AFFIRMATIVELY FURTHER: REVIVING THE FAIR HOUSING ACT'S INTEGRATIONIST PURPOSE

AUSTIN W. KING*

This Note seeks to contribute to the revival of an underutilized section of the Fair Housing Act intended not just to ban individual acts of discrimination but also to achieve integrated residential neighborhoods. The gulf between lofty, vague federal policy and the local governments responsible for zoning, planning, and housing siting decisions, however, has stymied this pro-integration purpose. Although all state and most local governments are required to certify that they are meeting their obligation to "affirmatively further fair housing," this certification has rarely risen above mere boilerplate. Building on recent litigation that reinvigorated the Act's positive purpose with some skeletal substance and a new proposed rule seeking to improve procedural compliance, this Note proposes an expanded federal rule to define meaningfully this obligation through concrete, quantitative benchmarks. In the absence of such an expanded rule, this Note suggests guidance on how a court might evaluate compliance with this capacious statutory standard by using housing-segregation data in a burden-shifting framework. This Note concludes by addressing workability and constitutionality concerns, evaluating practical hurdles, and testing the proposed rule against the Roberts Court's jurisprudence on equal protection and federalism. The ultimate purpose is a pragmatic program to achieve the still-unrealized goal that animated the Act's passage: a truly integrated nation.

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INTRODUCTION

> "[T]he problem of the Twentieth Century is the problem of the color line."
> —W.E.B. DuBois[1]

1968 was a uniquely pivotal year in United States history—the tumultuous protests against the Vietnam War on college campuses and at the Democratic National Convention, the explicitly racist presidential candidacy of George Wallace that captured forty-six electoral votes, the assassinations of Robert F. Kennedy and Dr. Martin Luther King, Jr., and the ensuing urban riots all shaped the nation for decades to come.[2] As cities smoldered and the National Guard mobilized in the wake of Dr. King's murder, Congress passed the Indian Civil Rights Act of 1968,[3] whose Title VIII is now widely known as the Fair Housing Act (the Act). President Johnson signed it into law on April 11, 1968, one week after Dr. King died.[4] This context for the Act's

[1] W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 41 (Signet Classic 1995) (1903).

[2] *See generally* MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD (2004) (characterizing 1968 as a pivotal year in American history and the world for its confluence of important political and cultural touchstones).

[3] Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

[4] *See generally* MICHAEL ERIC DYSON, APRIL 4, 1968: MARTIN LUTHER KING JR.'S DEATH AND HOW IT CHANGED AMERICA, at ix (2008) (discussing the assassination of Dr. King on April 4, 1968).

passage elucidates its dual purpose of proscribing individual acts of discrimination and eliminating systemic segregation—the latter widely identified as the desperate lament driving the riots.[5]

The Act announced the end of several centuries of legal discrimination in housing accommodations by proscribing private and public discrimination against members of certain protected classes, including race, religion, and national origin.[6] The Act also declared a second, positive purpose of "affirmatively" furthering fair housing (AFFH),[7] a goal that has been left underdeveloped and unrealized. These dual purposes were essential complements to addressing the social unrest—particularly in urban areas—that characterized the 1960s.[8] The Act's dual purposes intended to replace segregated ghettos with "truly integrated and balanced living patterns."[9] Although the statute does not explicitly use the word "integration," the legislative history[10] and several Supreme Court and lower-court cases unmistakably endorse the idea that the Act's purpose was residential integration.[11]

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[5] *See generally* U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 2 (1968) (finding urban riots to be an expression of frustration arising from segregation and lack of opportunity).

[6] Fair Housing Act, Title VIII of the Indian Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619 (2006). The Fair Housing Act Amendments of 1988 added handicap and family status to the list of protected classes. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

[7] 42 U.S.C. § 3608(d), (e)(5) (declaring that both the Secretary of Housing and Urban Development and all executive departments and agencies shall administer housing programs in a manner that "affirmatively" furthers fair housing).

[8] *See* U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 5 (discussing the causes of widespread urban riots).

[9] *See* 114 CONG. REC. 3421, 3422 (1968) (statement of Sen. Mondale) (arguing that the Fair Housing Act meant to replace segregated ghettos with "truly integrated and balanced living patterns"). This statement was later endorsed by the Supreme Court. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

[10] *See* 114 CONG. REC. 3421, 3422 (1968) (statement of Sen. Mondale); *see also* 114 CONG. REC. 9563, 9563 (1968) (statement of Rep. Celler) (describing the purpose of the Act as "remov[ing] the walls of discrimination which enclose minority groups"); *id.* at 2278 (statement of Sen. Mondale) (decrying "the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color").

[11] *Trafficante*, 409 U.S. at 211 (endorsing statement from legislative history of Sen. Mondale, quoted *supra* note 9); *see also* Hills v. Gautreaux, 425 U.S. 284, 299 (1976) (objecting that the "wrong committed by HUD confined the respondents to *segregated* public housing" (emphasis added)). Lower courts have concurred. *E.g.*, NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987) (finding the Act's affirmative purpose requires HUD to do "more than simply refrain from discriminating . . . and from purposely aiding discrimination by others"); Evans v. Lynn, 537 F.2d 571, 576–77 (2d Cir. 1975) (citing legislative history endorsing integration as a goal); Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) ("Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation . . . .").

The "Whites Only" for-rent signs have almost all come down and racially restrictive covenants have been retired, but in cities and towns across the country, discrimination continues in subtler forms and residences remain nearly as segregated as in 1968.[12] While the Act's anti-discrimination purpose has achieved substantial successes through ongoing private and public enforcement,[13] the gulf between federal fair housing policy and the local governments responsible for zoning, planning, and housing policy has stymied the Act's pro-integration purpose.[14] Although state and local governments that receive Community Development Block Grants (CDBG)[15] must affirmatively further fair housing,[16] this requirement had, until a recent decision involving Westchester County, New York,[17] received scant enforcement.[18] A new proposed rule[19] from the Department of Housing and Urban Development (HUD) goes a long way toward addressing the

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[12] *See* Florence W. Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 IND. L. REV. 507, 508 (2008) (noting that the United States "still is characterized by substantial racial discrimination with respect to the sale, rental, and occupancy of housing and by pervasive racial residential segregation"); *see also infra* notes 57–67 and accompanying text (discussing the extent of segregation).

[13] *See* FAIR HOUSING CTR. OF METRO. DETROIT, $380,000,000 AND COUNTING: A SUMMARY OF HOUSING DISCRIMINATION LAWSUITS THAT HAVE BEEN ASSISTED BY THE EFFORTS OF PRIVATE, NON-PROFIT FAIR HOUSING ORGANIZATIONAL MEMBERS OF THE NATIONAL FAIR HOUSING ALLIANCE (2010) (surveying private enforcement efforts and their successes since the Fair Housing Act's passage); *see also Fair Housing Assistance Program (FHAP)*, DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP (last visited Oct. 23, 2013) (describing HUD's grant program for local enforcement); *Fair Housing Enforcement Activities*, DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/enforcement (last visited Oct. 23, 2013) (documenting HUD's enforcement activities from 2004 to the present).

[14] *See infra* notes 68–70 and accompanying text (discussing the impact of local land use and housing policy on residential segregation).

[15] *See Community Development Block Grant Program*, DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited Oct. 23, 2013) ("The Community Development Block Grant (CDBG) program is a flexible program that provides communities with resources to address a wide range of unique community development needs. . . . The CDBG program provides annual grants on a formula basis to 1209 general units of local government and States.").

[16] Housing and Community Development Act of 1974, Pub. L. No. 93-383 (codified as amended at 42 U.S.C. § 5304(b)(2) (2006)) ("[T]he grantee will affirmatively further fair housing . . . ."). This is the second affirmative statutory requirement in addition to 42 U.S.C. § 3608, which applies to HUD and other executive branches.

[17] *See infra* section I.C (discussing the *Westchester* decision).

[18] *See infra* notes 51–55 and accompanying text (cataloguing criticism of enforcement efforts).

[19] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter Proposed Rule].

procedural failures that have plagued the AFFH obligation but does little to address its substantive requirements.

Recognizing integration as a dream now long deferred, this Note seeks to further the Act's goal of achieving housing integration with a novel yet pragmatic approach. It proposes to complement the proposed rule's procedural improvements with a quantitatively evaluated rule or legal framework that elevates substantive progress over process as the benchmark for compliance with the Act. This approach will increase the incentives for local governments to pursue integration and overcome local barriers that perpetuate segregation. This Note's proposal adds to a growing body of interest from academics[20] and advocates[21] in realizing the Act's integrative purpose. Yet this Note takes the unique approach of proposing the transformation of the AFFH requirement from procedural to substantive by defining compliance based on measurable progress while closely analyzing the practical and constitutional constraints of such a change.[22]

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[20] *See, e.g.*, James Robert Breymaier, *New Strategies in Fair Housing: The Need to Prioritize the Affirmative Furthering of Fair Housing: A Case Statement*, 57 CLEV. ST. L. REV. 245 (2009) (citing various models of integrative housing development as fulfilling the AFFH ideal); Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967 (2012) (advocating AFFH as a lever to move recalcitrant jurisdictions); 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 (2011–2012) (tracing the history of AFFH and extolling the *Westchester* litigation as a new model for achieving integration); Michelle Ghaznavi Collins, Note, *Opening the Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135 (2010) (encouraging courts to create a private right of action for AFFH enforcement); Matthew J. Termine, Note, *Promoting Residential Integration Through the Fair Housing Act: Are* Qui Tam *Actions a Viable Method of Enforcing Affirmatively Further Fair Housing Violations?*, 79 FORDHAM L. REV. 1367 (2010) (urging resolution of the circuit split to facilitate more *qui tam* suits enforcing AFFH); *see also* Matthew Shiers Sternman, *Integrating the Suburbs: Harnessing the Benefits of Mixed-Income Housing in Westchester County and Other Low-Poverty Areas*, 44 COLUM. J.L. & SOC. PROBS. 1 (2010) (proposing a legislative response to the *Westchester* litigation).

[21] *See, e.g.*, POVERTY & RACE RESEARCH ACTION COUNCIL, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST-TERM REPORT CARD (2013) (grading the Obama Administration on its enforcement of AFFH in HUD housing programs), *available at* http://www.prrac.org/pdf/HUDFirstTermReportCard.pdf; THE OPPORTUNITY AGENDA, REFORMING HUD'S REGULATIONS TO AFFIRMATIVELY FURTHER FAIR HOUSING (2010) (encouraging HUD to adopt regulations specifying increased procedural mechanisms and review), *available at* https://opportunityagenda.org/files/field_file/2010.03ReformingHUD Regulations.pdf.

[22] The legal scholarship previously cited generally eschews a rule-based approach to AFFH. *See supra* note 20 (citing works by Breymaier, Collins, Termine, Seicshnaydre, and Sternman). Schwemm, however, speculates about possible procedural improvements. *See* Schwemm, *supra* note 20, at 169–70. The advocates' proposals outline principles for a potential federal rule, though without the quantitative touchstone for compliance. *See* POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 21, at 4–5; THE

Part I outlines (1) the statutory framework for fair housing; (2) subsequent congressional enactments that extended both the reach of the Act and the duty of affirmatively furthering fair housing; (3) rules promulgated by HUD, the federal agency charged with administering the Act and the Community Development Block Grant program; and (4) Presidential Executive Orders that supplement these statutes. This Part also surveys the current state of residential segregation and its progress in the years since the Act's passage, arguing that segregation persists despite this legislative scheme. Part I concludes with the recent landmark ruling in *United States ex rel. Anti-Discrimination Center of Metro New York Inc. v. Westchester County*.[23] This suit alleged that Westchester County had falsely certified its compliance with the obligation to affirmatively further fair housing. The *Westchester* case serves as an exemplar of the difficulty of translating federal fair housing policy into effective local implementation and the weakness of the current federal regulatory approach. The limits of the court's decision will inform the regulatory and doctrinal proposals that follow.

Part II.A analyzes the procedural improvements in HUD's proposed rule and outlines a more robust, expanded federal rule that gives substance and force to the pro-integration purpose of the Act and its statutory and regulatory progeny. In brief, the expanded rule ties receipt of CDBG funds to statistically measurable progress in housing integration rather than to the proper filing of paperwork. In other words, a lack of measurable progress would indicate noncompliance with the Act, which would thus threaten the jurisdiction's receipt of CDBG funds. This financial incentive seeks to counteract the inertia of residential segregation and the disparate local zoning and planning mechanisms that frequently frustrate integrative development.[24]

As an alternative to such an expanded rule, Part II.B advises a court to use statistical analyses of housing patterns to evaluate a local jurisdiction's compliance with its obligation to affirmatively further fair housing. Specifically, this Note proposes a burden-shifting framework under which demonstrable progress in achieving integration establishes a rebuttable presumption that the jurisdiction's certifications of compliance are true. Likewise, a plaintiff who can demonstrate a lack of progress or retrogression in housing integration will

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OPPORTUNITY AGENDA, *supra* note 21, at 11–15. No publications have yet reviewed the workability and constitutional constraints of such a rule.

[23] 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

[24] *See infra* notes 69–70 and accompanying text (discussing the localized phenomena that contribute to continued residential segregation).

shift the burden to the government defendant to show that its certifications of affirmatively furthering fair housing are not false claims.

Finally, Part III analyzes the limitations of the reforms proposed in Part II. The expanded rule would face a number of difficult practical and political hurdles in implementation, such as jurisdictions opting out. Of further concern is whether this proposed rule interpreting the Fair Housing Act, promulgated under the power of the Thirteenth Amendment,[25] can survive the Supreme Court's recent decisions[26] interpreting the Fourteenth Amendment as requiring colorblindness. Additionally, the Court recently resurrected the "coercion" doctrine that limits new federal strings on existing state dollars in *National Federation of Independent Business v. Sebelius*,[27] which could arguably constrain new rules like the one proposed here.

I
SEGREGATION AND THE FAIR HOUSING ACT FORTY-FIVE YEARS LATER

The Fair Housing Act's passage sealed 1968 as the baseline for measuring housing patterns. Before the Act—despite a few limitations on discrimination in housing[28]—explicit racial segregation in housing was the norm.[29] The residential patterns of 1968 in most metropolitan areas had been constructed carefully to segregate as completely as possible African Americans from European Americans.[30] Forged by developers' racially restrictive covenants, individual property owners'

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[25] For a discussion of Congress's legislative authority under the Thirteenth Amendment, see *infra* note 205.

[26] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742–43, 747–48 (2007) (applying the Equal Protection Clause to strike down the voluntary race-conscious school integration plans in Seattle and Louisville).

[27] 132 S. Ct. 2566, 2608 (2012) (opinion of Roberts, C.J.) (limiting the "financial pressure" the Secretary of Health and Human Services can use to encourage States to accept certain terms of the Affordable Care Act).

[28] *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967) (striking down California Constitution article I, section 26, adopted by referendum, which purported to prohibit all fair-housing statutes and invalidate the recently adopted Rumford Fair Housing Act that prohibited racial discrimination in California housing); Shelley v. Kraemer, 334 U.S. 1, 20–23 (1948) (invalidating racially restrictive covenants as violating the Equal Protection Clause if enforced by courts); *In re* Lee Sing, 43 F. 359, 361–62 (N.D. Cal. 1890) (finding a Fourteenth Amendment violation in a San Francisco ordinance requiring Chinese inhabitants to leave the city).

[29] *See* DOUGLAS MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 17–60 (1993) (detailing the role of government and private actors in creating and enforcing residential segregation).

[30] *See id*. at 60–62 (describing the lack of progress made towards integration in major metropolitan areas across the United States throughout the 1970s).

discriminatory sales and rental decisions, racial steering,[31] blockbusting,[32] and the constant threat of violence against those who crossed the color line, the map had been drawn.[33] The Act eliminated these tools of hyper-segregation, but it could not hope to erase swiftly the housing patterns that were cemented in the 1960s by urban renewal and White flight.

How far has the nation come in these last forty-five years? Part I.A begins with a primer on the present state of the Fair Housing Act as it has been amended by Congress and interpreted by HUD—particularly its requirement that HUD and its grantees affirmatively further fair housing. Part I.B briefly surveys the nation's current housing patterns, concluding that, despite some hopeful advances in certain neighborhoods and for higher-income people of color,[34] the overwhelming majority of Americans still live in segregated neighborhoods and segregated metropolitan areas.[35] This in turn propagates the sundry social and economic ills associated with isolation in low-income ghettos.[36] Finally, Part I.C looks at the lessons that can be taken from the blockbuster *Westchester* case and how they might inform further reform.

A. The Fair Housing Act and the "Affirmatively Furthering Fair Housing" Requirement

The Fair Housing Act, in addition to proscribing public and private acts of discrimination on the basis of race and other protected classes, declared a second, positive purpose of fostering residential integration. This purpose first arises in the statutory text as a directive to the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively

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[31] *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982) (adopting complainant's definition of racial steering to mean the practice by which "brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups").

[32] Blockbusting has been defined as "the practice of inducing owners of property to sell because of the actual or rumored advent into the neighborhood of a member of a racial, religious or ethnic group." Summer v. Teaneck, 251 A.2d 761, 762–63 (N.J. 1969). For more information on blockbusting, see Note, *Blockbusting*, 59 GEO. L.J. 170 (1970).

[33] *See* MASSEY & DENTON, *supra* note 29, at 60–62 (discussing the persistence of urbal racial segregation in the 1970s).

[34] *See infra* notes 57–64 and accompanying text (surveying progress in integration).

[35] *See* Roisman, *supra* note 12, at 508 (noting lack of progress toward integration).

[36] *See infra* notes 76–79 and accompanying text (discussing sociological research on neighborhood effects).

to further the policies of" the Act.[37] The statute places the same burden on "[a]ll executive departments and agencies" in carrying out housing programs.[38]

To receive HUD grants, grantees must agree to affirmatively further fair housing.[39] If HUD knows that a grantee has violated the requirement, it is required under 42 U.S.C. § 3805(d)(5) to seek compliance and even compel it through withdrawal of funds.[40] The reach of AFFH is extraordinary: Every state and virtually every urban and suburban county and major municipality (collectively, "entitlement communities") accepts HUD funds.[41] Further, when states and counties pass funds to non-entitlement communities, the grantee is responsible for the sub-grantee's compliance.[42]

The AFFH requirement lay largely dormant as a regulatory tool until President Clinton issued Executive Order 12,892[43] in 1994. The Order required the HUD Secretary to promulgate rules[44] detailing the obligations of "executive agencies in ensuring that programs and activities are administered and executed in a manner that furthers fair housing" and of grantees "affirmatively to further the goal of fair housing."[45] Most importantly, the order required the rules to

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[37] 42 U.S.C. § 3608(e)(5) (2006).

[38] *Id.* § 3608(d).

[39] The Housing and Community Development Act of 1974 made this requirement explicit: "[T]he grantee will affirmatively further fair housing." 42 U.S.C. § 5304(b)(2) (2006); *see also* Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (declaring that the affirmative requirement on the HUD Secretary applies "through him on other agencies administering federally-assisted housing programs"); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 73, 75 (D. Mass. 2002) ("[T]here is no way—at least none that makes sense—to construe the boundary of the [AFFH duty] as ending with the Secretary. . . . These regulations unambiguously impose mandatory requirements on the [defendants] not only to *certify* their compliance with the federal housing laws, but actually to *comply*.").

[40] *See* Anderson v. City of Alpharetta, Ga., 737 F.2d 1530, 1537 (11th Cir. 1984) (describing HUD's obligation not just to refrain from discriminatory acts itself, but also to act "when HUD is aware of a grantee's discriminatory practices and has made no effort to force it into compliance with the Fair Housing Act by cutting off existing federal financial assistance to the agency in question").

[41] Entitlement communities that receive direct grants from HUD include the principal city of metropolitan statistical areas (a region centered around a major city, as defined by the Office of Management and Budget), any city with more than 50,000 residents, and counties with more than 200,000 residents excluding the population of other entitlement communities. Funding levels are set by a formula. *Community Development Block Grant Entitlement Communities Grants*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement (last visited Oct. 23, 2013).

[42] 24 C.F.R. § 570.487(b)(4) (2013).

[43] Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

[44] *Id.* § 4(a). ("[T]he Secretary of Housing and Urban Development shall, to the extent permitted by law . . . promulgate regulations . . . .").

[45] *Id.*

"describe a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing."[46]

The HUD regulations that followed President Clinton's order were more procedural than substantive. The basic rule for states and localities requires a certification that the grantee "will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard."[47] Each certification must be "satisfactory to HUD."[48] In practice, grantees do not submit the required Analysis of Impediments (AI) to HUD; they merely submit certifications attesting to its existence.[49] Although the current regulations are threadbare, HUD has published detailed but voluntary recommendations on how to conduct an AI in its Fair Housing Planning Guide.[50]

Advocates and a report from the Government Accountability Office have lambasted HUD oversight of the AFFH requirement as weak.[51] Even HUD's recent internal review found that jurisdictions did not produce AIs in compliance with its Planning Guide.[52] The AIs tended to be outdated, incomplete, and lacking in concrete time frames for implementation.[53] Yet despite this longstanding lack of rigor in localities' fair housing efforts, HUD traditionally brought very few enforcement actions. One scholar observed that, until recently, HUD had never denied funding to a grantee because of its failure to affirmatively further fair housing;[54] similarly, during a public hearing,

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[46] *Id.*

[47] 24 C.F.R. § 19.225(a)(1) (2013) (the regulation for localities). Similar language, for the regulation of states, is found in 24 C.F.R. § 570.487(b) (2013).

[48] 24 C.F.R. § 19.225(a).

[49] *See* THE OPPORTUNITY AGENDA, *supra* note 21, at 5 (decrying the voluntary nature of AI submissions).

[50] U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE, Vol. 1 (1996), *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

[51] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), *available at* http://www.gao.gov/new.items/d10905.pdf [hereinafter GAO REPORT] (finding that "many AIs were outdated or appeared to have been prepared in a cursory fashion" and "the department's oversight was limited"); *see also* The Opportunity Agenda, *supra* note 21, at 7–10 (finding fault with jurisdiction-wide compliance, specific program compliance, and the lack of integration with other civil rights laws).

[52] U.S. DEP'T OF HOUS. & URBAN DEV., ANALYSIS OF IMPEDIMENTS STUDY 15 (2009).

[53] GAO REPORT, *supra* note 51, at 9.

[54] Breymaier, *supra* note 20, at 249.

a HUD official recalled only three instances in two decades in which HUD sought AFFH compliance.[55] This trend, however, changed substantially during the Obama Administration when HUD officials began actively pursuing AFFH compliance administratively and in the courts.[56]

B. Racial Segregation Stubbornly Persists Even as Overt Acts of Discrimination Have Decreased

Although commentators debate the exact degree of segregation in the United States today,[57] the consensus is that the United States remains a mostly segregated nation. For example, most White Americans live in neighborhoods composed overwhelmingly of other Whites.[58] Although less dramatically segregated than White neighborhoods, Blacks and Latinos still live in neighborhoods with a significant concentration of persons of the same race.[59] By contrast, Asians tend

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[55] Michael Allen, Counsel, Relman & Dane, PLLC, Strong Enforcement is Required to Promote Integration on the Basis of Race and Disability, Testimony at a Public Hearing of the National Commission on Fair Housing and Equal Opportunity 3 (Sept. 22, 2008), *available at* http://www.prrac.org/projects/fair_housing_commission/boston/allen.pdf ("In fact, at the April 2008 National Fair Housing Policy Conference in Atlanta, a long-time HUD employee said he could think of only three instances over 20 years in which HUD [took] such action.").

[56] *See* POVERTY & RACE RESEARCH ACTION COUNCIL, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST-TERM REPORT CARD PART II, at 10 (approving of the Administration's intervention in the *Westchester* settlement and recent audits of 300 AIs); *see also* U.S. DEP'T OF HOUS. & URBAN DEV., HUD STRATEGIC PLAN FY 2010–2015 4 (2010), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf (describing HUD's role as policymaker, "funder, capacity builder, and regulator").

[57] *Compare* Edward L. Glaeser, *Desegregation Is Unsung U.S. Success Story*, BLOOMBERG NEWS (Jan. 30, 2012), http://www.bloomberg.com/news/2012-01-30/desegregation-is-an-unsung-u-s-success-story-edward-glaeser.html (arguing that not enough attention is given to progress made in desegregating the housing market), *with* Jonathan Rothwell, *Reports of the End of Segregation Greatly Exaggerated*, THE NEW REPUBLIC (Jan. 31, 2012), http://www.newrepublic.com/blog/the-avenue/100222/reports-the-end-segregation-greatly-exaggerated (taking issue with Glaeser's optimistic assessment and noting the persistence of low-income Black ghettos).

[58] JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2–3 (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf (analyzing data from the 2010 U.S. Census for all of the 367 Metropolitan Statistical Areas in the country). In a uniformly integrated housing pattern, there would be no racial differences in neighborhood composition. Yet in 2010, the typical White person lives in a neighborhood that is 75% White, 8% Black, 11% Latino, and 5% Asian, while the typical Black person lives in a neighborhood that is 45% Black, 35% White, 15% Latino, and 4% Asian. Similarly, the typical Latino lives in a neighborhood that is 46% Latino, 35% White, 11% Black and 7% Asian, while the typical Asian lives in a neighborhood that is 22% Asian, 49% White, 9% Black, and 19% Latino. *Id.*

[59] *Id.*

to live in neighborhoods with a higher concentration of Whites than Asians.[60]

Residential segregation is empirically assessed using two commonly used metrics: the dissimilarity index and the exposure index.[61] The dissimilarity index measures the degree to which two groups are evenly spread throughout an area by evaluating the percentage of one group that would have to move to achieve perfect integration in a metropolitan area.[62] In other words, the dissimilarity index measures the percentage of a particular racial group that would have to move so that each neighborhood within a city matched the overall racial demographics of the city itself. By that measure, the White-Black dissimilarity score declined significantly from a high of seventy-nine in 1970 to seventy-three in 1980, sixty-seven in 1990, sixty-four in 2000, and fifty-nine in 2010.[63] This trend is encouraging.[64]

The exposure index, on the other hand, measures the percentage of one race found in the average neighborhood of another, and it tells a more troubling story.[65] The Black-White exposure score has scarcely budged, from thirty-two in 1970 to thirty-five in 2010.[66] Thus, the average Black person in 2010 lived in a neighborhood with the same percentage of White people that were present in that neighborhood nearly a half-century ago. The overall story told by the most recent census is that, whereas some White neighborhoods have become less homogenous, Black neighborhoods remain largely unchanged.[67]

The mechanisms that explain these changes and the stability of housing patterns are manifold, but they essentially boil down to three

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60 *Id.*

61 *Id.* at 25 (explaining the two measurements).

62 *Id.*

63 *Id*. at 4.

64 Although its pace may be slowing, if the national dissimilarity index continues to drop by three to six points per decade, we would see a score of zero, or uniformly random racial distribution, in fifty to one hundred years.

65 *See* LOGAN & STULTS, *supra* note 58, at 4 (charting exposure index changes over time).

66 *Id.*

67 The positive trend here is that housing opportunities in middle- and high-income neighborhoods that were once exclusively White are now more available to those people of color with the economic means to access them. In 1980, the typical White person lived in a neighborhood that was eighty-eight percent White. *Id.* at 21. The slow change to seventy-five percent White over thirty years reflects the migration of people of color to White suburban neighborhoods. Another trend resulting in less rigid segregation is the influx of Latino and Asian immigrants to depopulated Black neighborhoods. While the average African American is essentially no more likely to live near Whites than forty years ago, the Black-Asian and Black-Latino exposure scores are on the rise. *Id.* at 22.

categories: discrimination, economics, and preferences.[68] A prospective tenant may be limited from certain housing choices by discrimination or steering, by the price of the unit or required transportation, or by her own decision to avoid certain neighborhoods. The first two categories are fundamentally the product of public policy: Racial discrimination is outlawed but inadequately enforced, while local zoning and other practices like limits on multifamily development, minimum lot sizes, and density caps serve to drive up housing costs artificially.[69] Powerful neighborhood associations and property interests often have something approaching a veto power over new development—a power they exercise.[70] Individual preferences drive some self-segregation, particularly for new immigrants with limited English proficiency.[71] Limited knowledge of neighborhoods and their characteristics, including knowledge acquired through social networks and personal experiences, may operate to constrict a prospective

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[68] *See, e.g.*, BROOKINGS INST., CTR. ON URBAN AND METRO. POLICY, THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE 8–9 (2002), *available at* http://www.brookings.edu/research/reports/2002/02/housingaffordability (discussing ways in which land-use regulations' economic effects have been shown to "limit the ability of low-income households and people of color to find suitable housing in decent neighborhoods"); U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY AND DEVELOPMENT RESEARCH, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at 39 (2013), *available at* http://www.huduser.org/portal/publications/fairhsg/hsg_discrimination_2012.html (describing present incidence of racial discrimination in housing rentals and sales); Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidence from a Multiethnic Metropolis*, 47 SOC. PROBS. 379, 379 (2000), *available at* http://www.econ.brown.edu/fac/glenn_loury/louryhomepage/teaching/Ec%20137/Ec%20137%20spring07/camille-charles.pdf (finding strong support for the thesis of "race-based explanations of preferences" in the context of same-race neighborhoods).

[69] *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION §§ 11–13 (2011) (detailing the various local and often racially neutral policies that can result in the disparate exclusion of racial minorities).

[70] *See* William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881, 882 (1999) (cataloguing mechanisms deployed by neighbors to halt development beyond testifying at zoning boards, including "alternative regulatory rationales, such as environmental impact statements, historic districts, aboriginal burial sites, agricultural preservation, wetlands, flood plains, access for the disabled and protection of (often unidentified) endangered species at other local, state and federal government forums, including courts of law"); *see also* LISA BEANE, ET AL., EVALUATION AND ANALYSIS OF MADISON'S DEVELOPMENT REVIEW AND PERMITTING PROCESS 8 (2005) (noting that developers complain that neighborhood associations have too much power to veto development plans); ROBERT J. DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 1–3 (1992) (describing broad governance powers of residential community associations).

[71] *Cf.* LOGAN & STULTS, *supra* note 58, at 22 ("Hispanic population growth is concentrated in areas that already have large Hispanic constituencies.").

resident's locational options.[72] Yet accepting that self-segregating preferences account for some portion of segregation in housing[73] does not obviate the need to combat both discrimination and zoning policies that result in economic exclusion that exacerbates residential immobility.[74] Finally, it is important to note that even while racial segregation slowly wanes, economic segregation is increasing.[75]

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[72] *See* Jeffrey Jacob & Abdul Munasib, *Housing Tenure Choice Implications of Social Networks* 1 (Okla. State Univ. Econ. Working Paper Series, No. 0901, 2009), *available at* http://spears.okstate.edu/ecls-working-papers/files/0901_munasib_SNHomeownership.pdf (describing the close relationship between social-network information and housing choices, especially homeownership).

[73] African Americans' preferences account for a small part of residential segregation. Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 487–88 n.47 (1995) (listing several sources noting that residential segregation is not the result of African American preferences); *see also* Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black–White Residential Segregation*, 26 J. URB. AFF. 379, 396 (2004) (concluding that while "[t]here is new evidence to support the existence of self-segregation among blacks . . . , this effect appears smaller than the effect of self-segregation among whites"). Generally, African Americans prefer integrated housing. *See* Joe T. Darden, *Choosing Neighbors and Neighborhoods: The Role of Race in Housing Preference*, *in* DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 15, 26 (Gary A. Tobin ed., 1987) (concluding that surveys of blacks "indicate a black preference for mixed or half-black half-white neighborhoods and the rejection of all-black and all-white ones"). African American preference for heavily Black neighborhoods, however, may be increasing. *Cf.* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM, at xii (2004) (theorizing that Blacks are "integration weary").

[74] Preferences are also products of policy choices: People may avoid neighborhoods where they have experienced racial hostility or discrimination, and those experiences could be reduced by increased enforcement of antidiscrimination laws. Further, preferences that are limited based on incomplete information may be remedied with policies that promote affirmative marketing of residential opportunities to individuals affiliated with the communities least likely to move there. Researchers often distinguish between segregated "ghettos" that residents are unable to leave because of limited opportunities and segregated "barrios" that residents choose not to leave because of affinity or preference. *See* LOGAN & STULTS, *supra* note 58, at 22 (describing this distinction). This generalization is useful to the extent that fair-housing advocates aim to eliminate ghettos and the corresponding off-limits neighborhoods that sustain them; meanwhile, barrios may stymie policy solutions because of immigrants' language-based preferences.

[75] *See generally* PAUL TAYLOR & RICHARD FRY, PEW RESEARCH CTR., THE RISE OF RESIDENTIAL SEGREGATION BY INCOME (2012), *available at* http://www.pewsocialtrends.org/files/2012/08/Rise-of-Residential-Income-Segregation-2012.2.pdf (analyzing the thirty largest metropolitan areas and finding growing income segregation). In 1980, for example, twenty-three percent of low-income households resided in a majority low-income census tract, but in 2010 twenty-eight percent did. *Id.* at 1. Meanwhile, in 1980 only nine percent of high-income households were in a majority high-income census tract, but that ratio has doubled to eighteen percent by 2010. *Id.* Currently, although income-based segregation is still far less prevalent than racial segregation, *id.* at 14, the fact that income segregation is the most pronounced in the metropolitan areas that have experienced the highest population growth, *see id.* at 4, indicates that a more stratified society will exist in the future. Economic status, as opposed to race, is not a class protected by the Fair Housing Act, but

Considerable academic debate also attends the question of whether place has an impact on residents' lives, typically phrased as "neighborhood effects."[76] If there are no neighborhood effects, residential integration would be a merely aesthetic and mostly hollow victory. Despite some theorizing that globalization or the Internet has diminished the impact of place,[77] empirical evidence overwhelmingly demonstrates the deep connection between neighborhood and a wide variety of social and economic outcomes.[78] For example, research shows that Black-White segregation strongly correlates with worse outcomes for African-Americans in education and employment.[79]

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race and economic status are so highly correlated in the United States that increasing economic segregation is a worrisome trend for advocates of racial integration. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 99–100 (10th Anniversary ed. 2006) ("[S]tudies comparing the wealth of blacks and whites have found that blacks have anywhere from $8 to $19 . . . for every $100 that whites possess."); Tami Luhby, *Worsening Wealth Inequality by Race*, CNNMONEY (June 21, 2012, 1:09 PM), http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/index.htm (describing the "Great Recession" as worsening wealth disparities between Whites and Blacks).

[76] *See, e.g.*, ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 31–49 (2012) (summarizing the literature on neighborhood effects and the development of the sociological unit of inquiry from individuals to communities); JUDITH BELL & MARY M. LEE, POLICYLINK, WHY PLACE AND RACE MATTER: IMPACTING HEALTH THROUGH A FOCUS ON RACE AND PLACE 16 (2011), *available at* http://www.policylink.org/site/c.lkIXLbMNJrE/b.6728307/k.58F8/Why_Place___Race_Matter.htm (follow "Full Report" hyperlink under report title) (discussing neighborhood environmental factors that disproportionately harm low-income communities and communities of color and suggesting strategies for building healthy communities to overcome these issues).

[77] *See, e.g.*, THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005) (extolling globalization as reducing the importance of place); Gene Marks, *If I Were a Poor Black Kid*, FORBES (Dec. 12, 2011, 7:25 AM), http://www.forbes.com/sites/quickerbettertech/2011/12/12/if-i-was-a-poor-black-kid/ (arguing that the Internet is the great equalizer in education).

[78] *See, e.g.*, SAMPSON, *supra* note 76 (finding correlations between place and a host of outcomes, including crime, health, income, juvenile delinquency, and education); James E. Rosenbaum & Stefanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago* Gautreaux *Housing Program and Recent Mobility Programs*, IND. L. REV. 653, 659–62 (2008); Margery Austin Turner & Dolores Acevedo-Garcia, *The Benefits of Housing Mobility: A Review of the Research Evidence*, *in* KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM 9, 9–10 (Philip Tegeler et al. eds., 2005), *available at* http://www.prrac.org/pdf/KeepingPromise.pdf (examining current research finding better life outcomes for voucher recipients who leave disadvantaged neighborhoods).

[79] *See* David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. ECON. 827, 841–47 (1997) (finding worse employment outcomes and high school graduation rates for Blacks associated with segregation); Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform*, 9 HOUSING POL'Y DEBATE 849, 880–81 (1998) (finding wide support for the spatial mismatch hypothesis and the resulting barriers that minority workers living in segregated cities face when it comes to job accessibility in White suburban areas); *cf.*

C. *The Landmark* Westchester *Decision Reinvigorates AFFH and Exposes the Need for New Rules*

Westchester County, New York, sits just to the north of the Bronx and the rest of New York City.[80] It was the first suburb in the world to develop on a mass scale,[81] and as of 2010 hosts 950,000 residents in 450 square miles.[82] Its forty-five municipalities generally boast high standards of living, fine public amenities, high incomes, and good schools.[83] In half of these municipalities, less than two percent of residents are African-American, while the county overall is about fifteen percent African-American.[84] A pathbreaking lawsuit by the Anti-Discrimination Center of Metro New York (ADC) challenged Westchester's repeated certifications that it was affirmatively furthering fair housing[85] and in so doing revitalized the requirement, providing a new tool for advocates and putting municipal leaders of segregated communities on notice of their obligation.

ADC alleged that during the period from 2000 to 2006 Westchester County failed to meet its obligation to affirmatively

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WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (Univ. of Chi. Press 1987) (arguing that structural, racially neutral changes have inflicted disproportionate harm on segregated, low-income urban neighborhoods of color when it comes to family dissolution and unemployment, and that therefore we must move away from race-specific policies when addressing these issues); Katherine M. O'Regan & John M. Quigley, *Spatial Effects upon Employment Outcomes: The Case of New Jersey Teenagers*, NEW ENG. ECON. REV., May–June 1996, at 41 (documenting the strong relationship between neighborhood composition and teen employment rates).

[80] *About Westchester*, WESTCHESTERGOV.COM, http://www3.westchestergov.com/home/about-westchester (last updated Apr. 12, 2012).

[81] Kenneth T. Jackson, *Foreword* to WESTCHESTER: THE AMERICAN SUBURB, at vii (Roger G. Panetta ed., 2006).

[82] FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, AN OVERVIEW OF AFFIRMATIVE MARKETING AND IMPLICATIONS FOR THE WESTCHESTER FAIR HOUSING SETTLEMENT 3 n.1 (2011), *available at* http://furmancenter.org/files/publications/Furman_Center_Review_of_Affirmative_Marketing.pdf.

[83] *See* Nikole Hannah-Jones, *Soft on Segregation: How the Feds Failed to Integrate Westchester County*, PRO PUBLICA, http://www.propublica.org/article/soft-on-segregation-how-the-feds-failed-to-integrate-westchester-county (last updated Nov. 2, 2012) (describing Westchester's high standard of living by reference to one of its affluent cities).

[84] WESTCHESTER CNTY. DEP'T OF PLANNING, WESTCHESTER COUNTY DEPARTMENT OF PLANNING DATABOOK 44 (2010), *available at* http://planning.westchestergov.com/images/stories/DataBook/databook.pdf (listing data for each of the county's municipalities by race). For a stark visual representation of the county's segregated housing patterns by race, see Andrew A. Beveridge, ANTI-DISCRIMINATION CTR., CONCENTRATION OF NONHISPANIC BLACK POPULATION BY CENSUS BLOCK, 2000 CENSUS, *available at* http://www.antibiaslaw.com/sites/default/files/files/WestchesterSegregation.pdf.

[85] United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty. (*Westchester I*), 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (denying motion to dismiss); United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty. (*Westchester II*), 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (issuing partial summary judgment in favor of plaintiff).

further fair housing because it did not properly identify impediments to fair housing choice or take sufficient action to overcome them.[86] ADC alleged that Westchester's AI utterly failed even to mention race.[87] The county answered that it did consider race *sub silentio* by considering income,[88] but the district court found its AI lacking, concluding that "an interpretation of 'affirmatively furthering fair housing' that excludes consideration of race would be an absurd result."[89] This holding—that AIs must consider race—gave substance to the AFFH requirement that was missing from the HUD regulations. Because Westchester had completely neglected race, the court could not analyze the thoroughness or sincerity with which it considered race as an impediment, nor the extent of the appropriate actions required to overcome identified impediments. In essence, the court held that AFFH required doing something more than nothing, but did not further instantiate the requirement.

After discovery, both parties moved for summary judgment, and the district court denied Westchester's motion and partially granted ADC's.[90] The decision laid out the material uncontested facts from the period, including that Westchester had received more than $52 million from CDBG,[91] that it had made its required annual certifications that it was affirmatively furthering fair housing,[92] that it failed to analyze race or racial discrimination as impediments to fair housing,[93] and, critically, that it had never developed affordable housing in any municipality that opposed it or taken any action to bring its subgrantees into compliance with AFFH.[94] Therefore, the court held that the repeated certifications "were false when they represented that the County would take appropriate actions to overcome the effects of race-based impediments to fair housing choice that its analysis had

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[86] *Westchester II*, 668 F. Supp. 2d at 550. The novelty of the suit came from the identity of the enforcer: It was not HUD, but a private, nonprofit fair housing organization that sought enforcement under the False Claims Act, 31 U.S.C. §§ 3729–3733 (2006), which permits *qui tam* suits on behalf of the United States to recover public money. For a discussion of *qui tam* suits and the difficulty of making out the elements of a claim, see generally Termine, *supra* note 20.

[87] *See Westchester I*, 495 F. Supp. 2d at 377–78.

[88] Income is, at best, an imperfect proxy for race. *See supra* note 75 (evaluating the relationship between race and income in the United States).

[89] *Westchester I*, 495 F. Supp. 2d at 388.

[90] *Westchester II*, 668 F. Supp. 2d at 550.

[91] *Id.* at 559–60.

[92] *Id.* at 553.

[93] *Id.* at 562.

[94] *Id.* at 559.

identified."[95] Dismissing the idea that the AFFH requirement lacked substance, the court held that it was "not a mere boilerplate formality, but rather . . . a *substantive* requirement."[96]

Just before the summary-judgment ruling, the Obama Administration's HUD officials intervened in the case[97] and soon reached a settlement with the County.[98] The settlement required Westchester to spend $51.6 million to create 750 affordable housing units within its municipalities with overwhelmingly White residents and imposed rigorous benchmarks and affordability requirements.[99] The settlement further required payment to ADC and attorneys' fees[100] as well as nonfinancial remedial measures, including adoption of an ordinance prohibiting source-of-income discrimination,[101] submission of a new AI,[102] and promotion of affordable units through "affirmative marketing."[103] Because the case settled, its merits were not reviewed on appeal.

The settlement won approval by the County's Board of Legislators,[104] but proved controversial and led to the defeat of the County Executive by an opponent who campaigned actively against

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[95] *Id.* at 565. The only remaining hurdle to a complete victory for ADC was establishing scienter on the part of the County. *See id.* at 567–68, 571 (finding the question of knowledge to be in dispute and unresolvable at the summary judgment stage).

[96] *Id.* at 569 (emphasis added).

[97] Memorandum of Law of the United States of America in Support of Its Application to Intervene, *Westchester II*, 668 F. Supp. 2d 548 (No. 06 Civ. 2860), 2009 WL 2899691. The United States declined to intervene in the *qui tam* suit in *Westchester I* under the Bush Administration. *Id.* at 5.

[98] Stipulation and Order of Settlement and Dismissal, *Westchester II*, 668 F. Supp. 2d 548 (No. 06 Civ. 2860), *available at* http://www.westchesterhousingmonitor.org/files/Stipulation.pdf.

[99] *See id.* ¶¶ 2, 5–7.

[100] *See id.* ¶¶ 2, 5–7.

[101] *Id.* ¶ 33(g). Source-of-income discrimination refers to the practice of landlords discriminating against certain tenants based upon their status as recipients of federal aid, particularly Section 8 Housing Choice Vouchers. *See, e.g.*, D.C. Code tit. 2 § 2-1401.02(29) (2013) (defining source of income); *see also* EQUAL RIGHTS CTR., WILL YOU TAKE MY VOUCHER? AN UPDATE ON HOUSING CHOICE VOUCHER DISCRIMINATION IN THE DISTRICT OF COLUMBIA (2013), *available at* http://www.equalrightscenter.org/site/DocServer/Will_You_Take_My_Voucher.pdf (surveying D.C. landlords' compliance with ordinance banning source-of-income discrimination).

[102] Stipulation and Order of Settlement and Dismissal, *supra* note 98, ¶ 32.

[103] *Id.* ¶¶ 25(a)(2), 33(e).

[104] Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of July 7, 2010 Through October 25, 2010, at 1, United States *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06-2860) [hereinafter Monitor's Report], *available at* http://www.westchesterhousingmonitor.org/monitor-reports (follow "Monitor's Report filed October 2010" hyperlink under "Monitor's Reports").

the settlement.[105] The County has since been less than enthusiastic in following through on its obligations. The court-appointed Monitor consistently rejected the County's Implementation Plan until it incorporated more specific objectives.[106] Meanwhile, HUD rejected Westchester's new AI for incompleteness and failing to propose "sufficiently responsive actions."[107] Recently, the County's analysis of its municipalities' zoning laws found none to be intentionally or unintentionally exclusionary.[108] The Monitor rejected the report: "The County's submission did not reflect the rigor of analysis required to reach a reasoned conclusion on the impact of restrictive zoning practices[,] and . . . the County failed to state a clear strategy to overcome any municipal exclusionary zoning practices."[109]

The implementation and enforcement of the *Westchester* settlement is ongoing,[110] and it is reverberating far outside its geographic boundary: "*Westchester*'s significance is that it provided a wake-up call to the federal government regarding the fact that its 1200 CDBG grantees could be, and should be, required to do what for many years the law has mandated as a condition of receiving HUD funds."[111] Other organizations have taken up ADC's strategy with limited success, notably in suits relating to special CDBG funds expended in the wake of Hurricane Katrina.[112] HUD has also dramatically increased

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105 *See* Hannah-Jones, *supra* note 83 (exploring the political blowback in the 2009 Westchester County Executive election in which the challenger "sought to capitalize on anger around the settlement"). The victor, Rob Astorino, a Republican, had lost to the incumbent who approved the settlement, Andrew Spano, a Democrat, four years earlier. *Id.*

106 *See* Monitor's Report, *supra* note 104, at 5–6 (stating that there are weaknesses with the Implementation Plan).

107 Letter from John D. Trasviña, Assistant Sec'y for Fair Hous. & Equal Opportunity, Dep't of Hous. & Urban Dev., to Kevin Plunkett, Deputy Cnty. Exec. of Westchester Cnty. 6 (Dec. 21, 2010), *available at* http://www.prrac.org/pdf/12-21-2010_HUD_Response_to_Westchester_AI.pdf.

108 Elizabeth Ganga, *Monitor in Fair Housing Settlement Studies Zoning Data*, J. NEWS, Mar. 25, 2013, at A7.

109 *Id.*

110 The Monitor publicly tracks its progress with quarterly reports and other updates at http://www.westchesterhousingmonitor.org/home.

111 Schwemm, *supra* note 20, at 163.

112 *See, e.g.*, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078, 1079–80 (D.C. Cir. 2011) (finding that HUD and Louisiana's formula for distributing funds in the Road Home program did not violate AFFH despite violating other provisions of the Fair Housing Act). Under the Obama Administration, HUD and DOJ have pursued these complaints rather than leaving them to private enforcement. *See, e.g.*, Complaint at 3, United States v. City of Joliet, 1:11-cv-05305 (N.D. Ill. Aug. 4, 2011) (intervening in private suit and citing failure to AFFH as one basis of complaint), *sub nom.* New West v. City of Joliet, 1:05-cv-01743, 2012 WL 366733, at *8 (Jan. 30, 2012) (partially granting and partially denying defendant's motion to dismiss); *see also* Whitney

its review of AIs as a result.[113] This activity has led scholars,[114] advocates,[115] and HUD itself to recognize the need for rulemaking.[116]

II
HUD and Courts Should Define AFFH as Making Measurable Progress Toward Residential Integration

The *Westchester* decision took an important first step in declaring the statutory requirement of affirmatively furthering fair housing to be "substantive" and not merely procedural, as in filing the proper "boilerplate" paperwork.[117] Yet because Westchester did not consider race whatsoever, the court did not elaborate the extent of the substance required. Municipalities might be left to wonder: To what degree is consideration of race required? Moreover, Westchester's failure to consider race in analyzing impediments to fair housing choice meant that it *per se* failed to take appropriate action to overcome those impediments. Determining the extent of appropriate action required is important for HUD and its grantees. This lack of clarity cries out for administrative guidance, and HUD has responded with a long-awaited, 132-page proposed rule.[118]

HUD's proposed rule, however, continues to elevate procedure over substance as the measure of compliance. In Part II.A, this Note will analyze the proposed rule's procedural improvements and offer general principles and specific advice for an expanded rule that would put substantive flesh on the bones of the existing regulations and HUD's proposed rule. In Part II.B, this Note suggests how a district court judge, in the absence of an expanded rule, should analyze a similar case, brought *qui tam* or by HUD, to evaluate whether a defending government that did something more than nothing did enough to satisfy the statutory mandate.

Hodgin, *What if HUD Took Back the Money?*, Galveston Daily News (Sept. 5, 2012) (discussing HUD's response to a complaint following Hurricane Ike).

113 *See* Schwemm, *supra* note 20, at 169 n.264 (noting increased auditing).

114 *See, e.g.*, *id.* at 169–70 (speculating about rulemaking).

115 *See, e.g.*, Poverty & Race Research Action Council, *supra* note 21 (calling on the Obama Administration to promulgate an AFFH rule); The Opportunity Agenda, *supra* note 21 (articulating procedural rule improvements).

116 U.S. Dep't of Hous. & Urban Dev., Statement of Regulatory Priorities (2012), *available at* http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201210/Statement_2500.html.

117 *Westchester II*, 668 F. Supp. 2d 548, 569 (S.D.N.Y. 2009).

118 Proposed Rule, *supra* note 19.

A. HUD's Proposed Rule Improves the AFFH Procedure but Should Require Quantifiable Progress to Determine Substantive Compliance

The principle most important to an effective rule is that inquiry into impediments to fair housing opportunities and a government's actions taken to address those impediments must be rigorously grounded in and measured against data. It will always be difficult for officials in Washington to know precisely the best way for any given locality to make progress toward residential integration, as the mechanisms that perpetuate segregation are highly localized and vary from one community to the next.[119] Because local officials are best situated to determine successful strategies, HUD should focus not on the nature of their actions but on their results, and hold grantees responsible for achieving measurable progress—quantifiable improvement—as well as for following through on their own proposals.[120]

This principle draws heavily from the experience of anti-discrimination advocates in the employment context, in which Title VII of the Civil Rights Act of 1964 forbids racial discrimination.[121] In 1971, the Supreme Court, in *Griggs v. Duke Power Co.*,[122] endorsed disparate-impact analysis, under which a plaintiff's statistical demonstration of an employment policy's adverse effects against a racial minority was sufficient to make out a successful claim, even in the absence of overt discrimination.[123] Disparate-impact claims facilitated an "experimentalism" in which voluntary compliance by employers was encouraged even in the absence of enforcement suits.[124] A data-driven AFFH rule

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[119] *See* SCHWEMM, *supra* note 69, at § 13 (showing the strength and diversity of exclusionary zoning mechanisms).

[120] This emphasis on local solutions is rooted in the theory of "democratic experimentalism." *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998) (defining democratic experimentalism as a form of governance in which "power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances" as overseen by regional or national coordinating bodies).

[121] 42 U.S.C. § 2000e-2 (2006).

[122] 401 U.S. 424, 436 (1971) (disapproving employer's use of a high school diploma requirement and written tests that had a severe disparate impact on the basis of race where the employer had not evaluated whether these requirements were a "reasonable measure of job performance").

[123] *See id.* at 430 ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices.").

[124] *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 255 (2011) (noting that equal-employment advocates used "'experimentalist' regulatory techniques to induce employers to voluntarily scrutinize and revise traditional employment practices to open more employment opportunities for racial minorities" (footnote omitted)); *see also* Susan Sturm, *Second Generation Employment*

would provide the Fair Housing Act with an analogously robust enforcement mechanism.[125] A mandate requiring recipients of federal funds to establish measurable benchmarks ex ante would similarly encourage compliance absent private enforcement by situating AFFH within the shadow of the law.

Although failing to advance substantive requirements for grantees, HUD's proposed rule goes a long way toward addressing the procedural shortcomings documented in its internal review[126] and by the GAO.[127] The proposed rule abandons the AI process and replaces it with an Assessment of Fair Housing (AFH).[128] Critically, unlike the AI, the existence of which grantees merely needed to attest to in a certification, a grantee must submit its AFH[129] for HUD's approval.[130] "Failure to submit . . . will automatically result in the loss of the CDBG funds . . . ."[131] While the AI required a generalized list of impediments to fair housing choice, the AFH is much more detailed in what it requires, including at minimum the following elements: a summary of fair housing issues and the grantee's capacity to address them;[132] analysis of HUD-provided, nationally uniform data (including integration and segregation patterns, racially or ethnically concentrated areas of poverty, disparities in access to community assets, and disproportionate housing needs);[133] "determinants" of these data (similar to the impediments list required in the AI);[134] an

Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001) (applying experimentalism to Title VII).

125 A critical assumption informing this idea is that politicians and public bodies are rational actors who respond to incentives like loss of funds, audits, and lawsuits. Sometimes termed public-choice or positive-political theory, the construct of the political actor as a rational actor who responds to incentive structures is widespread in the political science and legal literature. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991) (describing the important currents of the theory); Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 471 (1992) (defining positive political theory as "non-normative, rational-choice theories of political institutions").

126 *See* ANALYSIS OF IMPEDIMENTS STUDY, *supra* note 52.

127 *See* GAO Report, *supra* note 51.

128 Proposed Rule, *supra* note 19, at 43,729 (to be codified at 24 C.F.R. pt. 5) (defining the Assessment of Fair Housing as "the document that is submitted to HUD pursuant to § 5.154 that includes fair housing data analysis, an assessment of fair housing issues and determinants, and an identification of fair housing priorities and general goals").

129 *Id.* at 43,732 (same).

130 *Id.* at 43,733 (same) ("HUD's review of an AFH is to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting . . . .").

131 *Id.* at 43,732 (same).

132 *Id.* at 43,731 (same).

133 *Id.*

134 *Id.*

identification of fair housing priorities and goals;[135] and a summary of community participation.[136] HUD's provision of nationally uniform data on housing patterns to grantees, including the dissimilarity index and exposure index of each, will enable more accurate and realistic responsive actions.

These proposed AFH requirements are the procedural preface to substantive action—policies and programs that make measurable progress toward integrated housing within the localities. Here lies the importance of data-based accountability: Under an expanded rule, the grantee would have to demonstrate some measurable progress over time to show compliance. Sustaining a segregated status quo ought to be insufficient, but the proposed rule fails on this score. For CDBG grantees, it requires only that they "prioritize one or more goal(s) for mitigating or addressing the determinants" that limit fair housing choice,[137] and it vaguely heightens the follow-through requirement to "meaningful actions"[138] from "appropriate actions."[139] It does not, however, require that grantees set a goal for reducing measurable segregation, or actually reduce segregation. Indeed, it disclaims any such intent: "The proposed rule does not mandate specific outcomes. . . ."[140]

By contrast, the proposed rule does set a quantitative backstop in regulating Public Housing Authorities (PHA), which are also subject to the AFFH requirement: A PHA's certification of compliance will be invalid if its plan "[d]oes not reduce racial and national origin concentration in developments or buildings and is perpetuating segregated housing."[141] Without quantitative accountability or a backstop like that to which the PHAs are subject, the question of whether a grantee has taken meaningful actions is essentially an amorphous matter of good faith, which is difficult to evaluate given the multitude of actors involved in the myriad processes that govern housing patterns. To overcome the inertia of existing housing patterns and the powerful interests that protect them, localities need a strong incentive to effect change; tying a jurisdiction's ongoing receipt of CDBG funds to measurable progress in integration would prompt officials to seek progress.[142] Critically, the proposed rule contains no mechanism to

135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.* at 43,738 (to be codified at 24 C.F.R. pt. 91).
139 24 C.F.R. § 570.487(b).
140 Proposed Rule, *supra* note 19, at 43,711.
141 *Id.* at 43,742 (to be codified at 24 C.F.R. pt. 903).
142 CDBG comprises a relatively small but important piece of most cities' budgets. For example, Peoria, Illinois, an entitlement jurisdiction and proverbial everytown, received

determine noncompliance with the AFFH obligation by grantees other than failure to submit an AFH, and it does not describe sanctions for failure to take meaningful actions. Compliance audits and rigorous enforcement actions by HUD for such failure would strengthen the incentive.

In a time of austerity and budget sequestration,[143] HUD is unlikely to have the staffing resources to audit thoroughly every grantee's substantive compliance with AFFH, so it should develop a methodical system of prioritizing which jurisdictions receive audits.[144] Any jurisdiction that fails to improve either its dissimilarity index or exposure index in the three years between AFHs should receive a prioritized audit. Because segregation is slowly waning already,[145] prioritizing those few localities that measure no progress would duly limit the allocation of resources expended on AFFH. Jurisdictions that fail to improve either index in two consecutive three-year periods should be presumptively found in violation of the AFFH requirement of taking meaningful actions, with an appeals process available in which they could show with particularity their compliant efforts. Rebuttals of this presumption could include demonstration of macroeconomic forces outside the jurisdiction's control that stymied efforts to integrate, such as the recent foreclosure crisis.[146] A jurisdiction that fails to achieve any improvement over a decade should automatically lose its CDBG eligibility. HUD should further establish a complaint process whereby citizens or public-interest organizations could request

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$1,589,868 from CDBG in 2012. U.S. Dep't of Hous. & Urban Dev., *FY12 CPD Formula Allocation,* DATA.GOV, http://catalog.data.gov/dataset/fy12-cpd-formula-allocation (last updated May 25, 2013) (click "20383_allgrantees.xls" hyperlink). Its total operating budget for 2012 was $125,306,395. City of Peoria, 2012 ANNUAL BUDGET 1, http://www.peoriagov.org/content/uploads/2012/11/1348162851_2012_Budget_Book.pdf (last visited Oct. 23, 2013). CDBG therefore comprised one percent of its operating budget; although it may seem small, this is the "primary source of federal funds" that Peoria receives. *Id.* at 14 (author's calculations based on CDBG data from HUD compared to Peoria's total operating budget for 2012). Its loss would be financially painful but not ruinous.

143 *See* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011) (implementing automatic, across-the-board budget cuts termed "sequestration").

144 This proposed audit scheme is a modified version of the scheme used by the IRS. *See* THE OPPORTUNITY AGENDA, *supra* note 21, at 14 ("The IRS engages in three basic types of enforcement: (1) focusing on areas of high yield, both for specific impact and general deterrence against a particular type of evasion or taxpayer profile; (2) responding to information about non-compliance; and (3) conducting random audits.").

145 *See supra* notes 57–67 and accompanying text (discussing changes in segregation over time).

146 *See* Paul Kiel, *As Foreclosure Crisis Drags On, So Does Flawed Government Response*, PROPUBLICA (Dec. 31, 2012, 11:33 AM), http://www.propublica.org/article/as-foreclosure-crisis-drags-on-so-does-flawed-govt-response (describing the ongoing staggering rate of foreclosures and slow rate of recovery).

audits of certain jurisdictions upon a reasonable threshold showing. Finally, some audits should occur randomly.

In undertaking each audit, HUD must look not just at the actions that the jurisdiction reports taking but other actions and omissions by public and private actors that perpetuate or alleviate racial segregation, from discrimination by individuals to zoning policy. HUD should measure these actions against the impediments and goals identified and the actions proposed in the AFH. HUD should give greater weight to robust actions that involve changes to zoning or other policies and that result in the creation of housing units that further integration. It should give less weight to passive actions like public education about fair housing. If HUD determines that a jurisdiction is fulfilling its obligation to affirmatively further fair housing, it should be exempt from a random audit during the period of its AFH, and HUD should commit to not intervening in a *qui tam* suit.[147] In addition to determining that a grantee is noncompliant, HUD's audits could declare that a grantee is not yet in violation but could be doing more, in which case it should provide detailed feedback and recommendations, including model policies developed elsewhere.[148]

A first-time determination by HUD that a jurisdiction has failed its obligation should result in a one-year suspension of CDBG funds and should require a new AFH submission.[149] HUD should progressively increase sanctions for further violations. The precise extent of the quantifiable progress required should be developed methodically by HUD (and is beyond the ken of this proposal) as it conducts audits and develops an empirical understanding of the rates at which segregation can decrease with jurisdictions actively committed to integrative housing policies. This could be the basis for future quantitatively driven rulemaking once HUD has a larger data pool to consult.[150]

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147 HUD has the option of intervening and bringing the resources of the U.S. Department of Justice to bear in the suit or allowing it to proceed only with the private plaintiff. *See* Memorandum of Law of the United States of America in Support of Its Application to Intervene at 5, *supra* note 97 (Obama Administration intervening in Westchester litigation where Bush Administration had declined). A defendant may be more likely to settle and alter its practices when facing the United States, whose resources eclipse those of private nonprofit litigants.

148 *See, e.g.*, Monitor's Report, *supra* note 104 (approving model ordinances for Westchester municipalities).

149 A new AI was required of Westchester as part of its settlement. Stipulation and Order of Settlement and Dismissal, *supra* note 98, ¶ 32.

150 For example, experience could inform HUD that a five percent reduction in segregation is easily achievable over a ten-year period. HUD could then issue a new rule making a five percent reduction rather than a non-zero change the benchmark for compliance.

B. Absent a Rule, Courts Should Look to a Burden-Shifting Framework

The district court in *Westchester* had an easy time finding a violation of AFFH because the County had failed completely to consider race. Without identifying the impediments to housing choice related to race, the County could not have taken appropriate actions to overcome them. A more difficult case would be a jurisdiction that had a properly completed AFH but that failed to take meaningful actions to overcome impediments, or that conducted some but not all of the actions they proposed. If HUD promulgates a rule incorporating quantitative benchmarks to determine compliance, the courts may properly defer to HUD.[151] But in the absence of a rule, courts can achieve a similar result by borrowing the burden-shifting prima facie framework from Title VII to determine whether a violation of AFFH has occurred.[152] Notably, while "[o]ne of HUD's aspirations for the proposed rule is that it will reduce the risk of litigation for program participants,"[153] the acceptance of an AFH by HUD expressly does not relieve the grantee of potential liability for failure to meet its AFFH obligations.[154] Even with the improved process of the AFH, future litigation is likely, and the proposed rule does not empower a court to decide whether a defendant's actions were meaningful. This burden-shifting framework is a step in that direction.

Under this framework, when a plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to establish a legitimate, nondiscriminatory explanation for the adverse action.[155] Upon so doing, the burden of persuasion then shifts back to the plaintiff to demonstrate that the explanation is pretextual.[156] In

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[151] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (requiring courts to defer to administrative agencies' reasonable interpretations of statutes they are entrusted to administer).

[152] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (creating a burden-shifting framework whereby a plaintiff carries the burden of showing a prima facie case, after which the defendant may rebut the presumption by showing a non-pretextual, nondiscriminatory rationale for the adverse treatment).

[153] Proposed Rule, *supra* note 19, at 43,711 (executive summary).

[154] *See id.* at 43,733 (to be codified at 24 C.F.R. pt. 5) ("HUD's acceptance does not mean that HUD has determined that a jurisdiction has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Act; or has complied with other civil rights laws, regulations or guidance.").

[155] *See McDonnell Douglas*, 411 U.S. at 802 ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

[156] *See id.* at 804 (holding that once a defendant has offered an explanation for the adverse treatment, the burden shifts back to the plaintiff to show that the explanation "was in fact pretext" for discrimination).

applying this framework to AFFH, the plaintiff could make the prima facie case by showing either that the defendant jurisdiction had neglected to take the appropriate actions proposed in the AFH or that it had failed to improve its dissimilarity or exposure index. The burden would then shift back to the defendant to demonstrate that it had failed to do so because of nondiscriminatory reasons outside of its control. If those reasons include the refusal to act by its sub-grantees, the defendant would have to show that it took enforcement actions up to and including revocation of the grant to noncompliant sub-grantees.[157]

This burden-shifting framework hardly provides a mechanical answer to courts wrangling with the details of a suit that alleges partial noncompliance, rather than the easier total noncompliance at issue in *Westchester*.[158] Still, it provides an important procedural approach that benefits those jurisdictions that actually achieve measurable progress. This adds yet another important incentive for integrative housing policy, which will help localities overcome inertia and local interests that oppose integrative measures.

III
Putting the Expanded Rule to the Tests of Workability and Constitutionality

The expanded rule and doctrinal framework proposed in Part II are susceptible to numerous important critiques. First, they might not succeed due to practical considerations. Second, to the extent they do succeed, they may have negative consequences. Third, the expanded rule may be struck down as unconstitutional under the Supreme Court's recent jurisprudence on the Spending and Equal Protection Clauses. This Part examines each of these arguments in turn, concluding that the proposals of Part II are still worth pursuing.

A. The Rule May Not Succeed or May Result in Negative Consequences

The expanded rule has a number of practical limitations that could hinder its effectiveness in addressing endemic housing segregation. First, the quantitative measurements on which it places so much emphasis are imperfect. The dissimilarity index and exposure index are based on census tracts, which are a blunt instrument of

[157] *Cf.* 24 C.F.R. § 570.487(b)(4) (2013) (stating that a defendant is responsible for ensuring that sub-grantees comply with the defendant's certification).

[158] *See Westchester II*, 668 F. Supp. 2d 548, 562–66 (S.D.N.Y. 2009) (laying out the holding of the easier case).

measurement, generally housing between 1200 and 8000 residents.[159] Large physical barriers like highways or parks internally split some census tracts, which do not necessarily correspond to neighborhoods as perceived by residents.[160] Furthermore, two available zoning strategies can improve these indices: increasing affordable housing opportunities—which tends to bring new residents of color to White neighborhoods—in exclusive areas; or developing market-rate housing—which tends to bring White residents to neighborhoods of color—in economically marginalized areas.[161] The latter strategy may be more politically feasible as low-income neighborhoods feature less political participation than their wealthier counterparts.[162] This gentrification brings some positive effects to disadvantaged neighborhoods, but may also lead to displacement of existing residents as rents rise and old housing stock is demolished.[163]

Second, the strategy of denying CDBG funds to jurisdictions that do not comply with the AFFH requirement necessarily means that once HUD removes funding, the requirement no longer attaches. Furthermore, jurisdictions may simply opt out in the first instance. Because the CDBG funding formula gives more money to those

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159 *Geographic Terms and Concepts—Census Tract*, U.S. CENSUS BUREAU, http://www.census.gov/geo/reference/gtc/gtc_ct.html (last visited Oct. 23, 2013).

160 *See, e.g.*, Hannah-Jones, *supra* note 83 (describing a tiny, isolated sliver of the exclusive village of Rye, "cleaved from the city years ago when interstates 287 and 95 came through . . . [and] where Westchester County has chosen to put 18 units of affordable housing, part of a deal settling a lawsuit over the county's failure to promote integration as required by the Fair Housing Act of 1968").

161 There are, of course, other strategies to reduce segregation, but they will tend to involve governmental outlays rather than private investment. *See, e.g.*, Laurie M. Anderson et al., *Providing Affordable Family Housing and Reducing Residential Segregation by Income: A Systematic Review*, 24 AM. J. PREVENTATIVE MED. 47, 50 (2003) (canvassing literature on two interventions: the subsidized development of mixed-income housing in segregated, disadvantaged neighborhoods, and tenant voucher programs that enable low-income people to leave neighborhoods of concentrated disadvantage).

162 *See* Bonnie Kavoussi, *Rich Americans Are Nearly Twice as Likely to Vote as the Poor*, HUFFINGTON POST (Mar. 1, 2013, 2:18 PM), http://www.huffingtonpost.com/2013/03/01/voter-turnout-income_n_2790755.html (noting a positive linear relationship between income and voter participation).

163 *See* MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INST., DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES, at v (2001) (advocating policies with the goal of "optimizing the benefits of neighborhood change" such as decreases in crime "while minimizing or eliminating the downsides of such change," for example, displacement of long-time residents); *see also Health Effects of Gentrification*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 15, 2009), http://www.cdc.gov/healthyplaces/healthtopics/gentrification.htm (outlining the negative health consequences of displacement).

localities with greater poverty,[164] the most exclusive communities already receive the least CDBG funds per capita. Consequently, these communities have less to lose. Additionally, because these communities have more affluent tax bases to begin with,[165] it follows that they can most afford to lose the CDBG funding. As federal budgeting for CDBG declines,[166] the incentive becomes even weaker. This raises the concern that those jurisdictions already least likely to provide supportive services for low-income residents will further curtail efforts, resulting in harm to the very population the rule seeks to assist.

Additionally, as the fallout from the *Westchester* settlement exemplifies,[167] and some early reactions to the proposed rule demonstrate,[168] politicians may pay a political price for promoting integration in housing or reap the rewards of opposition. This may empower political forces hostile to desegregation, possibly leading recalcitrant jurisdictions to opt out of the minimal procedural regulations to which they are at least currently subjected. HUD, moreover, is a cabinet agency responsive to the President's prerogatives;[169] although the Obama Administration has shown interest in promoting integration,[170] this may not be true of future administrations. Relatedly, HUD's bureaucrats may be subject to capture by its "client" local

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164 TODD RICHARDSON, U.S. DEP'T OF HOUS. & URBAN DEV., CDBG FORMULA TARGETING TO COMMUNITY DEVELOPMENT NEED, at vii–viii (2005), *available at* http://huduser.org/portal/publications/CDBGAssess.pdf.

165 *Cf.* Note, *Making Mixed-Income Communities Possible: Tax Base Sharing and Class Desegregation*, 114 HARV. L. REV. 1575, 1580 (2001) ("In a wealthy area, by contrast, neighborhood effects aggregate [towards less poverty]. The neighborhood's stability and prestige increase its property values.").

166 Ryan Holeywell, *CDBG Cuts Even Greater Than Expected in Some Places*, GOVERNING (Jan. 18, 2012), http://www.governing.com/blogs/fedwatch/cdbg-cuts-even-greater-than-expected-in-some-communities.html.

167 *See* Hannah-Jones, *supra* note 83 (asserting that after the settlement, the Westchester County Executive lost his election to an opponent of the new affordable housing siting).

168 *See, e.g.*, Christian Alexandersen, *Rothschild Speaks about HUD Attempt at "Social Engineering,"* CARROLL COUNTY TIMES, Aug. 9, 2013 (quoting a local elected official opposing receipt of federal funds with AFFH obligation, who warns that "Americans are witnessing the conversion of our federal agencies into Marxist change agents. It is the federal government that is engaging in racism against non-minorities"); Robert P. Astorino, Op-Ed., *Washington's "Fair Housing" Assault on Local Zoning*, WALL ST. J., Sept. 6, 2013, at A15 ("Apartments, high rises or whatever else the federal government or a developer wants can be built on any block in America.").

169 Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 669 (1965) (codified as amended at 42 U.S.C. §§ 3531–3537 (2006)).

170 *See* POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 56, at 3, 7 (2013) (applauding the Obama Administration's enforcement of AFFH).

governments.[171] For these reasons, some advocates have called for a separate agency to enforce HUD's fair housing responsibilities.[172]

Finally, quantitative targets set in Washington do not always translate into local progress. The No Child Left Behind education policy is a case in point.[173] Commentators have criticized its overreliance on standardized tests as the mechanism for holding schools accountable for measurable progress.[174] As school districts failed to meet the benchmarks laid out by the law, the Obama Administration responded by issuing thirty-three waivers to states to provide them more time and flexibility in achieving the required results.[175] A related concern for the doctrinal proposal is that courts are not particularly institutionally suited for quantitative analysis.[176]

These potential difficulties should guide implementation of the expanded rule but not prevent its promulgation. The imprecision of the census tract does not detract from its utility in measuring housing patterns. HUD could tailor the expanded rule to prevent gamesmanship of the type that would favor gentrifying Black neighborhoods over opening up housing opportunities in White neighborhoods by requiring progress on both indices.[177] The opt-out problem is a real one; still, it seems preferable to target limited federal dollars to those communities that comply with AFFH rather than reward intransigence on segregation. The analogy to No Child Left Behind's

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171 *Cf*. David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 497 (1999) ("In 'captured' agencies, agency regulators do not act as 'arms-length' representatives of some larger 'public interest' in their interactions with regulated industries. Instead, government officials work to advance the agenda of current firms . . . by formulating regulations that benefit or at least do not substantially burden the industry."). *But cf.* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 83–88 (1989) (describing the factors that limit various industries from capturing their regulators).

172 *E.g.*, NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 19 (2008).

173 Elementary and Secondary Education Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

174 *See, e.g.*, DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION (2010) (chronicling the author's conversion from supporter to critic of the reliance on standardized testing); Alfie Kohn, Op-Ed., *'Too Destructive to Salvage*,' USA TODAY, May 31, 2007, at A11 (arguing the law should be scrapped entirely).

175 Joy Resmovits, *No Child Left Behind Waivers Granted to 33 U.S. States, Some with Strings Attached*, HUFFINGTON POST (July 19, 2012), http://www.huffingtonpost.com/2012/07/19/no-child-left-behind-waiver_n_1684504.html.

176 *See, e.g.*, Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983) (describing the complex analyses that "technocrats do understand and judges clearly cannot understand").

177 While gentrification improves the Black-White exposure index, it does not improve the White-Black dissimilarity index. *See supra* notes 58–67 and accompanying text.

mandates is incomplete: There is no powerful local lobby against higher test scores with whom the federal government seeks to compete.[178] Finally, the potential for capture or for a future administration to change policy inheres in administrative law;[179] these concerns should keep advocates alert but do not undermine the expanded rule's potential.

To the extent that the proposed or expanded rules succeed in fostering integration, negative consequences may follow. While this Note assumes the normative attractiveness of integration, there exists a strong dissent from a civil rights perspective.[180] Reducing racially concentrated areas would reduce the number of federal and state legislative districts that have majorities of color. Given the paucity of elected officials of color from majority-White districts, this could result in decreased representation for minorities, though recent trends here are positive.[181] Finally, the expanded rule could use an "exit" at the horizon for jurisdictions that substantially succeed in achieving integrated housing.[182]

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[178] *See* KATHRYN M. NECKERMAN, SCHOOLS BETRAYED: ROOTS OF FAILURE IN INNER-CITY EDUCATION 181 (2007) ("If the problem was simply that teachers and students weren't trying hard enough, then [NCLB's] assessments and incentives might make a difference."). With respect to integration, many local governments may not be trying hard enough because of constituency and electoral pressures. *See supra* notes 70 and 105 respectively.

[179] *See generally* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q. J. ECON. 1089 (exploring incentives for bureaucrats in different regulatory environments).

[180] *See* Derrick A. Bell, *Bell, J., Dissenting*, *in* WHAT *Brown v. Board of Education* Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision 185 (Jack M. Balkin ed., 2001) (arguing that formal legal equality and integration can mask ongoing, severe racial inequalities and let society off the hook for addressing them).

[181] *See* ZOLTAN L. HAJNAL, CHANGING WHITE ATTITUDES TOWARD BLACK POLITICAL LEADERSHIP 146 (2007) (noting the increase from zero to six in the number of Black members of Congress representing majority-White districts from 1960 to 2000 and describing extant but waning White voter disinclination to support Black candidates). The election of President Obama suggests a more rapid change in this direction.

[182] Although most urban areas are nowhere near realizing integrated housing patterns, HUD should consider developing a process to certify those jurisdictions that have nearly eliminated segregation as exempt from the progress requirements so long as they do not retrogress, an additional incentive for succeeding. Similarly, the expanded rule lacks a method of distinguishing between preference-driven "barrios" and discrimination-driven "ghettos," and may need to develop distinct benchmarks for the two types of resulting segregation. *See supra* note 74 (discussing the distinction between "barrios" and "ghettos").

B. The Rule Would Likely Survive the Roberts Court's Jurisprudence on the Equal Protection and Spending Clauses

A decade ago, the expanded rule proposed in Part II.A would have encountered similar political and practical workability problems, but would not have run the risk of offending contemporary understandings of the Constitution. Today, however, it faces two potential constitutional hurdles: the new "coercion" doctrine and an Equal Protection Clause jurisprudence that emphasizes formal colorblindness over racial justice. Upon closer analysis, these hurdles ought not hinder the expanded rule, but they raise novel questions that should be considered carefully.

1. The New "Coercion" Doctrine Would Be Inapposite

In the landmark Supreme Court ruling on President Obama's Patient Protection and Affordable Care Act (Affordable Care Act or ACA), *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts concluded that the ACA's Medicaid expansion violated the Constitution by threatening to withdraw existing Medicaid funding from states that did not accept the expansion.[183] Justices Breyer and Kagan joined him in this conclusion, and the joint dissent of Justices Scalia, Kennedy, Thomas, and Alito also found the Medicaid expansion unconstitutional.[184]

The logic behind the coercion-theory holding applies with equal force to administrative rulemaking as it does to new statutes,[185] so the

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[183] 132 S. Ct. 2566, 2604–08 (2012) (Roberts, C.J.).

[184] *Id.* at 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (deciding Congress cannot coerce states into involuntarily accepting conditional grants). Thus, although seven Justices concurred with the coercion rationale expressed in the Chief Justice's opinion, only two joined him, with four agreeing in the logic but in dissent. In this fractured decision, a threshold question is whether Part IV even constitutes a holding giving rise to a binding precedent. *See, e.g.*, John Elwood, *What Did the Court "Hold" About the Commerce Clause and Medicaid?*, THE VOLOKH CONSPIRACY (July 2, 2012, 11:28 AM), http://www.volokh.com/2012/07/02/what-did-the-court-hold-about-the-commerce-clause-and-medicaid (questioning whether the dissenting Justices' rationales count as holdings under *Marks v. United States*, 430 U.S. 188 (1977)). In *Marks*, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). In this case, the coercion theory is the single rationale that explains the result and enjoys the assent of seven Justices, so it should be considered a precedent-setting holding. Indeed, the two Justices who disagreed with this rationale labeled it a "holding." *Sebelius*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[185] If Congress and the executive acting in concert cannot coerce states into compliance with their shared goals, it follows that the executive acting alone through rulemaking is also bound to respect the states' sovereignty.

expanded rule proposed in Part II.A must comply with *Sebelius*. In essence, the federal government may not make the states "an offer they can't refuse" by threatening so large a portion of their budgets that compliance becomes involuntary.[186] Congress can induce state action through funding conditions, but, following contract principles, such inducements may not coerce or unduly influence.[187] Such compulsion "runs contrary to our system of federalism."[188]

Although some commentators predicted that this part of the opinion portends a broader assault on the Spending Clause,[189] the language used by the Chief Justice and the joint dissenters strongly suggests that the invalidation of the Medicaid expansion is likely *sui generis*. Chief Justice Roberts echoes the state petitioners in arguing that "the Medicaid expansion is far from the typical case."[190] "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs."[191] In his most colorful phrase, the Chief Justice decried the policy as "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[192] Of ultimate importance is that, as opposed to a mere modification or clarification, the expansion is "a shift in kind, not merely degree,"[193] that came decades after the states signed up. However, the opinion did not precisely demarcate the distinction between what the Court considers a

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186 *See Sebelius*, 132 S. Ct. at 2602, 2604 (Roberts, C.J.) ("The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981))).

187 *See id.* at 2602 ("It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence.'" (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937))).

188 *Id.*

189 *See* Lyle Denniston, *A Giant Hole in the Safety Net?*, SCOTUSBLOG (June 28, 2012, 8:55 PM), http://www.scotusblog.com/?p=148049 (expressing concern that without limits, coercion theory could invalidate any regulations states find onerous); Damien M. Schiff, NFIB v. Sebelius*, Coercion, and the Unconstitutional Conditions Doctrine*, SCOTUSREPORT (Aug. 6, 2012, 8:38 AM), http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine (discussing Clean Air Act sanctions and noting that "[d]epending on the amount of those funds and their importance to a state budget, such a condition could amount to financial coercion akin to that imposed by the Affordable Care Act").

190 *Sebelius*, 132 S. Ct. at 2603 (Roberts, C.J.) ("Given the nature of the threat and the programs at issue here, we must agree [that the Medicaid expansion is far from the typical case].").

191 *Id.* at 2604.

192 *Id*. at 2605.

193 *See id.* at 2605–06 ("It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.").

change in kind versus degree: "We have no need to fix a line either."[194]

The joint dissenters agreed that the Medicaid expansion crossed the line from encouragement to coercion, but were more careful than the Chief Justice to limit the reach of their conclusion, warning that "courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear."[195] The dissent argued that the sheer size of the existing Medicaid program made the new regulations coercive.[196] "The States devote a larger percentage of their budgets to Medicaid than to any other item. . . . The States are far less reliant on federal funding for any other program."[197] Finally, the dissent says that the purpose of the Affordable Care Act—near-universal health care coverage—showed that Congress intended to make a coercive offer to the states, and that its failure to include a backup option in case a state opted out shows Congress knew the offer was not made on fair terms.[198]

The expanded AFFH rule may be met with protest from states and cities that do not relish the thought of extra regulations generally, let alone one that will require difficult pushback against entrenched local interests. But the policy considerations informing the coercion theory do not apply here. First, the requirement of affirmatively furthering fair housing has existed since the inception of the Community Development Block Grant program,[199] and states and localities receiving grants have been certifying their compliance with the AFFH requirement since President Clinton's Executive Order 12,892.[200] Providing more specific guidance and using metrics to evaluate progress is more of a change in degree than a change in kind. It is not a new requirement like the Medicaid expansion, but new rigor in an old requirement. It would be difficult to argue that lax enforcement created a reliance interest in noncompliance. Second, the AFFH policy, unlike the ACA, does not require one state to participate in order to achieve its goals in another.

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194 *Id.* at 2606–07.

195 *See id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

196 *See id*. at 2662–63 & 2663 n.14 ("44.8% of all federal outlays to both state and local governments was allocated to Medicaid . . . .").

197 *Id.* at 2663.

198 *See id.* at 2665 ("Congress well understood that refusal [to accept the Medicaid expansion] was not a practical option.").

199 *See supra* notes 39–42 and accompanying text (describing the statutory framework of CDBG and AFFH).

200 *See supra* notes 43–48 and accompanying text (describing the creation and mechanism of the certification process).

The financial reality also stands a world apart. The highest percentage of its budget that any state receives in CDBG funding[201] is only one-fortieth the lowest percentage that any state receives in Medicaid.[202] Wherever the line is, CDBG is unlikely to be on the same side as Medicaid.

Along with the precise location of the line between inducement and coercion, the Court did not address whether the coercion theory only applies facially, as it did in *Sebelius*, or whether a specific state or locality with a uniquely high dependence on an existing funding stream could mount an as-applied challenge to new requirements. But because the coercion theory is rooted in federalism concerns, it seems doubtful that the Court would entertain an as-applied challenge; in policing against federal "commandeering" of the states, the Court appears concerned with improper congressional intent.[203] If a regulation allowed most states a meaningful choice while leaving several states or their subdivisions without one, the Court would be unlikely to infer a nefarious congressional plot to exceed its authority. Although this coercion restriction on the Spending Clause has just seen its first deployment, it may be its last because of Medicaid's unique size and scope. In any event, an expanded AFFH regulation ought to be found acceptably persuasive without crossing the line into coercive.

2. *Recent Equal-Protection Decisions Would Likely Foreclose This Rule but for Past Discrimination and the Thirteenth Amendment*

The Fair Housing Act's declaration of policy states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[204] But what

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[201] South Dakota receives the highest percentage at approximately 0.23%, as calculated by dividing its 2012 CDBG allocation by its total state expenditures for fiscal year 2011. *See* U.S. Dep't of Hous. & Urban Dev., *supra* note 142 (noting South Dakota's total 2012 CDBG allocation of $8,908,926); BRIAN SIGRITZ, NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 7 (2012), *available at* http://www.nasbo.org/publications-data/state-expenditure-report (providing data on total state expenditures for fiscal year 2011).

[202] Wyoming receives the lowest percentage of its overall budget in Medicaid funds at approximately 5.39%, as calculated by dividing its 2010 federal Medicaid allocation by its total state expenditures for fiscal year 2011. *See* Wyoming Medicaid Statistics, MEDICAID.GOV, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/wyoming.html (last visited Oct. 23, 2013); SIGRITZ, *supra* note 201, at 7.

[203] *Sebelius*, 132 S. Ct. at 2603 (Roberts, C.J.) (noting that the doctrine seeks to prevent Congress from "cross[ing] the line distinguishing encouragement from coercion" (quoting New York v. United States, 505 U.S. 144, 175 (1992))).

[204] 42 U.S.C. § 3601 (2006).

exactly are those constitutional limitations today? The Act borrows authority from the Thirteenth Amendment[205] and the Fourteenth Amendment's Equal Protection Clause,[206] especially as it protects classes other than race.

The Roberts Court's most forceful foray into equal-protection jurisprudence came in *Parents Involved in Community Schools v. Seattle School District No. 1*.[207] The Chief Justice's majority opinion ended by reducing its holding to a simple maxim: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[208] This logic seemed a direct retort to an earlier era on the Court, as in Justice Blackmun's observation that "to get beyond racism, we must first take account of race"[209]—to say nothing of *Brown v. Board of Education*.[210] Under the present strict-scrutiny standard for government policies that take race into account, policies face the steep burden of demonstrating that they are narrowly tailored to a compelling state interest.[211]

One of the few surviving state interests deemed compelling is "remedying the effects of past intentional discrimination."[212] It may

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[205] Congress's ability to enforce the Thirteenth Amendment through legislation affecting private conduct was ratified by the Supreme Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which upheld the Civil Rights Act of 1866, the original but rarely enforced fair-housing law, as a valid exercise of Congress's prerogative to eradicate the badges of slavery. In an interesting quirk of timing, *Mayer* was argued before the Supreme Court two days before Dr. King's assassination, and came down several months later with seven Justices in support of the conclusion that the Civil Rights Act of 1866 reached private action under the power of the Thirteenth Amendment. *Id.* at 413, 438 ("It has never been doubted, therefore, 'that the power vested in Congress to enforce the article by appropriate legislation,' includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.'" (quoting *Civil Rights Cases*, 109 U.S. 3, 20, 23 (1883))). Further, the Supreme Court has declared that it could effectuate the Fair Housing Act's purposes "only by a generous construction." Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring).

[206] Although Congress did not explicitly identify its source of authority, the Act targets state and local action, the hallmark of Fourteenth Amendment power. 42 U.S.C. § 3615 (2006) ("[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.").

[207] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[208] *Id.* at 748.

[209] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

[210] 347 U.S. 483 (1954). The dissenters in *Parents Involved* argued that the majority had overruled *Brown sub silentio*. *See Parents Involved*, 551 U.S. at 798–803 (Stevens, J., dissenting) (describing the majority's reliance on *Brown* as "a cruel irony"); *see also id.* at 803 (Breyer, J., dissenting) (arguing that the majority "undermines *Brown*'s promise of integrated primary and secondary education").

[211] *Parents Involved*, 551 U.S. at 720 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)).

[212] *Id.* (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

be that a race-conscious AFFH rule survives on this basis alone, because the federal government itself systematically and intentionally discriminated against African Americans and other minorities in its housing programs until the civil rights era.[213] The federal government, however, was hardly the only player in the past-intentional-discrimination game. Probably every state and most localities could be shown to have engaged in intentional discrimination in housing based on race.[214] Would the expanded rule be subject to an as-applied challenge in jurisdictions that plaintiffs could not show to have engaged in intentional discrimination, but that nevertheless suffer from pervasive segregation? This was the result in *Parents Involved*: Because Seattle never ran segregated schools and Louisville's desegregation court order had been lifted in 2000, remedying past discrimination was unavailable as a compelling state interest.[215] In any event, the Thirteenth Amendment power to desegregate is not limited by the strict scrutiny jurisprudence of the Equal Protection Clause,[216] so the expanded rule should pass muster.

CONCLUSION

Writing in 1903, W.E.B. DuBois's prescience about the problem of the Twentieth Century[217] was limited only by his horizon and

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213 *See* Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (finding HUD in violation of the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012), for its support of racially segregated public housing); *see also* 114 CONG. REC. S2281, S2528 (1968) (statement of Sen. Edward W. Brooke) (favoring passage of the Fair Housing Act because "an overwhelming proportion of public housing . . . directly built, financed and supervised by the Federal Government [ ] is racially segregated" and lamenting that "our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation").

214 *See* Schwemm, *supra* note 20, at 135–36 (describing extensive local government discrimination in housing). From state statutes enshrining segregation to state courts enforcing racially discriminatory covenants, the Supreme Court's declaration that the Fair Housing Act merits a "generous construction" should permit even a minimum amount of state action advancing segregation to provide sufficient authority for HUD and the courts to act. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972).

215 *Parents Involved*, 551 U.S. at 753–54 (2007) (Thomas, J., concurring).

216 The Thirteenth Amendment's power to eliminate badges of slavery, however, may only extend to desegregating African Americans, the primary but hardly only class whose housing opportunities are severely constricted by both intentional discrimination and other forces. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439, 443 (1968) (focusing the holding on "*[n]egro* citizens . . . who saw in the Thirteenth Amendment a promise of freedom" (emphasis added)). *But cf.* Akhil R. Amar & Daniel Widawksy, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1359, 1368–72 (1992) (proposing an expanded reading of the Thirteenth Amendment beyond proscribing the "peculiar institution" to include banning child abuse and canvassing Supreme Court precedent in support of a broader interpretation).

217 *See* DUBOIS, *supra* note 1, at 41 ("[T]he problem of the Twentieth Century is the problem of the color line.").

inability to see it troubling the United States well into the new millennium. While DuBois would likely be impressed at numerous advances in racial equality and attitudes made since his death in 1963, he would likely be dismayed to recognize housing patterns that are so thoroughly similar.

The *Westchester* decision upended decades of "boilerplate" compliance with the statutory requirement of affirmatively furthering fair housing by announcing it was "substantive" and holding Westchester County accountable for its failure to comply. The decision revived the Fair Housing Act's unrealized second purpose of promoting housing integration. HUD's proposed rule greatly improves the procedural aspects of AFFH compliance, but it comes up short on substantive benchmarks. This Note proposes an expanded federal rule and judicial doctrine that use actual progress in the most common measurements of segregation to determine compliance with the affirmative statutory requirement. Although not without its practical limitations and potential downsides, this proposal would likely survive new constitutional constraints.

In proposing regulatory and doctrinal solutions to advance the pro-integration purpose of the Fair Housing Act, this Note eschews legislative remedies. This choice is in part to narrow the focus from the innumerable possible statutory proposals to address housing segregation, but it is also based upon political reality. In a nation this divided,[218] in no small part along racial and residential lines, dispassionate discourse and legislative expedience on an issue that so inflames the public's passions are remote possibilities.[219] The proposals herein can be effected immediately, and, if successful in advancing the Act's promise of an integrated nation, might someday yield a polity unified behind that same vision. May it not take another century.

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[218] *See* Linton Weeks, *A Nation Divided: Can We Agree On Anything?*, NPR (Feb. 28, 2012, 10:11 AM), http://www.npr.org/2012/02/28/147338798/disagreeable-america-can-t-we-all-just-get-along (lamenting notable political and social splits but concluding hopefully).

[219] The 111th Congress did consider, but did not adopt, a proposal to create a private right of action for the affirmatively furthering fair housing requirement. *See* Housing Opportunities Made Equal (HOME) Act, H.R. 6500, 111th Cong. § 3(f) (2010) ("'Discriminatory housing practice' . . . includes a failure to comply with the section 808(e)(5) of this title or a regulation made to carry out section 808(e)(5).").