to 34% of white men.[583] As such, structural racism operated to bolster the prospects of success for whites while suppressing the horizons of African Americans.[584] Yet these statistics also verify that the racialized benefits of Jim Crow did not

576. *Id.*

577. *Id.* However, the court did note that even a person working "40 hours per week at $5.00 per hour, or 20 hours per week at $10.00 per hour" could "exceed Habitat's minimum-income requirement." *Id.* at 1271 n.5.

578. *Id.* at 1273.

579. *Id.* at 1272-73 (emphasis omitted) (quoting Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923 (10th Cir. 2012)).

580. *Id.* at 1273.

581. *See* Zatz, *supra* note 82, at 1383.

582. *See id.* at 1383, 1386.

583. 401 U.S. 424, 430 n.6 (1971).

584. *See id.* at 430.

translate into a guarantee that every white person graduated from high school, as 66% of white men did not.[585] Thus, if the playing field had been equal, it seems fair to conclude that many more African Americans would have graduated high school, but it is unlikely it would have been all of them.[586] Other roadblocks and challenges that inform the landscape of life would still manage to frustrate and possibly upend this objective just as it had for some privileged whites.[587]

The point here is that the disparity confirms that some members of the population are suffering from external status causation even though we cannot pinpoint and name the specific individuals.[588] Similarly, the overrepresentation of racial minorities in the HCV program is a verification of the intergenerational economic repercussions of a protected trait.[589] While we may allow private actors opportunities to escape liability for external status causation, HUD and its grantees are not similarly situated due to their AFFH obligation.[590] To fulfill this AFFH duty, housing providers cannot be permitted

585. *See id.* at 430 n.6.

586. Zatz, *supra* note 82, at 1395.

587. *See id.*

588. *See id.*

589. *See, e.g.*, Crenshaw, *supra* note 302, at 1352 ("Yet economic exploitation and poverty have been central features of racial domination—poverty is its long-term result.").

590. The specific policies adopted by HUD have generally varied with each presidential administration, but the AFFH mandate is rooted in the text of the FHA. *See* 42 U.S.C. § 3608(d)-(e). Moreover, pertinent HUD initiatives that fund state and local activities such as the HCV program are authorized by a federal statute that also mandates the AFFH obligation. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 104(b)(2), 8, 88 Stat. 633, 638-39, 662-66 (codified as amended at 42 U.S.C. §§ 5304(b)(2), 1437f). Thus, the interpretation advanced herein is not contingent on any AFFH regulations, which have and will continue to be subject to change as administrations shift. *See supra* notes 56-58 and accompanying text. This approach therefore quite comfortably squares with the recent demise of judicial deference to federal agencies in resolving statutory ambiguities. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271 (2024) ("[T]he basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference . . . . The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit."). Similarly, the text-based approach attempts to navigate the evolving major questions doctrine, which appears to be gaining steam as a "clear statement rule," before agencies are empowered under delegation statutes to exercise regulatory authority on matters involving vast political and economic significance. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012-14 (2023) (cautioning that even broad, unambiguous statutes may fall within the major question doctrine's ambit after it was invoked in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), where the Court invalidated the EPA's attempt to require coal-fired power plans to adopt generation shifting methods to facilitate adoption of cleaner sources of electricity).

to opt out of participation in the HCV program in those jurisdictions where a state or local PHA has signed up for its administration.[591]

Conclusion

One would comb the statutory text of the FHA in vain searching for a reference to "integration," let alone any indication that integration was the chief objective of the nation's second fair housing law. Instead, Title VIII operates in accord with its predecessor, the Civil Rights Act of 1866, which outlawed race-based discrimination in residential real estate transactions to facilitate the capacity of African Americans to realize autonomy, agency, and access to opportunity. Yet fair housing advocates have mobilized selective legislative history to justify the perpetuation of discriminatory practices against African Americans in the name of integration. It is not surprising that liberal proponents of the FHA were oblivious to the conflict between the legislation's antidiscrimination provisions and their integration aspirations. They were products of their day, wherein race and discrimination were understood through the prism of the perpetrator perspective. Case law has confirmed that liberal civil rights advocates viewed race as nothing more than an ancestrally inherited set of phenotypical characteristics, such as skin color or hair texture, rather than as a socially constructed tool for allocating life chances. In accord, legislative history is not a helpful lever in advocating for a responsive and expansive interpretation of Title VIII.

Instead, racial justice advocates should heed lessons from antidiscrimination jurisprudence indicating that the best prospects for broadening the scope of civil rights legislation lies in advancing textually grounded interpretations. To that end, it is beyond reproach that a chief objective of federal fair housing laws was to expand the choices that historically marginalized populations could make in terms of establishing a residence and reaping the benefits thereof on par with privileged groups. At

591. While this Article's approach to defining the AFFH obligation has not been adopted, courts have found jurisdictions liable when they fall short of current standards. *See, e.g.*, Comer v. Cisneros, 37 F.3d 775, 785, 790 (2d Cir. 1994) (finding that plaintiffs had standing to proceed with allegations that the City of Buffalo and federal defendants violated their duty pursuant to AFFH by failing to rectify racially discriminatory practices in their HCV Program, which was formerly known as Section 8). In *United States ex. rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, the district court held the grantee's certification violated its AFFH obligation by failing to adequately consider the impact of race on housing opportunities in its jurisdiction. 668 F. Supp 2d 548, 564 (S.DN.Y. 2009). Finding that Westchester falsely certified seven annual AFFH certifications, the court granted partial summary judgment in favor of the plaintiff. *Id.* at 561, 569-71. Notably, the court clarified that "[t]he AFFH certification was not a mere boilerplate formality, but . . . a substantive requirement, rooted in the history and purpose of the fair housing laws." *Id.* at 569.

bottom, all civil rights laws seek to establish a social duty to avoid the unwarranted replication of human hierarchy and segregation by opening pathways to equal opportunities that can be accessed without barriers based on protected traits. The injury that must be avoided is status causation, which constitutes the adverse consequences stemming from membership in a protected group. Internal status causation refers to processes whereby housing providers or other relevant entities and actors consider a prohibited characteristic either purposefully or unconsciously to the detriment of protected persons. External status causation captures moments where a person's circumstances are influenced or correlated with a protected trait such that they are vulnerable to harms from an otherwise generally applicable rule or policy.

Framing the nature of the injury in this manner helps rebuff the perpetrator perspective's focus on identifying intentional discriminators because it centers status causation as the target of civil rights laws while capturing the myriad avenues through which the harms can be imparted. Moreover, the relevant theories of liability—including disparate treatment, systemic disparate treatment, and discriminatory effects—are all rooted in judicial interpretation of the text of Title VII and Title VIII. Employing this textualist paradigm also unveils an avenue for potentially uplifting the victim perspective and its focus on the material conditions informing the lives of oppressed groups. Rather than pursuing an uphill battle to update the definitions of race and racism in the courts, external status causation already provides a mechanism for capturing the economic dimensions of racial oppression.

Granted, this solution is imperfect. Unlike internal status causation, antidiscrimination jurisprudence generally bifurcates the questions of injury and liability when external status causation is at issue. Thus, defendants can sometimes escape accountability for external status causation if there are undue fiscal or administrative burdens that would frustrate legitimate objectives.

However, unlike Title VII, Title VIII places an affirmative obligation on federal agencies in programs concerning housing and urban development. As a result, the federal government must be held accountable when its programs operate to frustrate the fair housing choices of African Americans and other protected households. The insight provides a new framework for defending community revitalization. External status causation clarifies the nexus between race, class, space, and opportunity that the FHA was designed to disrupt and upend. To be sure, no community should be able to categorically resist its fair share of affordable housing. But community revitalization must also be part of the landscape to broaden possibilities for access to opportunity and foster meaningful fair housing choice.

To that end, it also is clear that HUD is improperly exacerbating external status causation in the HCV program by permitting its state and local grantees to issue vouchers in jurisdictions where it is legal to discriminate against households based on their source of income. Cases entailing accommodation requests for the economic repercussions of a disability have more pointedly raised the question of a housing provider's responsibility to address the financial standing of a household when it's connected to a protected trait. Those lessons are still relevant for the HCV program when the admitted households thereunder disproportionately consist of racial minorities, which itself is a testament to the enduring footprint of historical subordination and exploitation. As it stands, the AFFH obligation represents an unrealized promise to rectify racialized access to opportunity, and it will remain unfulfilled until the FHA is imbued with the victim perspective and its focus on eradicating external status causation.