

## Notes and Comments

### HOPE AFTER HOPE VI? REAFFIRMING RACIAL INTEGRATION AS A PRIMARY GOAL IN HOUSING POLICY PRESCRIPTIONS

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**ABSTRACT**—In a small but significant portion of urban public housing, the dual legacies of segregation and concentrated poverty have long plagued residents. Over the course of decades, these legacies have contributed to chronic systemic failures, the burden of which has disproportionately fallen on members of minority groups. The federal government has responded through two strands of policies, each aimed at a different legacy. First, Congress enacted the Fair Housing Act to root out the last vestiges of state-sanctioned segregation by affirmatively promoting racial integration. Second, and more recently, Congress created a program known as HOPE VI to combat the concentration of very poor residents in urban public housing by replacing dilapidated projects with mixed-income developments, which bring in moderate-income working families to serve as role models. But success in overcoming historical failures remains elusive—largely because housing policies that promote income mixing seem bound to come into conflict with housing policies that promote racial integration. Persistent patterns of residential segregation in HOPE VI communities attest to the problem. The use of restrictive income-based admissions policies has put once-distressed neighborhoods on track to become as segregated as before, though the racial pendulum has swung in the opposite direction. I thus argue that programs advancing racial integration should trump income-mixing considerations when the compasses point in different directions. Reaffirming racial integration as a primary policy goal would ultimately remedy the related harms of racial isolation and displacement that have continued to mar HOPE VI projects. Just as importantly, adopting an integrative norm comports with both the express obligations and underlying spirit of the Fair Housing Act.

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INTRODUCTION

For decades, two regrettable legacies have dominated the housing policy conversation in America’s most distressed urban neighborhoods: racial segregation and concentrated poverty. In combination, they have contributed to chronic systemic failures in the small but significant portion of public housing that can be found there. However, despite their tendency to overlap and even reinforce one another, these legacies give rise to distinct kinds of harms, and have thus inspired similarly distinct kinds of policy prescriptions.

Residential segregation, for its part, continues to burden urban public housing sites and mobility programs despite significant progress in other facets of American society. The harms occasioned by segregation are, of course, beyond dispute. It is also difficult to deny that the federal government was at one time complicit in creating the conditions that precipitated these harms. The government itself appears to have conceded the point: Congress passed the Fair Housing Act (FHA) in 1968 to specifically address government-sanctioned discrimination in the housing arena and mandate official efforts to affirmatively promote racial integration to ameliorate entrenched problems.<sup>1</sup> Since then, the courts have played a critical role in protecting the bite of the FHA’s requirements,

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<sup>1</sup> Fair Housing Act, Pub. L. No. 90-284, §§ 801–819, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

imposing additional desegregation policies where government-sponsored practices have threatened to undermine the FHA's integrative norm.<sup>2</sup>

The other dominant historical legacy has been the concentration of poor families and individuals in the very worst urban public housing projects.<sup>3</sup> Over time, this process has produced vast pockets in the inner city where residents silently suffer from deprivations of resources and economic opportunity. Congress, having long debated the extent to which public housing should be reserved for the very poorest Americans, rather than members of different income groups, created a grant program known as HOPE VI in an effort to “[p]rovide housing that will avoid or decrease the concentration of very low-income families.”<sup>4</sup> HOPE VI has funded the replacement of dilapidated high-rise projects with low-density, mixed-income developments where moderate-income working residents are to serve as role models for their poor neighbors. Congress has authorized billions of dollars in grant money to pursue this goal.<sup>5</sup> And income mixing, it seems, has produced measured benefits for some HOPE VI communities. A number of neighborhoods “have seen substantial increases in per capita incomes and substantial declines in unemployment rates and dependence on public assistance,” along with a drop in violent crime rates.<sup>6</sup>

Housing policies that promote income mixing, however, seem bound to come into conflict with housing policies that promote racial integration—an inevitability demonstrated by persistent patterns of residential segregation in HOPE VI communities. Indeed, it appears quite clear that income-based admissions policies in urban HOPE VI redevelopments have ultimately worked to exclude the poorest public housing residents, the large majority of whom are racial minorities, primarily because these groups disproportionately bear the burden of extreme poverty. Once-distressed neighborhoods are on track to become as segregated as before, though the racial pendulum has swung in the opposite direction. The poor and

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<sup>2</sup> The *Gautreaux v. Chicago Housing Authority* litigation in Chicago provides one particularly prominent example. See 296 F. Supp. 907 (N.D. Ill. 1969).

<sup>3</sup> A congressionally authorized study conducted between 1989 and 1992 found that 6% of the nation's public housing stock was in a state of severe distress. It is this portion—located almost entirely in urban areas—that will be the primary focus of this Comment.

<sup>4</sup> Notice of Funding Availability for Revitalization of Severely Distressed Public Housing; HOPE VI Revitalization and Demolition Grants, Fiscal Year 2003, 68 Fed. Reg. 60,178, 60,178 (Oct. 21, 2003) [hereinafter Notice of Funding Availability].

<sup>5</sup> See MAGGIE MCCARTY, CONG. RESEARCH SERV., HOPE VI: BACKGROUND, FUNDING, AND ISSUES 7–10 (2005), available at <http://alexandriava.gov/uploadedFiles/planning/info/CRSBriefingonHopeVI.pdf> (showing that Congress appropriated more than \$6 billion in funds to HOPE VI between 1993 and 2005).

<sup>6</sup> G. Thomas Kingsley, *Taking Advantage of What We Have Learned*, in FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA'S CITIES 263, 265 (Henry G. Cisneros & Lora Engdahl eds., 2009) [hereinafter FROM DESPAIR TO HOPE].

displaced have increasingly resettled in outlying communities that are no less racially and socially isolated than the places they left. HOPE VI thus produces a neighborhood dynamic that appears to be incompatible with long-run integration. In light of these unfortunate outcomes, I will argue that programs advancing racial integration—the FHA chief among them—should trump income-mixing policies—embodied by HOPE VI—when the compasses point in different directions. One particularly strong justification for reconciling the competing policy strands by reprioritizing racial integration is that it best promotes the interests of those who are generally recognized as the intended beneficiaries of national public housing policy.<sup>7</sup>

This discussion is particularly timely because, after years of waning congressional support, HOPE VI will soon be a thing of the past.<sup>8</sup> With no comprehensive successor program yet emerging, lawmakers have a rare opportunity to step back and significantly recalibrate the current direction of national housing policy. After making the case for the deficiencies of an exclusively mixed-income approach, I conclude by offering three integrative policies to guide public housing in a new and more beneficial direction.

The argument will proceed in four Parts. Part I explores the genesis of the modern public housing program, the historical entrenchment of both segregation and extreme poverty in urban projects, and the various agendas that have dominated national housing policy since 1937. Part II focuses on the modern rise of HOPE VI in response to the social and physical distress of urban public housing after the 1970s. It takes an especially critical look at the program’s underlying mixed-income principle, which seeks to remedy the harms occasioned by concentrated poverty in public housing. It

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<sup>7</sup> A central purpose of HOPE VI, for instance, is to “[i]mprove the living environment for public housing residents of severely distressed public housing projects.” Notice of Funding Availability, *supra* note 4, at 60,178; see also *HUD’s Public Housing Program*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/topics/rental\\_assistance/phprog](http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog) (last visited Aug. 15, 2012) (“Public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities.”). That distressed projects are (or were) populated almost entirely by poor racial minorities in urban areas is no secret—a point taken up throughout the rest of this Comment. Thus, it is no stretch to say that the statutorily designated beneficiaries are characterized by two salient and intertwined features: their membership in a minority group and their extreme poverty.

<sup>8</sup> Funding in fiscal year 2010 was just \$124 million, less than 20% of the amount allocated a decade earlier. See *infra* notes 56–59 and accompanying text. Lawmakers are exploring small-scale successor programs to HOPE VI, including the new “Choice Neighborhoods” program. See *Choice Neighborhoods: History and HOPE*, EVIDENCE MATTERS (U.S. Dep’t of Hous. & Urban Dev. Office of Policy Dev. and Research), Winter 2011, at 1, 3; see also *Choice Neighborhoods*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/cn](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/cn) (last visited Aug. 15, 2012) (“Choice Neighborhoods grants build upon the successes of public housing transformation under HOPE VI to provide support for the preservation and rehabilitation of public and HUD-assisted housing, within the context of a broader approach to concentrated poverty.”).

also introduces the Cabrini-Green neighborhood in Chicago, which was redeveloped using HOPE VI funds, to illuminate the most abstract concepts and ground discussion of the legal and social implications of income-mixing policies. Part III describes the inevitable points of conflict between these policies and policies aimed at promoting racial integration—the FHA in particular. It argues that the inadvertent consequences of income-mixing policies often work against the interests of the intended principal beneficiaries of national housing policy and therefore ought to give way. Part IV concludes by making the normative case for reaffirming racial integration as a primary policy goal and suggests three mechanisms for affirmatively furthering the goal of integrated housing embodied in the FHA.

## I. THE EVOLUTION OF U.S. HOUSING POLICY

The story of public housing in urban America is a long and, at least in its later chapters, tragic one. This Part traces that story from its beginnings to its contemporary state, culminating in HOPE VI. It also describes how the particular segment of public housing that is the subject of this Comment came to be overwhelmingly poor and racially segregated, problems that have inspired competing policy prescriptions over the past few decades.

### A. Historical Developments

Congress first created the modern public housing program when it passed the Housing Act of 1937 (1937 Act),<sup>9</sup> which followed the shock of the Great Depression.<sup>10</sup> At that time, Congress introduced an enduring two-tiered system that vested “control over the scope and direction of public housing” in the federal government,<sup>11</sup> but left implementation to local public housing authorities (PHAs).<sup>12</sup> Municipalities across the nation

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<sup>9</sup> United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437–1439 (2006)). Even this first piece of public housing legislation was the subject of “vociferous objections,” foreshadowing decades of tumult. GAIL RADFORD, *MODERN HOUSING FOR AMERICA* 189 (1996); see also Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 896 (1990) (“From its inception, public housing was controversial.”).

<sup>10</sup> For a thorough reconstruction of the political forces that gave rise to the 1937 Act and the subsequent tug-of-war over its progressive legacy (with a special eye toward Chicago), see D. BRADFORD HUNT, *BLUEPRINT FOR DISASTER: THE UNRAVELING OF CHICAGO PUBLIC HOUSING* 15–34 (2009).

<sup>11</sup> Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL’Y 117, 126 (2009).

<sup>12</sup> See *id.*; see also Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 499–500 & n.11 (1993) (“A public housing authority is a municipal corporation created pursuant to state enabling legislation. Typically, a PHA is governed by a board of commissioners appointed by the mayor and city council of the jurisdiction in which it is located.”).

subsequently established their own PHAs to construct and operate local developments using federal funds made available under the 1937 Act.<sup>13</sup> The new plan for public housing encountered stiff resistance from private interests that feared competition from the federal government in the housing market.<sup>14</sup> In response, Congress mandated that public housing developments authorized by the 1937 Act “be modestly designed and constructed in order to ensure that the program would be limited to low-income people.”<sup>15</sup>

After World War II slowed construction, Congress revived the federal public housing program with the Housing Act of 1949 (1949 Act)<sup>16</sup> to provide apartments for those displaced by slum clearance.<sup>17</sup> Congress accordingly authorized PHAs to construct 810,000 additional units of public housing.<sup>18</sup> Just as importantly, Congress took occasion to declare that providing “a decent home and a suitable living environment for every American family” was a matter of national housing policy.<sup>19</sup> The luster of that promise, however, faded in time, as it took more than two decades to complete all of the authorized units.<sup>20</sup>

During this twenty-year period, the physical and social distress in urban public housing began to accelerate. Projects in cities across the nation became closely associated with urban decay, rampant crime, and social

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<sup>13</sup> See Peter Kivisto, *A Historical Review of Changes in Public Housing Policies and Their Impacts on Minorities*, in RACE, ETHNICITY, AND MINORITY HOUSING IN THE UNITED STATES 1, 4 (Jamshid A. Momeni ed., 1986); see also Schill, *supra* note 12, at 499–500 (“Under the Housing Act of 1937, local public housing authorities (‘PHAs’), rather than the federal government, build, own, and operate housing for low and moderate income households. Once a municipality decides to participate in the program, it establishes a PHA, which executes an Annual Contributions Contract with the federal government. Under the contract, the PHA funds the purchase of land and the capital costs of the housing by issuing long term bonds . . . . The federal government agrees to make all interest payments on the bonds, effectively underwriting the full capital cost of the development.” (footnotes omitted)).

<sup>14</sup> See Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL’Y 35, 37 (2002).

<sup>15</sup> *Id.*

<sup>16</sup> Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended in scattered sections of 42 U.S.C.).

<sup>17</sup> See Schill, *supra* note 12, at 500; see also Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1292, 1294 (1995) (noting that this mandate assured an “influx of very poor households” into public housing).

<sup>18</sup> See J. Paul Mitchell, *Historical Overview of Direct Federal Housing Assistance*, in FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT 187, 195 (J. Paul Mitchell ed., 1985); see also Kivisto, *supra* note 13, at 5. This number represented an impressive expansion of the public housing program, considering only 135,000 units were built in the sixteen years leading up to the 1949 Act. *Id.*

<sup>19</sup> Housing Act of 1949, § 2.

<sup>20</sup> See Mitchell, *supra* note 18, at 195; see also Schill, *supra* note 9, at 895–96 (noting that it took until 1972 to construct all of the additional units promised in the 1949 Act).

isolation.<sup>21</sup> PHAs found themselves largely powerless to stem the tide of decline in public housing. Their operation and maintenance budgets, which were funded by rent, had dwindled due to increasingly poor tenants unable to pay sufficient amounts. At the same time, Congress remained unwilling to provide operational subsidies for the units it authorized.<sup>22</sup> These financial troubles, compounding the perceived failures of public housing, ultimately led President Nixon to declare a moratorium on housing program activity in 1972.<sup>23</sup> The weight of administrative scandals, changing political winds, crumbling infrastructure, and persistent “white resistance to residential integration” all played a role in the declaration.<sup>24</sup>

It quickly became clear that the moratorium’s impact would not be limited to mere changes in proposed construction. On the broadest level, the moratorium also ushered in a new era in public housing policy largely dominated by the free market and private development.<sup>25</sup> The introduction of the Section 8 program in 1974 was particularly emblematic of this move.<sup>26</sup> Upon authorizing a voucher system to aid low-income families, the federal government began subsidizing the rent of qualifying tenants who opted to live in privately-owned units.<sup>27</sup> The Low Income Housing Tax Credit (LIHTC) program followed in 1986.<sup>28</sup> It focused on encouraging the

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<sup>21</sup> Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL’Y DEBATE 299, 315–20 (2000) (“Despite the fact that most public housing functioned well, a few failed projects colored the image of the entire program.”).

<sup>22</sup> See R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING* 99–100 (3d ed. 2012) (explaining how the dual pressures of aging buildings in need of more repairs and lower rental payments created serious financial difficulties for PHAs).

<sup>23</sup> *Id.* at 134–38. The entire political history surrounding the moratorium is, of course, significantly more complex than what is described above, but such a far-reaching discussion falls outside the scope of this Comment. For a complete treatment of the subject, see *id.* at 107–38.

<sup>24</sup> *Id.* at 107–11, 130–34. Author R. Allen Hays describes the public housing program, plagued by policy and political disputes after the Johnson Administration, as a “ship [that] was standing on the launching pad, with plenty of fuel and a seemingly clear flight path charted, [when] the captaincy changed hands and the crew was still deeply divided on the basic direction it should take.” *Id.* at 108.

<sup>25</sup> See Schill, *supra* note 12, at 500 (“At that time, the federal government changed directions in housing policy and began to subsidize private developers of low-income housing.”).

<sup>26</sup> Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8, 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437f (2006)). Section 8 was a major feature of the Housing and Community Development Act of 1974. See *id.* (codified as amended in scattered sections of 42 U.S.C.).

<sup>27</sup> See § 1437f. Section 8 thus provides tenant-based assistance. Once voucher recipients find a participating private landlord, the tenant must pay a fixed percentage of the household’s income in rent while the government pays the landlord the balance. See Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 986 (2010). Reliance on private developers to remedy public problems was part and parcel of the emerging conservative narrative in American politics at the time. See generally HAYS, *supra* note 22, at 139–47 (explaining in detail the political roots of the housing policy evolution that occurred from 1973 to 1980). The Section 8 program—with only minor adjustments—survives to this day.

<sup>28</sup> Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (codified as amended at I.R.C. § 42 (2006)).

private “development and rehabilitation of housing for low-income households.”<sup>29</sup> Meanwhile, funding levels for traditional public housing fell precipitously during the Reagan years,<sup>30</sup> leaving the nation saddled with a deteriorated physical stock of public housing, poor on-site management, and frayed relationships between many PHAs and their residents by the end of the 1980s.<sup>31</sup>

One constant throughout these decades of policy upheaval was the unshakeable legacy of racial discrimination in urban public housing projects. Indeed, these projects bore the mark of segregation almost from inception.<sup>32</sup> PHAs largely operated their housing units according to the segregationist norms that dominated federal policy and the private housing market at the time.<sup>33</sup> By the 1950s and 1960s, municipalities and PHAs had begun relegating the poorest households to spatially and socially isolated units through siting policies that located new construction in parts of town struggling with segregation.<sup>34</sup> One consequence was to further entrench existing patterns of racial separation in urban centers. At the same time, demographic upheaval, notably the suburban flight of moderate-income white families and the northern migration of blacks from the Deep South, significantly altered the character of most urban projects.<sup>35</sup> Public housing

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<sup>29</sup> Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 (1998) (internal quotation marks omitted). Florence Roisman, noting that the program became “the only game in town” after Reagan’s substantial overhaul of federal housing policy, provides a complete assessment of program particulars in her article. *See id.*

<sup>30</sup> *See HAYS, supra* note 22, at 235–37. The withdrawal of federal financial support for housing was a part of broader budget cuts undertaken by the Reagan Administration. *See id.*

<sup>31</sup> *See* Harry J. Wexler, *HOPE VI: Market Means/Public Ends—The Goals, Strategies, and Midterm Lessons of HUD’s Urban Revitalization Demonstration Program*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 195, 200–01 (2001).

<sup>32</sup> *See* Kivisto, *supra* note 13, at 4–5. The federal government operated public housing on the basis of de jure racial segregation almost from the start. *See* 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 622–27 (Transaction Publishers 1996) (1944) (explaining that the power of public opinion pressured housing authorities to segregate public housing).

<sup>33</sup> *See* MYRDAL, *supra* note 32, at 625–26; Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 917–18 (2005) (“From the creation of federally financed public housing under the Public Works Administration in 1933, through the enactment of the U.S. Housing Act in 1937, to the adoption of Title VI in 1964, ‘public housing was de jure segregated. These projects were operated according to a Public Housing Administration ([federal] “PHA”) policy of “separate but equal.”’ Although one might have thought that the Supreme Court’s decision in *Brown v. Board of Education* clearly signaled the unconstitutionality of government-imposed racial segregation, federal housing officials disregarded the implications of *Brown* for the housing programs.” (footnotes omitted)).

<sup>34</sup> *See* Schill & Wachter, *supra* note 17, at 1295; *see also* von Hoffman, *supra* note 21, at 315 (“In response to site controversies, housing authorities built new housing projects near old ones, thus concentrating public housing in certain working- and lower-class areas of the city. As a result, the construction of new projects often reinforced old racial ghettos.”).

<sup>35</sup> *Cf.* Douglas S. Massey, *The New Geography of Inequality in Urban America*, in RACE, POVERTY, AND DOMESTIC POLICY 173, 174–79 (C. Michael Henry ed., 2004) (documenting the social and

became recognized as “a permanent home to a very poor and disproportionately nonwhite population.”<sup>36</sup> To be sure, the federal government played no small part in this development. The government sanctioned residential segregation through explicitly discriminatory policies in the early years of the public housing program and indifference to local discrimination in later years.<sup>37</sup> All of this led the Civil Rights Commission to conclude that “the [f]ederal [g]overnment has been . . . most influential in creating and maintaining urban residential segregation.”<sup>38</sup>

The legacy of extreme poverty in public housing developed over much the same period. From the beginning, Congress debated whether public housing should be reserved for the very poorest Americans or whether it should accommodate members of different income groups.<sup>39</sup> Indeed, early congressional rhetoric suggests these developments were initially intended to serve as temporary housing for the working poor.<sup>40</sup> The vision of a compassionate stopover for the “deserving” poor (i.e., the submerged middle class), however, failed to materialize in any significant way.<sup>41</sup> The 1949 Act seemed to concede that public housing was instead the exclusive domain of the most destitute Americans.<sup>42</sup> Consequently, “[l]ocal

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geographic disparity between white and black communities that grew tremendously starting in the 1950s).

<sup>36</sup> Schill, *supra* note 9. According to Schill, white flight and subsequent changes in the inner city were not simply an organic process; he notes that active “[f]ederal government policies and programs . . . subsidized the movement of middle and moderate income households out of the city to the suburbs.” *Id.* For another view on the changing character of public housing after the 1949 Act, see LAWRENCE J. VALE, RECLAIMING PUBLIC HOUSING 5–6 (2002).

<sup>37</sup> See Hendrickson, *supra* note 14, at 43–47.

<sup>38</sup> U.S. Comm’n on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* 39 (1975).

<sup>39</sup> Schill & Wachter, *supra* note 17, at 1293–94 (“The 1937 Housing Act reflects the ambivalence that members of Congress felt over who should live in public housing.”).

<sup>40</sup> Congress originally pitched the idea of public housing as a temporary refuge for the “submerged middle class” struggling to cope with the Great Depression. See Schill, *supra* note 12, at 510 (internal quotation marks omitted). The rhetorical distinction between the “deserving” poor—generally conceptualized as hardworking citizens who have temporarily fallen on hard times—and the “undeserving” poor—often minority households headed by a single female—is a politically potent one, especially in the realm of public housing. See, e.g., Robyn Minter Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB. LAW. 573, 579–80 (1998).

<sup>41</sup> Despite public appeals to the submerged middle class, “it was assumed from the beginning that only the very lowest income persons, those so desperately poor as to have no chance of obtaining housing on the private market, should be served.” HAYS, *supra* note 22, at 93.

<sup>42</sup> See Housing Act of 1949, Pub. L. No. 81-171, § 301, 63 Stat. 413, 422–23 (codified as amended at 42 U.S.C. § 1415 (2006)) (requiring PHAs to select “families having the most urgent housing needs” and to ensure both that an applicant’s “net family income” did not exceed a predetermined “maximum income limit[.]” and that the applicant had “lived in an unsafe, insanitary or overcrowded dwelling, or was to be displaced by another low-rent housing project or by a public slum-clearance or redevelopment project, or actually was without housing”); see also Hendrickson, *supra* note 14, at 40 (“With the

governments and PHAs . . . acted to promote the concentration and isolation of very poor households in public housing through their siting policies and management practices.”<sup>43</sup> And this concentration and isolation would lead directly to an innovative new housing policy known as HOPE VI.

### B. *Introducing HOPE VI*

America’s inner cities experienced a period of intense crisis in the late 1980s and early 1990s as the burden of extreme poverty, rampant crime, and racial isolation weighed on millions.<sup>44</sup> Scenes of severely distressed public housing and “the hopelessness and wasted human potential of the residents living [there]” became familiar.<sup>45</sup> Congress responded to the crisis in 1989 when it established the National Commission on Severely Distressed Public Housing (Commission).<sup>46</sup> Congress asked the Commission to “explore the factors contributing to structural, economic, and social distress; identify strategies for remediation; and propose a national action plan to eradicate distressed conditions by the year 2000.”<sup>47</sup> The Commission ultimately found that 6% of the nation’s public housing was in the direst of straits.<sup>48</sup> Residents of these units were paralyzed by fear of widespread neighborhood crime, incapable of securing meaningful employment, confined to unsafe and unsanitary units, and unable to access much-needed self-sufficiency programs.<sup>49</sup>

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passage of the 1949 Act, Congress sent a message that public housing would be reserved for the poorest citizens.”).

<sup>43</sup> Schill & Wachter, *supra* note 17, at 1295.

<sup>44</sup> See Bruce Katz, *The Origins of HOPE VI*, in FROM DESPAIR TO HOPE, *supra* note 6, at 15, 16–17. Among the most notable and devastating consequences of concentrated poverty are economic disadvantage, high crime rates, and overall social dislocation. See Schill, *supra* note 12, at 519–22 (describing the groundbreaking scholarship of William Julius Wilson on the subject of “concentrated ghetto poverty”).

<sup>45</sup> Mindy Turbov, *Public Housing Redevelopment as a Tool for Revitalizing Neighborhoods: How and Why Did It Happen and What Have We Learned?*, 1 NW. J.L. & SOC. POL’Y 167, 177 (2006). The tragedy of public housing did not escape public attention in the nation’s major media outlets. See, e.g., Kevin Johnson, *For Kids, Nowhere to Hide: Gunfire Part of Life in Chicago Projects*, USA TODAY, Oct. 15, 1992, at 3A; Patrick T. Reardon, *CHA Reeling from Years of Maintenance Neglect*, CHI. TRIB., Nov. 2, 1992, § 2, at 1. It should be noted that part of Congress’s sudden urgency in dealing with the crisis likely derived from the “pervasive notion that federal policies had contributed to [the worsening] conditions” in inner cities. Katz, *supra* note 44, at 20.

<sup>46</sup> See Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, §§ 501–507, 103 Stat. 1987, 2048–52.

<sup>47</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/RCED-98-187, HOPE VI: PROGRESS AND PROBLEMS IN REVITALIZING DISTRESSED PUBLIC HOUSING 3 (1998).

<sup>48</sup> NAT’L COMM’N ON SEVERELY DISTRESSED PUB. HOUS., THE FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING: A REPORT TO THE CONGRESS AND THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT 2 (1992) [hereinafter FINAL REPORT].

<sup>49</sup> See Turbov, *supra* note 45, at 177. See generally FINAL REPORT, *supra* note 48 (laying out in full the Commission’s findings and recommendations).

Based on its findings, the Commission released its final report in 1992 that included detailed recommendations in the three areas of greatest national concern: the needs of residents, the physical condition of developments, and management operations.<sup>50</sup> Congress then designed the HOPE VI program to implement the recommendations under the direction of the Department of Housing and Urban Development (HUD).<sup>51</sup> The program aimed to change both the physical configuration of public housing—designing new buildings and site plans—and social outcomes in poor neighborhoods—promoting resident self-sufficiency through positive incentives, partnerships with community organizations, and access to comprehensive services.<sup>52</sup> The broad agenda seemingly underscored an implicit recognition that the government needed to redefine its role in public housing and neighborhood development in order to meet the needs of a significant share of the urban poor. HOPE VI accomplished this by providing federal grants to PHAs to revitalize distressed public housing projects.<sup>53</sup>

Such an ambitious program did not come particularly cheaply or easily. From 1993 through 1998, the program remained unauthorized and therefore reliant on annual appropriations bills for funding that ultimately totaled more than \$3 billion.<sup>54</sup> Congress finally authorized HOPE VI when it passed the Quality Housing and Work Responsibility Act of 1998 (QHWRA).<sup>55</sup> Funding for HOPE VI, however, decreased dramatically in the ensuing

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<sup>50</sup> See FINAL REPORT, *supra* note 48, at 10–25.

<sup>51</sup> See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 102-389, 106 Stat. 1571, 1579–81 (1992) (codified at 42 U.S.C. § 1437 (2006)). The HOPE acronym, which stands for “Homeownership and Opportunity for People Everywhere,” was originally borrowed from a series of grant programs under the Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625 (1990). See, e.g., S. REP. NO. 356, at 40 (1992). The acronym has stuck though it is at least a little descriptively inaccurate.

<sup>52</sup> See Janet L. Smith, *Public Housing Transformation: Evolving National Policy*, in WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES 19, 32–33 (Larry Bennett et al. eds., 2006) [hereinafter WHERE ARE POOR PEOPLE TO LIVE?].

<sup>53</sup> See MCCARTY, *supra* note 5, at 5–9. HOPE VI grants have taken one of five forms: revitalization grants, planning grants, demolition-only grants, “Neighborhood Networks” grants, and “Main Street” grants. *Id.* at 5. Of these forms, revitalization is by far the largest category. See *About HOPE VI*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/hope6/about](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/hope6/about) (last visited Aug 15, 2012) (showing that revitalization grants account for more than 90% of funds awarded through HOPE VI). For this reason, revitalization is the sole focus of this Comment.

<sup>54</sup> See MCCARTY, *supra* note 5, at 4, 7. For a yearly breakdown of HOPE VI appropriations from 1993 to 2004, see *id.* at 7 tbl.1.

<sup>55</sup> Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461 (codified as amended in scattered sections of 42 U.S.C.). QHWRA authorized HOPE VI through the conclusion of 2002. *Id.* Since then, Congress has reauthorized funding for HOPE VI each fiscal year. For a complete discussion of the QHWRA’s implications, see Terry A.C. Gray, *De-Concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality Housing and Work Responsibility Act of 1998*, 11 STAN. L. & POL’Y REV. 173 (1999).

years, from \$570 million in fiscal year 2003 to just \$150 million in fiscal year 2004.<sup>56</sup> Appropriation levels have never recovered, though HOPE VI continues to persist for now.<sup>57</sup> All told, Congress has committed nearly \$7 billion to the program since its inception in 1993,<sup>58</sup> more than \$6.1 billion of which has been awarded to PHAs in the form of revitalization grants.<sup>59</sup>

This federal investment was intended in part to radically alter the prevailing perception of public housing, which had become tethered to images of urban decay.<sup>60</sup> Most revitalization activity thus targeted the “modern high-rise project” for its especially strong evocation of failed policy norms.<sup>61</sup> The founding purpose of HOPE VI was to replace these ugly and stigmatized complexes with low-density buildings that blended seamlessly into the cityscape, housing families of varying income levels.<sup>62</sup> This particular policy innovation was predicated on “getting the private sector to invest in, develop, and then manage properties” that would support both public housing residents and market-rate renters.<sup>63</sup> The resulting mixed-income, mixed-financed developments<sup>64</sup> were supposed to represent a fundamental break from the ineffective policies and practices that led public housing to ruin.<sup>65</sup>

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<sup>56</sup> See MCCARTY, *supra* note 5, at 7 tbl.1.

<sup>57</sup> See *HOPE VI Appropriations and Funding History*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/pih/programs/ph/hope6/about/#4b> (last visited Aug. 15, 2012). HOPE VI received \$124 million in the 2010 fiscal year, though future funding was recently cast into serious doubt. See *HUD Announces Funding for HOPE VI & New Choice Neighborhood Program*, APA POL’Y NEWS FOR PLANNERS (Aug. 27, 2010, 10:29 AM), <http://blogs.planning.org/policy/?p=282>; see also Dep’t of Hous. & Urban Dev., Public and Indian Housing: Revitalization of Severely Distressed Public Housing (2012), [http://portal.hud.gov/hudportal/documents/huddoc?id=HOPE\\_VI\\_2012.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=HOPE_VI_2012.pdf) (“No funds are requested for the Revitalization of Severely Distressed Public Housing (HOPE VI) program in fiscal year 2012. Instead, [HUD] will continue to build on the success of the HOPE VI program through the implementation of Choice Neighborhoods . . .”).

<sup>58</sup> See *Grants Awarded*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/pih/programs/ph/hope6/about/#6> (last visited Aug. 15, 2012).

<sup>59</sup> Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Awards Six Housing Authorities \$113.6 Million to Revitalize Public Housing, Transform Surrounding Neighborhood (June 1, 2010), available at [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-112](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-112).

<sup>60</sup> See *supra* notes 44–45 and accompanying text.

<sup>61</sup> Smith, *supra* note 52, at 33.

<sup>62</sup> This is characteristic of a design movement known as New Urbanism. See *infra* Part II.A. Economic integration, a centerpiece of HOPE VI policy, is also taken up *infra* Part II.A.

<sup>63</sup> Smith, *supra* note 52, at 33. This is to say nothing of the difficulty of successfully attracting market-rate renters who are generally middle-class and unaccustomed to living in proximity to public housing residents.

<sup>64</sup> “Mixed-finance” is a shorthand term for government “partnerships with private developers to create new mixed-income communities by combining HUD funding with private financing” under HOPE VI. Mindy Turbov & Valerie Piper, *HOPE VI and Mixed-Finance Redevelopments: A Catalyst for Neighborhood Renewal*, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 27, 31 (2005).

<sup>65</sup> See *id.* at 27 (claiming that the new emphasis on leveraging private resources has “radically chang[ed] the urban landscape” for the better); Roger K. Lewis, *Changes Improve HUD Program to*

## II. THE MIXED-INCOME APPROACH

HOPE VI, by its own terms, is a policy prescription meant to address the legacy of extreme poverty in public housing, rather than the concurrent legacy of segregation. The program has its roots in a long-running congressional debate “about who should live in public housing and . . . the desirability of reserving public housing for the poorest in society.”<sup>66</sup> In this instance, Congress chose to adopt a mixed-income approach to modern public housing reform, which has become the defining characteristic of the HOPE VI program. This Part examines the theoretical considerations underlying this approach and explores the questions left open by income-mixing policies. It then introduces the example of Cabrini-Green, a recently redeveloped neighborhood in Chicago, to ground the discussion.

### A. Theoretical Roots

HOPE VI, as I have suggested, is perhaps best understood as a response to the tremendous human costs of concentrated poverty in inner cities.<sup>67</sup> The broad notion of concentrated poverty can be understood as the geographic isolation of very poor residents inhabiting densely-packed inner-city neighborhoods, often characterized by racially segregated public housing complexes in extreme disrepair where residents are cut off from the social and economic necessities of middle-class life.<sup>68</sup> Moreover, concentrated poverty is in many respects a self-enforcing cycle: Historically, “as the poor [have gotten] poorer, so [have] the neighborhoods where they congregate[.]”<sup>69</sup> Mixed-income policy is thus designed to intervene and mitigate the factors that ensure the continued marginalization of isolated neighborhoods.

The Commission confronted these factors and the general spatial distribution of poverty head-on in its final report.<sup>70</sup> It expressly recognized that residents of isolated developments were “very poor and getting

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*Spruce Up Urban Housing*, WASH. POST, May 15, 1999, at G14 (describing how HOPE VI funds are used and ultimately leveraged to “catalyze revitalization”).

<sup>66</sup> Hendrickson, *supra* note 14, at 39; see discussion *supra* notes 40–43 and accompanying text.

<sup>67</sup> The Commission’s recommendations focused almost exclusively on how to remedy conditions largely attributable to the effects of concentrated poverty. See FINAL REPORT, *supra* note 48, at 6, 9–31 (recommending specific steps to alleviate the problems associated with concentrated poverty in “severely distressed public housing”); see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 58 (1987) (describing in detail the term “concentration effects”).

<sup>68</sup> See Alexander Polikoff, *HOPE VI and the Deconcentration of Poverty*, in *FROM DESPAIR TO HOPE*, *supra* note 6, at 65, 65. Polikoff notes that the Robert Taylor Homes on the South Side of Chicago were one particularly infamous example of this phenomenon. *Id.*

<sup>69</sup> Massey, *supra* note 35, at 173.

<sup>70</sup> See FINAL REPORT, *supra* note 48.

poorer<sup>71</sup> and, in response, proposed allowing for an increased mix of incomes among households in new developments.<sup>72</sup> Subsequent HOPE VI legislative reforms adopted the mixed-income notion wholesale.

Economic integration thus became an instrumental part of national housing policy. The underlying theory was that neighborhoods subject to income mixing would “include actively employed residents to serve as role models and homeowners with a vested interest in the upkeep of the neighborhood.”<sup>73</sup> This theory is largely derived from the work of William Julius Wilson, especially his seminal book, *The Truly Disadvantaged*. Wilson argued that because “concentrated ghetto poverty generates problems different both in kind and in magnitude from the problems poor people encounter in less isolated environments,”<sup>74</sup> the most effective policy prescriptions would combat isolation through the presence of middle- and working-class families.<sup>75</sup> He believed these families would import and share certain communal values with their less fortunate neighbors, and this exchange would ultimately cultivate social stability, mainstream norms, and patterns of behavior conducive to regularized employment.<sup>76</sup> Accordingly, proponents have suggested that poor public housing residents will learn from the newly arrived moderate-income working families and proceed to go out and join the labor market themselves.<sup>77</sup>

HOPE VI, in pursuing this agenda of economic integration, has also been informed by a design movement known generally as New Urbanism.<sup>78</sup> This movement is grounded in notions of spatial deconcentration and

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<sup>71</sup> *Id.* at 47.

<sup>72</sup> *Id.* at 69–70.

<sup>73</sup> *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 904 (8th Cir. 2005).

<sup>74</sup> Schill, *supra* note 12, at 519.

<sup>75</sup> WILSON, *supra* note 67, at 61.

<sup>76</sup> *See id.* at 55–62.

<sup>77</sup> *See Hendrickson, supra* note 14, at 74 (“[Mixed-income advocates] suggest that the inclusion of working families and those of moderate income in public housing will provide role models for poor public housing residents, inviting them to learn from moderate-income families and encouraging them to get jobs.”).

<sup>78</sup> New Urbanism, in many ways, is simply a set of principles that redefines more traditional notions of community planning. Such principles derive from a broad vision:

In a well designed neighborhood, adults and children can walk safely to nearby shopping, schools, and parks. Public facilities serve as focal points for community activity. A broad range of housing options allow[s] a mix of family sizes, ages, incomes, and cultures to live harmoniously. Transit service to regional jobs is a convenient walk from home. Neighbors know each other and take a special sense of pride in their homes and community. Healthy neighborhoods foster positive community spirit that can in turn help mend old wounds and remake the city.

CONGRESS FOR THE NEW URBANISM & U.S. DEP’T OF HOUS. & URBAN DEV., PRINCIPLES FOR INNER CITY NEIGHBORHOOD DESIGN 3 (2000), available at <http://www.huduser.org/publications/pdf/principles.pdf> [hereinafter PRINCIPLES]. Application of these principles will necessarily vary in form, depending on the neighborhood.

community continuity, which map onto the programmatic goals of HOPE VI with relative precision. In the context of HOPE VI, the fundamental thrust of New Urbanism is to transform isolated high-rise projects into low-density mixed-income developments that reflect and interact with the surrounding area, both physically and socially.<sup>79</sup> What results, in theory at least, are safe neighborhood spaces that facilitate daily interaction among members of various income groups.<sup>80</sup> Indeed, these very interactions anchor the role model theory of income-mixing policies.

Another hallmark of the HOPE VI program is its reliance on private developers. This mixed-finance approach carves out a significant role for the private sector in public housing redevelopment.<sup>81</sup> More concretely, PHAs are encouraged to collaborate with private firms in the construction, management, and ownership of new developments.<sup>82</sup> The Commission professed a belief that “public housing residents; [f]ederal, [s]tate, and local governments; housing authorities; and other public and private community-based organizations can change the landscape of severely distressed public housing developments” if they only worked together.<sup>83</sup> PHAs have subsequently carried out thousands of redevelopments relying in part on private financing. This fact becomes particularly significant in the context of setting and enforcing income-based admissions policies, which largely determine the profitability and sustainability of any given HOPE VI redevelopment.<sup>84</sup>

### B. Some Open Questions

The biggest question left open by an income-mixing policy approach is what happens to the poor public housing residents who are excluded from new mixed-income developments to make room for higher income movers. This question has bedeviled HOPE VI proponents nearly everywhere reforms have been undertaken. And the problem is not an insignificant one: indeed, HOPE VI developers must not only accommodate higher income

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<sup>79</sup> See Peter Calthorpe, *HOPE VI and New Urbanism*, in FROM DESPAIR TO HOPE, *supra* note 6, at 49, 51–53. Unlike the projects being replaced, such spaces do not admit of visual boundaries separating the “good” from the “bad.” See Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 420–21 (2003).

<sup>80</sup> See PRINCIPLES, *supra* note 78; see also Pindell, *supra* note 79 (applying the principles of New Urbanism to HOPE VI redevelopments).

<sup>81</sup> See 24 C.F.R. § 941.600(a)(1) (2006); see also Turbov & Piper, *supra* note 64 (arguing that HOPE VI has been successful in revitalizing many communities largely because it has attracted new private investment).

<sup>82</sup> § 941.600(a)(1).

<sup>83</sup> FINAL REPORT, *supra* note 48, at xiv. But see Note, *When Hope Falls Short: HOPE VI, Accountability, and the Privatization of Public Housing*, 116 HARV. L. REV. 1477 (2003) (arguing that privatization of public goods and services, like public housing, suffers from systematic deficiencies).

<sup>84</sup> See *infra* Part III.A.3.

residents, but must do so with fewer gross units than before because of the emphasis on low-density construction. Locking out residents most in need of help may thus exacerbate the very problem income mixing purports to solve.

Larger questions about the actualization of the (theoretical) social and economic benefits of neighborhood income mixing also persist.<sup>85</sup> Some commentators suggest that the poorest public housing residents neither welcome nor stand to gain from the arrival of higher income neighbors.<sup>86</sup> These suggestions impliedly distrust the soundness of the role model theory in areas afflicted by concentrated poverty.<sup>87</sup>

Finally, there are questions about the interaction and impact of income-mixing policies on the continued efforts to promote residential racial integration. While the Commission chose not to address such issues, the legacy of segregation hangs uncomfortably in the background. The extent to which income-mixing theory can facilitate, or at least not stand in the way of, efforts to engage the root causes of segregation, some of which are common to the legacy of concentrated poverty, is a primary concern.<sup>88</sup>

### C. HOPE VI in Chicago

At this point, an example may help illuminate some of the more abstract principles that underpin mixed-income policy and the problems that such a policy encounters in practice—especially where it intersects with historical segregation in public housing. Among major metropolitan areas, Chicago offers perhaps the best vantage point for assessing the on-the-ground realities of HOPE VI. The city's decades-long struggle with racial segregation in public housing is a tragedy well documented.<sup>89</sup> By the middle part of the last century, virtually every existing development in Chicago could be found in a neighborhood that was at least 84% black and desperately poor.<sup>90</sup> The policies and practices that simultaneously concentrated and isolated impoverished households in predominantly black

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<sup>85</sup> For a particularly thorough and convincing critique of mixed-income policy, see Ellickson, *supra* note 27.

<sup>86</sup> See, e.g., *id.* at 1012–16.

<sup>87</sup> See *infra* notes 191–96 and accompanying text.

<sup>88</sup> See Pindell, *supra* note 79, at 388 (“[HOPE VI] raises concerns about the effects of race consideration (or lack of consideration) in policy formation, the extent of policy engagement with genuine structural barriers to integration, and the connection of policies to market-based foundations.”).

<sup>89</sup> See, e.g., ALEXANDER POLIKOFF, WAITING FOR GAUTREAU: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006); Michael H. Schill, *Chicago's Mixed-Income New Communities Strategy: The Future Face of Public Housing?*, in AFFORDABLE HOUSING AND URBAN REDEVELOPMENT IN THE UNITED STATES 135 (Willem Van Vliet ed., 1997).

<sup>90</sup> See ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO 1940–1960, at 242–43 (Univ. of Chi. Press 1998) (1983).

neighborhoods have been aptly described as “the ghettoization of public housing.”<sup>91</sup> This was no accident, as the Chicago Housing Authority (CHA) and city council institutionalized racially discriminatory practices over many years.<sup>92</sup>

Residents took to the courts to challenge these practices, particularly site-selection and tenant-assignment plans. They eventually won a landmark victory in *Gautreaux v. Chicago Housing Authority*,<sup>93</sup> which produced a judicial order in 1969 that imposed geographic restrictions on the construction of new public housing in areas with a significant percentage of black residents.<sup>94</sup> To this day, *Gautreaux* forms the backdrop for new housing-development activity in Chicago.

Much of the damage, however, had already been done. Existing high-rise projects exacerbated racial isolation and the concentration of poverty with predictably dire social consequences, underscored by, among other things, a dramatic rise in violent crime rates.<sup>95</sup> Worsening conditions led the

<sup>91</sup> See Schill & Wachter, *supra* note 17, at 1296.

<sup>92</sup> At a transformative time for public housing following World War II, Chicago’s leaders were intent on keeping black residents from moving into white neighborhoods. The mayor and city council effectively encouraged the ghettoization of public housing (a legacy in Chicago and among the worst in the nation) by consistently “defeat[ing] any integration efforts attempted by the CHA.” William Mullen, *The Road to Hell: For Cabrini-Green, It Was Paved with Good Intentions*, CHI. TRIB., Mar. 31, 1985, at H11; see also HAYS, *supra* note 22, at 132–34 (describing the “policy of massive resistance” pursued by Mayor Richard J. Daley and the city council in the wake of efforts to integrate public housing). For a thorough overview of the forces that pushed public housing developments to Chicago’s ghettos between 1963 and 1971, see Frederick Aaron Lazin, *The Failure of Federal Enforcement of Civil Rights Regulations in Public Housing, 1963–1971: The Co-optation of a Federal Agency by Its Local Constituency*, 4 POL’Y SCI. 263 (1973).

<sup>93</sup> 304 F. Supp. 736, 738–39 (N.D. Ill. 1969). *Gautreaux v. Chicago Housing Authority* spawned an extensive web of judicial decisions and orders beginning in 1967. See Joseph Seliga, Comment, *Gautreaux a Generation Later: Remediating the Second Ghetto or Creating the Third?*, 94 NW. U. L. REV. 1049, 1056 & n.36 (2000) (“The *Gautreaux* case against the CHA is made up of many different opinions that have been handed down since 1967. The initial opinions relate to the plaintiffs’ Fourteenth Amendment claims regarding the discriminatory site selection and tenant assignment plans of the CHA. The remaining opinions relate to issues regarding the implementation of the judgment order that was handed down by the court as the remedy for the violation of the plaintiffs’ constitutional rights.”). The residents successfully charged that CHA sited “public housing projects almost exclusively within neighborhoods the racial composition of which was all or substantially all Negro at the time the sites were acquired, for the purpose of, or with the result of, maintaining existing patterns of urban residential segregation by race.” *Gautreaux v. Chi. Hous. Auth.*, 265 F. Supp. 582, 583 (N.D. Ill. 1967). For the full story of the decades-long *Gautreaux* litigation, see POLIKOFF, *supra* note 89.

<sup>94</sup> *Gautreaux*, 304 F. Supp. at 738–39. The district court entered the order to implement its earlier judgment that the CHA had committed a constitutional violation by “intentionally cho[osing] sites for family public housing and adopt[ing] tenant assignment procedures . . . for the purpose of maintaining existing patterns of residential separation of races in Chicago.” *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 908 (N.D. Ill. 1969); see also *Gautreaux*, 304 F. Supp. at 737 (declaring that the court’s order was necessary to stop the CHA from continuing unconstitutional practices).

<sup>95</sup> See Katz, *supra* note 44, at 16–17; see generally SUSAN J. POPKIN ET AL., *THE HIDDEN WAR: CRIME AND THE TRAGEDY OF PUBLIC HOUSING IN CHICAGO* 25–27 (2000) (noting that most policymakers and researchers “agree that the physical and social isolation of many large [public housing] developments contributed greatly” to the prevalence of crime and drug trafficking).

federal government to stage an unprecedented intervention in 1995, when HUD took control of CHA.<sup>96</sup>

1. *The Plan for Transformation.*—HUD and the city worked to realize a momentous change in direction for public housing in the four years that followed.<sup>97</sup> This process culminated in 1999 when HUD handed the reins back to CHA.<sup>98</sup> As a condition of federal withdrawal, CHA adopted the “Plan for Transformation” (Plan),<sup>99</sup> a citywide blueprint for redeveloping and reformulating public housing using funding from HOPE VI grants.<sup>100</sup> CHA still calls the Plan “the largest, most ambitious redevelopment effort of public housing in the United States.”<sup>101</sup> The overarching purpose of the Plan is to rehabilitate or redevelop Chicago’s entire stock of public housing in accord with mixed-income principles.<sup>102</sup> In practice, this has meant demolishing 51 dilapidated high-rises across the city to be replaced by approximately 25,000 housing units in newly constructed rowhouses and low-rise buildings.<sup>103</sup> According to system-wide goals, these units will be apportioned evenly among low-income public housing residents, moderate-income residents eligible for subsidized “affordable housing,” and market-rate buyers or renters.<sup>104</sup> HUD initially

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<sup>96</sup> See, e.g., Joel Kaplan & Flynn McRoberts, *Officially, HUD Takes Over CHA: Cleveland Housing Boss May Get Top Job*, CHI. TRIB., May 31, 1995, § 1, at 1; Flynn McRoberts, *New CHA Boss Has Hard Task: He’ll Try to Rebuild Faith, Funds, Dreams*, CHI. TRIB., Sept. 24, 1995, § 4, at 1; Steve Mills & Blair Kamin, *CHA Is Biggest Challenge for U.S. Housing Official*, CHI. TRIB., May 29, 1995, § 1, at 6; *Rep. Collins Confirms CHA Takeover*, CHI. TRIB., May 26, 1995, § 1, at 1. Problems with “widespread mismanagement” also contributed to CHA’s takeover. See Pam Belluck, *Chicago Regains Control of Housing Agency*, N.Y. TIMES, May 29, 1999, at A11.

<sup>97</sup> See Janet L. Smith, *The Chicago Housing Authority’s Plan for Transformation*, in *WHERE ARE POOR PEOPLE TO LIVE?*, *supra* note 52, at 93, 97–101.

<sup>98</sup> See, e.g., Belluck, *supra* note 96 (noting Chicago still faced a “daunting” task in moving residents from crumbling high-rises to better neighborhoods with better units).

<sup>99</sup> CHI. HOUS. AUTH., PLAN FOR TRANSFORMATION (2000), available at <http://www.thecha.org/filebin/pdf/FY2000-Annual-Plan.pdf> [hereinafter CHA PLAN]. For an excellent assessment of the Plan’s successes and failures during its first decade of operation, see Lawrence J. Vale & Erin Graves, *The Chicago Housing Authority’s Plan for Transformation: What Does the Research Show So Far?* (June 8, 2010), available at [http://web.mit.edu/dusp/dusp\\_extension\\_unsec/people/faculty/ljv/vale\\_macarthur\\_2010.pdf](http://web.mit.edu/dusp/dusp_extension_unsec/people/faculty/ljv/vale_macarthur_2010.pdf).

<sup>100</sup> See Larry Bennett, *Restructuring the Neighborhood: Public Housing Redevelopment and Neighborhood Dynamics in Chicago*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 54, 57–58 (2000).

<sup>101</sup> *The Plan for Transformation*, CHI. HOUS. AUTH., [http://www.thecha.org/pages/the\\_plan\\_for\\_transformation/22.php](http://www.thecha.org/pages/the_plan_for_transformation/22.php) (last visited Aug. 15, 2012).

<sup>102</sup> See *id.*; see generally Smith, *supra* note 97, at 93 (providing a historical survey of the events that led to the introduction of the Plan and the political and philosophical forces driving it).

<sup>103</sup> See CHA PLAN, *supra* note 99, at 2.

<sup>104</sup> See John Handley, *Redeveloping Public Housing: CHA Aims for Integration, Not Isolation, in Demolishing and Replacing High-Rises*, CHI. TRIB., Aug. 22, 2004, § 16, at 1 (“The new developments are designed for mixed-income residents. Only about a third of the residents will be public housing tenants, most from the old project. Another third will be subsidized, moderate-income residents and the remaining third will be market-rate buyers or renters.”). Public housing residents consist of those who earn less than half of the area’s median income. See NAT’L HOUS. LAW PROJECT, FALSE HOPE: A

committed \$1.5 billion in HOPE VI funds to CHA over a period of ten years to make the Plan a reality.<sup>105</sup>

Development associated with the Plan is ongoing today, although the proposed end date passed in 2009. Nearly all of the high-rises, however, have long since vanished and, with them, the most imposing reminders of CHA's sordid past.

2. *The Cabrini-Green Neighborhood.*—The Plan has effected a profound transformation in many Chicago neighborhoods. One such example is Cabrini-Green on the Near North Side of Chicago.<sup>106</sup> This neighborhood offers a unique and close-up opportunity to assess the reorganization of space and people resulting from aggressive mixed-income development. It will also help ground a discussion of the problematic legal implications that arise from HOPE VI developments.

Despite modest successes in its early years,<sup>107</sup> for much of its history Cabrini-Green represented everything wrong with public housing in America. Gangs, drugs, and violent crime were inescapable.<sup>108</sup> Then, in 1993, CHA received its first HOPE VI grant in the amount of \$50 million to revitalize the area.<sup>109</sup> Through partnership efforts with private developers,<sup>110</sup> townhomes began appearing along the blocks where anonymous high-rises

CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM 7–8 n.6 (June 2002), available at <http://www.nhlp.org/files/FalseHOPE.pdf>. Subsidized affordable housing units are generally targeted at residents earning somewhere between 50% and 80% of the area's median income. See, e.g., Jerry J. Salama, *The Redevelopment of Distressed Public Housing: Early Results from HOPE VI Projects in Atlanta, Chicago, and San Antonio*, 10 HOUSING POL'Y DEBATE 95, 109 (1999). And market-rate renters or buyers are all of those who earn sufficient incomes, at least over 80% of the area's median income, such that they do not qualify for public assistance.

It should also be noted that the public housing transformation in Chicago entailed an overall reduction of about 13,000 units available to public housing residents (from 38,000 to 25,000). See Smith, *supra* note 97, at 93. The precise mix of public housing, affordable housing, and market-rate units varies, depending on the particular development. See *infra* note 111 and accompanying text.

<sup>105</sup> See Smith, *supra* note 97, at 93; Melita Marie Garza, *CHA to Be Torn Up, Rebuilt: \$1.5 Billion Plan Razes 51 High-Rises, Boosts Minority Firms*, CHI. TRIB., Feb. 6, 2000, § 1, at 1.

<sup>106</sup> The neighborhood's generally accepted geographic boundaries are Sedgwick Street on the east, Chicago Avenue on the south, Halsted Street on the west, and Evergreen Avenue or Clybourn Avenue on the north.

<sup>107</sup> See generally J.S. FUERST, *WHEN PUBLIC HOUSING WAS PARADISE 3* (2003) (recounting "the almost bucolic world of public housing in the 1940s and 1950s" in Chicago that was largely forgotten during its steep decline).

<sup>108</sup> See, e.g., Pam Belluck, *Gang Gunfire May Chase Chicago Children from Their School*, N.Y. TIMES, Nov. 17, 1997, at A1; Don Terry, *Chicago Plans Police Sweep of Troubled Housing Area*, N.Y. TIMES, Oct. 20, 1992, at A16.

<sup>109</sup> See BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST, *THE THIRD SIDE: A MID-COURSE REPORT ON CHICAGO'S TRANSFORMATION OF PUBLIC HOUSING 15* (2009), available at [www.bpichicago.org/documents/THETHIRDSIDE.9-03-09.pdf](http://www.bpichicago.org/documents/THETHIRDSIDE.9-03-09.pdf) [hereinafter BPI REPORT]. This HUD investment was the first of a series of commitments that would eventually culminate in the official Plan. See *id.*

<sup>110</sup> See, e.g., Handley, *supra* note 104, at 1.

once cast their long shadows. CHA prescribed a rigid income mix that departed from the citywide average to aggressively promote the integration of middle-class families and the deconcentration of the poorest of the poor: 50% were made available at the market rate, 20% were designated “affordable for sale,” and only 30% were left for CHA tenants.<sup>111</sup> The total number of public housing units in Cabrini-Green decreased from 2625 before redevelopment to 1200 (proposed) units upon completion.<sup>112</sup> Dislocation has thus been an unavoidable issue.

Though the demolition and replacement of densely populated high-rises represents progress on many fronts, problems persist. Those residents unable to secure their return often do not integrate into better areas; instead, they tend to reconstitute ghetto-like neighborhoods farther away from the city center for a variety of reasons, many beyond their control.<sup>113</sup> Unfortunately, the abundance of social science research on tenant outcomes within the CHA system, and Cabrini-Green specifically, does not offer many clear answers.<sup>114</sup> But it does confirm that large numbers of dislocated public housing residents never make it back to their original neighborhoods and fail to reap any substantial improvements in quality of life as a result—unlike the lucky few who are able to return.<sup>115</sup>

It is worth noting at this point that black households accounted for at least 99% of the public housing population at Cabrini-Green when the redevelopment process began in the early 1990s.<sup>116</sup> Much of the housing reserved for moderate- and middle-income families in Cabrini-Green today is inhabited by an increasingly white population.<sup>117</sup> These demographic

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<sup>111</sup> See Salama, *supra* note 104, at 108–09 & tbl.5; Handley, *supra* note 104; Matthew F. Gebhardt, Politics, Planning and Power: Reorganizing and Redeveloping Public Housing in Chicago 174 (2009) (unpublished Ph.D. dissertation, Columbia University) (on file with author); see also BPI REPORT, *supra* note 109, at 51 (summarizing the basic goals of the Plan).

<sup>112</sup> BPI REPORT, *supra* note 109, at 61 app.A.

<sup>113</sup> See Seliga, *supra* note 93, at 1071–86 (describing this phenomenon as the creation of the “third ghetto” in Chicago).

<sup>114</sup> Compare BPI REPORT, *supra* note 109, at 29–30 (concluding that relocation has not gone smoothly for CHA residents), with SUSAN J. POPKIN ET AL., URB. INST., THE CHA’S PLAN FOR TRANSFORMATION: HOW HAVE RESIDENTS FARED? 3 (2010), available at <http://www.urban.org/uploadedpdf/412190-CHAs-Plan-for-Transformation.pdf> (concluding that, on balance, residents’ circumstances have improved since 2005). See generally LARRY BURON ET AL., U.S. DEP’T. OF HOUS. & URBAN DEV., THE HOPE VI RESIDENT TRACKING STUDY: A SNAPSHOT OF THE CURRENT LIVING SITUATION OF ORIGINAL RESIDENTS FROM EIGHT SITES i–ix (2002), available at [http://www.urban.org/UploadedPDF/410591\\_HOPEVI\\_ResTrack.pdf](http://www.urban.org/UploadedPDF/410591_HOPEVI_ResTrack.pdf) (concluding, rather ambivalently, that “different housing environments offer relocatees different opportunities and challenges”).

<sup>115</sup> See, e.g., POPKIN ET AL., *supra* note 114, at 3, 5.

<sup>116</sup> See Salama, *supra* note 104, at 103–04 & tbl.3. This is a striking number, especially considering that in the same year, Chicago’s total population was only 33% African-American. *Id.* at 103.

<sup>117</sup> See *Mapping the 2010 U.S. Census*, N.Y. TIMES, <http://projects.nytimes.com/census/2010/map> (last visited Aug. 15, 2012) (click “Zoom to a State,” select “Ill.,” drag the screen such that Chicago

changes have played out as CHA succeeded in economically integrating what was once a neighborhood of concentrated poverty.<sup>118</sup> The interesting question is whether income mixing has helped ameliorate, or instead has further entrenched, the legacy of extreme residential segregation in Cabrini-Green. To answer, one must look to the set of parallel housing policies aimed at promoting racial integration and the substantive legal mandates they have created.

### III. INEVITABLE COLLISION OF COMPETING POLICY STRANDS

Some of the most important civil rights gains made in the middle part of the last century occurred in the area of housing policy. Foremost among these gains was the FHA, which explicitly combats the legacy of racial segregation in public housing (and the housing market generally). Because the FHA operates in the same sphere as income-mixing policies—despite addressing different problems—experience teaches us that a certain amount of friction is inevitable. This Part argues that, in the case of the FHA and HOPE VI, this friction is anything but trivial. It thus describes how the unintended consequences of HOPE VI and its mixed-income approach contravene the substantive protections of the FHA, using Cabrini-Green as a point of reference. It then suggests that income-mixing policies ought to be subordinated to racially integrative policies in order to best promote the interests of those who are the intended beneficiaries of national housing policy.

#### *A. Inevitable Conflict with the FHA*

Whatever the nuances of local implementation, HUD and PHAs must administer the HOPE VI program in accord with federal statutory obligations. The most important obligations emanate from Title VIII of the Civil Rights Act of 1968, better known as the FHA.<sup>119</sup> The FHA imposes one positive obligation and one negative obligation that remain particularly significant. First, the FHA *mandates* that the Secretary “administer the programs and activities relating to housing and urban development in a

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is in the center, and progressively zoom to view census tracts 804, 819, and 8383, which approximate Cabrini-Green).

<sup>118</sup> See, e.g., Siobhan O’Connor, *Two Tales of One City*, GOOD (Feb. 11, 2008, 2:11 AM), [http://www.good.is/post/two\\_tales\\_of\\_one\\_city](http://www.good.is/post/two_tales_of_one_city) (“[New housing units] are selling for up to \$850,000 a piece. Since the Plan launched, in 2000, more than \$2 billion in residential property has been sold within two blocks of Cabrini.”).

<sup>119</sup> 42 U.S.C. §§ 3601–3619, 3631 (2006). One commentator believes that “[i]f any lesson is to be learned from recent history, it is that the one tool that has been effective in ameliorating racial discrimination and segregation in federally assisted housing has been litigation.” Roisman, *supra* note 33, at 934.

manner affirmatively to further the policies” of fair housing.<sup>120</sup> Congress, in using this language, sought to actively promote residential integration,<sup>121</sup> in part by requiring HUD to take real steps to “remove the walls of discrimination which enclose[d] minority groups.”<sup>122</sup> Second, the FHA *prohibits* governmental action that discriminates on the basis of “race, color, religion, sex, familial status, or national origin.”<sup>123</sup> This more modest provision delegitimized outwardly unequal treatment of protected classes. Both obligations thus mark substantive boundaries on the range of permissible alternatives for the transformation of distressed public housing.

1. *The “Affirmatively Further” Provision.*—The FHA declares: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>124</sup> This promise largely relies on the statutory provision directing HUD to act in a manner that “affirmatively . . . further[s] the policies” of fair housing.<sup>125</sup> In creating this obligation, Congress neglected to record what exactly it meant by the phrase “affirmatively . . . further.”<sup>126</sup> Yet the context and legislative history of the FHA, along with subsequent attempts to define the phrase, ultimately point toward a requirement that HUD administer its programs in furtherance of actual racial integration, rather than merely refrain from future discrimination.<sup>127</sup>

Judicial clarification of the textual uncertainty indeed demonstrates that the duty to affirmatively further fair housing means something more than simply nondiscrimination.<sup>128</sup> Courts interpreting § 3608(e)(5) of the FHA have found that it requires HUD and PHAs to affirmatively promote integration and therefore consider both the racial and social implications of

<sup>120</sup> § 3608(e)(5).

<sup>121</sup> One sponsor remarked that the FHA would foster “truly integrated and balanced living patterns.” 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

<sup>122</sup> 114 CONG. REC. 9563 (1968) (statement of Rep. Celler).

<sup>123</sup> § 3604.

<sup>124</sup> *Id.* § 3601.

<sup>125</sup> *Id.* § 3608(e)(5). The FHA imposes this duty specifically on the Secretary of HUD. *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See* Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U. L. REV. 491, 533–49 (1979) (describing this prevailing interpretation as the “substantive” one and distinguishing it from the alternative “pure” interpretation).

<sup>128</sup> *See, e.g.,* Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Jorman v. Veterans Admin., 579 F. Supp. 1407 (N.D. Ill. 1984); Burney v. Hous. Auth. of Beaver Cnty., 551 F. Supp. 746 (W.D. Pa. 1982); *see also* Michelle Ghaznavi Collins, Note, *Opening 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, 2141–44 (2010) (discussing cases that read § 3608(e)(5) as requiring additional obligations—including consideration of racial and socioeconomic data in siting public housing—beyond the simple obligation not to discriminate in discrete instances).

public housing decisions.<sup>129</sup> More explicitly, the Second Circuit held that this duty is only satisfied through action “taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the [FHA] was designed to combat.”<sup>130</sup> Such action includes, at a minimum, critically assessing the impact of a proposed housing decision on the “supply of genuinely open housing.”<sup>131</sup> It also includes taking additional steps to ameliorate the historical legacy of discrimination in the housing market by private individuals and government actors, some of whom may be “tempted to continue to discriminate even though forbidden to do so by law.”<sup>132</sup>

The judicial interpretation of the affirmatively further provision largely derives from the legislative history of the FHA.<sup>133</sup> Senator Walter Mondale, a sponsor of the bill, remarked that the purpose of the FHA was to slow and replace “the rapid, block-by-block expansion of the ghetto . . . [with] truly integrated and balanced living patterns.”<sup>134</sup> Accordingly, the FHA targeted the most entrenched policies and practices that perpetuated segregation through the unequal provision of housing opportunities among members of different races. Senator Edward Brooke, another sponsor of the bill, further noted that the FHA intended to remedy the “weak intentions” that led to the federal government directly or indirectly “sanctioning discrimination in housing throughout this Nation.”<sup>135</sup> Lawmakers recognized that simply guarding against the most egregious kinds of discrimination would do little to advance the cause of integration in the face of advanced and subtle techniques for enforcing separation.<sup>136</sup> Now, as then, giving substantive

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<sup>129</sup> See *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154–55 (1st Cir. 1987) (stating that the FHA requires HUD to “do more than simply refrain from discriminating (and from purposely aiding discrimination by others)”; *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 820–21 (3d Cir. 1970) (stating that the FHA essentially prohibits total “color blindness” in housing decisions because actions that are non-discriminatory in isolation can nevertheless increase residential segregation); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 417 (D. Md. 2005) (stating that HUD is held to a “high standard,” which implies “a commitment to desegregation”).

<sup>130</sup> *Otero*, 484 F.2d at 1134.

<sup>131</sup> *NAACP*, 817 F.2d at 156.

<sup>132</sup> *Id.* at 154–55.

<sup>133</sup> For a comprehensive overview of the legislative history of the FHA, much of which is outside the scope of this Comment, see Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969).

<sup>134</sup> 114 CONG. REC. 3422 (1968) (remarks of Sen. Mondale). *But see* Rubinowitz & Trosman, *supra* note 127, at 538 n.178 (suggesting the full context of the remarks may support a different reading than is generally accepted).

<sup>135</sup> 114 CONG. REC. 2281 (1968) (statement of Sen. Brooke).

<sup>136</sup> The FHA attempted to establish equal rights that had some force on the ground. *Cf.* 114 CONG. REC. 9595 (1968) (statement of Rep. Pepper) (considering a bill that would use the power of the state to

effect to the affirmatively further provision remains the best way to overcome the harmful legacies of private and governmental discrimination and thereby satisfy the goals of the FHA.<sup>137</sup>

In the context of Cabrini-Green, the Plan may violate this statutory duty to the extent that CHA did not sufficiently consider the impact of the new development on black residents, who were largely precluded from nonpublic housing units and therefore largely denied the social and economic benefits of a gentrifying neighborhood.<sup>138</sup> Even a cursory glance at the inevitable demographic changes, brought on at first by displacement and later by the rising cost of living in an area adjacent to the most expensive neighborhoods in the city, would reveal an adverse impact on a large number of black residents. Indeed, only 30% of the housing in Cabrini-Green is “genuinely open” to poor black families who previously resided in segregated and ghettoized projects and do not have the means to occupy higher income units.<sup>139</sup> More broadly, mixed-income developments will by their nature struggle to take the necessary affirmative steps because so many of the people harmed by the legacy of residential segregation are forced out to make way for market-rate renters. These housing developments are constructed in a way that encourages dramatic swings in neighborhood composition, as there was in Cabrini-Green, making it nearly impossible to maintain an ideal (and sustainable) level of integration somewhere in the middle.<sup>140</sup>

2. *The Anti-Discrimination Provision.*—In addition to the positive obligation, the FHA also prohibits discrimination in federal housing

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weed out discrimination and criticizing the government’s slow-paced struggle to clearly establish “equal” rights).

<sup>137</sup> *But see* Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 907 (8th Cir. 2005) (discussing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), and describing the prevailing interpretation as “an invasive form of judicial review”). Claiming a deferential standard of review, the court held it would only review HUD’s challenged decision “to assess whether HUD exercised its broad authority in a manner that demonstrates consideration of, and an effort to achieve, [tangible] results,” and not “whether HUD has, in fact achieved tangible results in the form of furthering opportunities for fair housing.” *Id.*

<sup>138</sup> *See* *Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 96-C-6949, 1997 WL 31002, at \*12 (N.D. Ill. Jan. 22, 1997) (refusing to hold that plaintiffs failed to make out a claim under the FHA by alleging that low-income Cabrini residents will be denied housing in their redeveloped neighborhood and thus “forced to live in a non-racially integrated area”). CHA was obviously aware at the time the Plan was conceived that any displacement arising from deconcentrating public housing units would fall almost entirely on black families, who comprised 99% of the public housing population in the neighborhood. *See infra* notes 162–68 and accompanying text.

<sup>139</sup> *See* *Salama*, *supra* note 104, at 109 (indicating that CHA was required to develop only 30% of the units as public housing). Desperately poor public housing residents do not have the economic means to occupy affordable-housing and market-rate units, which are designed for those earning at least 50% of the area’s median income.

<sup>140</sup> For a more complete discussion of what constitutes an “ideal” level of integration, see *infra* Part IV.A.

practices.<sup>141</sup> Hence, a violation occurs when “discriminatory actions, or certain actions with discriminatory effects, . . . affect the availability of housing.”<sup>142</sup> Disparate impact theory concerns those actions with discriminatory effects. They are generally taken without overt discriminatory intent (i.e., actions that are facially neutral);<sup>143</sup> but to say the governmental body did not intend to discriminate against a protected group is not to say it is necessarily free from liability for a differential outcome.<sup>144</sup> *Metropolitan Housing Development Corp. v. Village of Arlington Heights* opened the door to the possibility of holding a governmental body liable when the Seventh Circuit held that “a showing of discriminatory intent is not required under section 3604(a)” to establish a violation.<sup>145</sup> Thirty years later, most federal circuit courts now apply a burden-shifting analysis.<sup>146</sup>

The first step is to make out a prima facie case of disparate impact discrimination. To do so, plaintiffs must show that a “facially neutral policy has a significant adverse impact on members of a protected minority group.”<sup>147</sup> If this initial burden is satisfied, the burden shifts to the governmental body to demonstrate legitimate, nondiscriminatory policy objectives that led to the discriminatory effect.<sup>148</sup> It also “must demonstrate that the [policy or practice in question] has a ‘manifest relationship’ to the legitimate, non-discriminatory policy objectives and ‘is justifiable on the ground it is necessary to’ the attainment of these objectives.”<sup>149</sup> Even if the

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<sup>141</sup> 42 U.S.C §§ 3603(a)(1), 3604 (2006).

<sup>142</sup> *Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984). Violations on the basis of discrimination against a protected group member “because of” such status come in three flavors: (1) individual disparate treatment, (2) disparate impact, and (3) failure to make a reasonable accommodation with respect to disabled persons. *See Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir. 2002), *cert denied*, 537 U.S. 813 (2002).

<sup>143</sup> *See generally* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (marking the first time the Supreme Court recognized the availability of disparate impact claims, which do not require proof of discriminatory motive).

<sup>144</sup> *See* *Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 96-C-6949, 1997 WL 31002, at \*13 (N.D. Ill. Jan. 22, 1997); *see also* *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (“A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find.”).

<sup>145</sup> 558 F.2d at 1290. The extent of the ruling was limited, however, by the court’s “refus[al] to conclude that every action which produces discriminatory effects is illegal.” *Id.*

<sup>146</sup> *See, e.g., Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902–03 (8th Cir. 2005).

<sup>147</sup> *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *see also* *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 934–41 (2d Cir. 1988), *judgment aff’d in part*, 488 U.S. 15 (1988) (holding that a prima facie case does not require a showing of intent, only that a racially discriminatory impact actually resulted).

<sup>148</sup> *See, e.g., Darst-Webbe*, 417 F.3d at 902–03; *Oti Kaga*, 342 F.3d at 883; *Huntington Branch*, 844 F.2d at 936; *cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658 (1989) (employing a fundamentally similar analysis in the analogous context of an employment discrimination case).

<sup>149</sup> *Darst-Webbe*, 417 F.3d at 902 (quoting *Oti Kaga*, 342 F.3d at 883).

governmental body successfully carries its burden, the plaintiff may yet prevail upon showing a less discriminatory alternative policy that would accomplish program goals just as effectively.<sup>150</sup>

Cabrini-Green residents have made disparate impact claims in the past. In *Cabrini-Green Local Advisory Council v. Chicago Housing Authority*, residents challenged the very first set of CHA rehabilitation and demolition plans filed with HUD under HOPE VI.<sup>151</sup> The initial plans called for neighborhood-wide redevelopment resulting in a net loss of approximately 1000 public housing units.<sup>152</sup> Residents contended that subsequent displacement would have a disproportionate adverse impact on black households, who overwhelmingly occupied the units scheduled for demolition.<sup>153</sup> Though CHA was not accused of acting with an intent to discriminate, the court found that the residents' "allegations of discriminatory effects [were] enough to state a claim for relief under the FHA."<sup>154</sup> The parties eventually entered a consent decree before going to trial.<sup>155</sup> However, it is clear that the door remains open to disparate impact claims even in the absence of "overtly bigoted behavior."<sup>156</sup>

Today, after more than a decade of experience with HOPE VI and the Plan, the problem of discriminatory effects arising from redevelopment appears in sharp relief. A prima facie showing could be made from evidence of the displacement that accompanies deconcentration insofar as displacement results in partial reconstitution of the ghetto in outlying areas.<sup>157</sup> The policy or practice in question would be CHA's prescribed

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<sup>150</sup> *Id.* at 902–03; *Oti Kaga*, 342 F.3d at 883; *cf.* *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 702–03 (8th Cir. 1987) (articulating the same analysis in an employment discrimination context).

<sup>151</sup> No. 96-C-6949, 1997 WL 31002, at \*1 (N.D. Ill. Jan. 22, 1997).

<sup>152</sup> *Id.* at \*2.

<sup>153</sup> *Id.* at \*3.

<sup>154</sup> *Id.* at \*13. The court flatly rejected the "assertion that *Arlington Heights* and its progeny make clear that some 'showing of discriminatory intent is required' to establish a Fair Housing Act violation." *Id.*

<sup>155</sup> See Patricia A. Wright et al., *The Case of Cabrini-Green, in WHERE ARE POOR PEOPLE TO LIVE?*, *supra* note 52, at 168, 174.

<sup>156</sup> *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); see generally Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409 (evaluating many of the fair housing disparate-impact cases that followed *Arlington Heights* and proposing a unified substantive standard to be applied in future cases).

<sup>157</sup> *Cf.* Seliga, *supra* note 93, at 1056 (explaining that the court in *Gatreux v. Chicago Housing Authority* recognized the discrimination underpinning CHA's policy for siting new housing projects in isolated, predominately black neighborhoods (citing *Gatreux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969))). Disparate impact caused by the process of relocation that necessarily flows from the Plan should be similarly actionable. Some level of displacement is, of course, part and parcel of deconcentration activities. The problem is that the residents forced to vacate do not experience any real improvement in their quality of life, especially relative to those residents allowed to remain. See *supra* notes 113–15 and accompanying text.

income mix, which reserves just 30% of housing units for very low income tenants in Cabrini-Green.<sup>158</sup> Though facially neutral, the mix in many ways perpetuates the incidence of racial segregation in Chicago's public housing: It denies housing opportunities to those public housing tenants experiencing extreme poverty, and that denial has an adverse effect on black tenants because they constitute a disproportionate share of the relevant tenant population.<sup>159</sup>

One contemporary legacy of Cabrini-Green's historical isolation<sup>160</sup> is that 99% of CHA residents there are black.<sup>161</sup> Nearly every single family dislocated by the redevelopment (mixing) process is thus black.<sup>162</sup> In accordance with the Plan, the new mixed-income community includes less than half the volume of public housing as before, a reduction in excess of 1400 units.<sup>163</sup> Only a small fraction of the original black public housing residents were able to return after being displaced at the time of redevelopment. Indeed, the newly created affordable housing and (especially) market-rate units, which together constitute no less than 70% of the neighborhood, are largely inhabited by white residents.<sup>164</sup> Since 2000, more than two-thirds of new homeowners in redeveloped neighborhoods across the city have been white.<sup>165</sup> Between 2000 and 2003, a time of

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<sup>158</sup> See *supra* note 111 and accompanying text.

<sup>159</sup> See Wright et al., *supra* note 155, at 169 (“The residents of Cabrini-Green are 99 percent African-American, and this has been the case for almost the entirety of the development’s history.”); see also Salama, *supra* note 104, at 103–04 (asserting the same point that, historically, 99% of Cabrini-Green public housing residents have been black). In general terms, under the FHA, a policy or practice has a disparate impact when it “has a greater adverse impact on one racial group than on another.” *Arlington Heights*, 558 F.2d at 1290.

<sup>160</sup> Cf. Wright et al., *supra* note 155, at 169.

<sup>161</sup> *Id.* As of 2009, 87% of CHA’s 21,863 residents system-wide (i.e., all the residents of CHA housing designated for families and seniors) were black. CHI. HOUS. AUTH., FY2009 MOVING TO WORK ANNUAL REPORT: PLAN FOR TRANSFORMATION YEAR 10, at 103 app.1 (2010), available at [http://www.thecha.org/filebin/pdf/mapDocs/Final\\_Version-FY2009\\_Annual\\_Report.pdf](http://www.thecha.org/filebin/pdf/mapDocs/Final_Version-FY2009_Annual_Report.pdf).

<sup>162</sup> See Salama, *supra* note 104, at 108–09 (explaining that the Plan engendered serious concerns with replacement housing because the proposed redevelopment required a reduction in public housing units of approximately 50%). The residents have not always gone quietly. See John Bebow & Antonio Olivo, *CHA Moves Tenants Out—But Not Up: Ex-Residents Still Live in Struggling, Segregated Areas*, CHI. TRIB., Feb. 27, 2005, § 1, at 1; Mary Schmich, *Future Closes In on Cabrini*, CHI. TRIB., July 4, 2004, § 4 at 1.

<sup>163</sup> See BPI REPORT, *supra* note 109, at 61 app.A. As of September 2009, only 32% of these units had been constructed. *Id.*

<sup>164</sup> See, e.g., Mary Schmich, *A New Day at Cabrini-Green: Key Developer Also Trying to Rebuild Lives*, CHI. TRIB., July 8, 2004, § 2, at 1, 4 (describing market-rate renters as “typically white singles or couples”).

<sup>165</sup> See Kimbriell Kelly, *Rising Values*, CHI. REP., July/Aug. 2005, at 9, 9 (describing the “dramatic metamorphosis” that occurred around Cabrini-Green as “[t]he racial pendulum . . . swung from black to white”). The homeownership number is significant because market-rate units, unlike CHA units, are often up for sale.

maximum upheaval in Cabrini-Green,<sup>166</sup> less than 2% of those granted home loans in the area, an indicator of the ability to purchase affordable for-sale and market-rate units, were black; almost 80% were white.<sup>167</sup> The clear implication is that black households remain relegated to public housing units and in significantly smaller numbers than before. Without the means to move into nonpublic housing units effectively reserved for higher income renters, blacks will continue to give ground.<sup>168</sup>

3. *A Justifying Government Purpose.*—Under the burden-shifting analysis, CHA or any governmental body similarly shown to have employed a policy or practice with discriminatory effects may argue that the effects are incident to legitimate, nondiscriminatory policy objectives.<sup>169</sup> These objectives are often framed as general statutory mandates.

In *Darst-Webbe Tenant Ass'n Board v. Saint Louis Housing Authority*,<sup>170</sup> a group of public housing residents used disparate impact theory to challenge the St. Louis Housing Authority's (SLHA) demolition of older housing projects in favor of mixed-income developments with fewer public housing units.<sup>171</sup> The Eighth Circuit affirmed the dismissal of the action after hearing the case a second time.<sup>172</sup> The court held that the residents could not prevail in the face of legitimate HOPE VI policy objectives that justified the revitalization plan without providing a viable alternative, even if they presented sufficient evidence of discriminatory effects.<sup>173</sup> The court also upheld the practice of maintaining a strict cap on the number of public housing units as necessary to the attainment of statutory policy objectives.<sup>174</sup>

The SLHA identified “reducing the concentration of low-income housing and developing sustainable, mixed income communities” as two

<sup>166</sup> See *id.* at 9–10 (describing the mechanics of neighborhood change through soaring land values and increased annual property sales).

<sup>167</sup> *Id.* at 13.

<sup>168</sup> The poorest of the original public housing residents who cannot secure a new unit will be forced to relocate using vouchers.

<sup>169</sup> See sources cited *supra* notes 148–49.

<sup>170</sup> 202 F. Supp. 2d 938 (E.D. Mo. 2001), *aff'd in part and remanded in part*, 339 F.3d 702 (8th Cir. 2003) (*Darst-Webbe I*), *remanded to* 299 F. Supp. 2d 952 (E.D. Mo. 2004), *aff'd*, 417 F.3d 898 (8th Cir. 2005) (*Darst-Webbe II*).

<sup>171</sup> *Darst-Webbe II*, 417 F.3d at 900–01. SLHA had released a revitalization plan calling for only 80 new public housing units (in a proposed 550-unit mixed-income development) to offset the loss of more than 1000 units in the targeted projects. See Brief of Appellants at 9, *Darst-Webbe II*, 417 F.3d 898 (No. 04-1614).

<sup>172</sup> *Darst-Webbe II*, 417 F.3d 898.

<sup>173</sup> *Id.* at 903–06. HOPE VI policy goals include, of course, deconcentrating poverty in public housing and developing new mixed-income communities. *Id.* at 903.

<sup>174</sup> *Id.* at 903–06 (approving the use of “marketability” as a consideration in determining the appropriate housing mix).

statutory mandates constituting nondiscriminatory objectives.<sup>175</sup> SLHA also articulated another particularly powerful nonstatutory objective that is likely to apply with equal force in the Cabrini-Green context: “[P]roviding for the *marketability* of a new mixed income community to families from a range of incomes by providing a balanced mix of housing types . . . .”<sup>176</sup> Marketability considerations in many ways appear to necessarily follow from the implementation of income-mixing policies.

Granting that this objective is not pretextual and CHA’s 30% policy does indeed bear a manifest relationship to it,<sup>177</sup> the proffered marketability objective is still of questionable legitimacy and merit. The *Darst-Webbe* court nonetheless held that achieving broad statutory goals necessitated the use of “a marketable housing mix so that the post-redevelopment population would include actively employed residents to serve as role models and homeowners with a vested interest in the upkeep of the neighborhood.”<sup>178</sup>

This expansive notion of marketability, however, is both insufficiently rigorous and minimally beneficial. First, it is rooted in “imprecise predictive judgments” made by PHAs regarding the appropriate number of public housing units necessary for a stable mixed-income community.<sup>179</sup> In reality, hard evidence does not appear to support the existence of any one solution to the mix question.<sup>180</sup> Chosen percentages are more often the naked “result of negotiations between the parties with interest in and power over” the redevelopment process, even if they are held out as essentially scientific—as was the case in Cabrini-Green.<sup>181</sup> By adhering to a low

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<sup>175</sup> *Id.* at 903 (grounding these goals in 42 U.S.C. § 1437p(d) (2006) and § 1437v(a)(3), respectively).

<sup>176</sup> *Id.* (emphasis added). SLHA offered four other specific objectives, but they are not of general applicability and will therefore not be analyzed here. *Id.*

<sup>177</sup> Another way for plaintiffs to prevail in the burden-shifting analysis is to show that the proffered objectives are pretextual. *See id.* at 903–04. That is, the objectives are post hoc justifications for a policy or practice *intended* to discriminate against members of a protected group because of such status.

<sup>178</sup> *Id.* at 904.

<sup>179</sup> *Id.* at 903–05. The *Darst-Webbe* court tiptoed around nearly all of the uncomfortable implications of the marketability determination. The court did not, however, hesitate to endorse marketability as a salient factor in setting the appropriate income mix. Others have been more forthcoming in giving shape to the notion. One pair of developers, for instance, noted that colleagues “who choose to mix income groups try to avoid the mistake of overloading a project with low-income households and [thus] jeopardizing the marketability of higher priced units.” Paul C. Brophy & Rhonda N. Smith, *Mixed-Income Housing: Factors for Success*, CITYSCAPE, 1997, at 3, 26.

<sup>180</sup> *See* Brief of Appellants, *supra* note 171, at 32–35. The *Darst-Webbe* court admits as much. In fact, the evidence does not really support anything at all. *See Darst-Webbe II*, 417 F.3d at 904 (“[T]here was no one piece of evidence that stated with certainty how many low-income rental units should have been included or what the optimal housing mix may have been.”).

<sup>181</sup> Gebhardt, *supra* note 111, at 181 (“[The 30%] number has been outwardly portrayed as the maximum amount of public housing that can be feasibly supported on the site if it was to remain attractive to private developers and to support a viable mixed income neighborhood. However, as was

“marketable” cap on public housing units, the CHA resolves this uncertainty in the mixing calculus (decisively) in favor of middle-class homebuyers, the one group not facing institutional, structural, and market barriers to finding adequate housing. This result seems undesirable when considering that the FHA was drawn broadly to eliminate the most pervasive elements of racial discrimination and segregation in public housing.<sup>182</sup>

Second, marketability judgments encode a distinct middle-class preference to the extent that marketable mixes are geared toward attracting a constant stream of market-rate buyers.<sup>183</sup> The underlying issue is persistent racial tension that likely triggers, to some degree, middle-class misgivings about moving into historically isolated neighborhoods.<sup>184</sup> In Cabrini-Green, 30% thus implicitly represents an assumed steady-state arrangement between poor black neighbors and newly arrived middle-class residents, based largely on the preferences of the latter.<sup>185</sup> The *Darst-Webbe* court obscured this issue by focusing on market studies without stopping to consider how regressive racial and socioeconomic attitudes informed the results.<sup>186</sup> The problem here cuts at the heart of fair housing policy. Allowing middle-class movers, usually white families, to define the appropriate amount of class and racial interaction through market preferences undermines the FHA’s integrative norm.<sup>187</sup> Their neighborhoods are particularly susceptible to the homogenizing forces that preclude an ideal level of integration, which occurs somewhere between the prior state of concentrated poverty and the present state of gentrification. The practical effect of relying on marketability determinations is to indirectly perpetuate

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the case with the Henry Horner Homes redevelopment, these assertions were not based on any verified evidence.”).

<sup>182</sup> See 42 U.S.C. § 3601 (2006). In passing the FHA, Congress intended to “remove the walls of discrimination which enclose minority groups.” 114 CONG. REC. 9563 (1968) (statement of Rep. Celler). Moreover, unreasonably restrictive limits on low-income housing, especially in the absence of even a modicum of evidence, simply cannot be construed as affirmatively furthering fair housing. See *infra* Part III.A.1.

<sup>183</sup> See, e.g., Brophy & Smith, *supra* note 179, at 25–26 (“Mixed-income housing will work only where there are sufficient units aimed at the higher income population to create a critical mass.”).

<sup>184</sup> The legacy of racial segregation in public housing, of course, still lives on in many ways. Indeed, a group of public housing residents among the first to move into a mixed-income community were told by a CHA official shortly before the transition that their new white neighbors held “[t]he expectation . . . that you’re going to be loud, you’re going to be raw, you’re going to be bringing roaches.” Flynn McRoberts, *A New World—Down the Block*, CHI. TRIB., Oct. 8, 1998, § 1, at 1.

<sup>185</sup> Cf. *id.* (acknowledging the general unease and racial undertones that characterized one early attempt to bring white middle-class families into residential proximity with black Cabrini-Green residents).

<sup>186</sup> See *Darst-Webbe II*, 417 F.3d 898, 904–06 (8th Cir. 2005).

<sup>187</sup> See *infra* Part III.A.1.

at least some existing residential segregation in service of income-mixing policies.

In the end, marketability lacks legitimacy and merit as a policy objective. It is just a mechanism used to enforce restrictive income caps that often has the unfortunate effect of (re)segregating HOPE VI neighborhoods by race. This will be true as long as black families constitute the overwhelming majority of poor public housing residents, a trend that shows no signs of changing.

### *B. Deficiencies of Income Mixing as Sound Social Policy*

The practical shortcomings of HOPE VI in light of clear statutory obligations to promote residential integration underscore the problems that income mixing presents as a primary policy objective. Specifically, implementation of the mixed-income principle tends to preference higher income newcomers at the expense of dislocated lower income residents, and consequently tends to reinforce racial separation over the long run through demographic dynamics that subvert stable integration.<sup>188</sup> Any appearance of successful integration accompanying the first wave of higher income residents inevitably succumbs to the homogenizing force of officially sanctioned gentrification. Income mixing can also upset productive social networks and connections, the very thing it purports to encourage. For these reasons, income-mixing policies ought to yield to racially integrative policies in order to best promote the interests of those who are the intended beneficiaries of national housing policy.

*1. Misplaced Benefits.*—First, economic integration does not sufficiently allocate social and economic benefits in a way that works to the advantage of the intended policy beneficiaries. It is important to bear in mind here that the first purpose set forth in the HOPE VI statute is to “[i]mprove the living environment” of families in distressed public housing—families who are overwhelmingly poor and black.<sup>189</sup> At best, however, economic integration is just one ingredient in larger housing policy reforms that must be undertaken to achieve the ultimate end of “truly integrated and balanced living patterns,”<sup>190</sup> rather than the paramount goal

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<sup>188</sup> The most familiar mechanisms that enforce this preference, discussed earlier in this Part, are considerations of marketability and (relatedly) strict caps on the number of public housing units available in new mixed-income developments. See *supra* Part III.A. Public housing residents are therefore unable to stay in their gentrifying neighborhoods at anything close to predevelopment numbers. See Salama, *supra* note 104, at 108–09. And those who are displaced often end up in other segregated neighborhoods, no better off than before. See Vale & Graves, *supra* note 99, at 53–55.

<sup>189</sup> Notice of Funding Availability, *supra* note 4, at 60,178; see also CHA PLAN, *supra* note 99, at 11 (noting that the first goal of the Plan is to “[p]rovide quality housing opportunities to very low and low-income households”).

<sup>190</sup> 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

itself. This is so because any connection between economic integration and the production of social benefits for the poorest residents rests on a series of strained assumptions:

The premise of the mixed-income objective is that poor people are more likely to improve their social condition and their behavior through exposure to higher income households. While this argument may have some validity, it is predicated on primarily cultural and behavioral explanations for social problems that are also partly structural and institutional. The mixed-income narrative privileges discourses of social dysfunction as the root cause of continued poverty.<sup>191</sup>

Such an approach implicitly recognizes the domination of middle-class tastes and preferences in community building and income mixing, much like the notion of marketability. But the role model theory does not bear much fruit in practice.<sup>192</sup> Very poor residents are often not receptive to their new, higher income neighbors and struggle to make the kinds of formal and informal connections that lead to material gain.<sup>193</sup> Moreover, the singular pursuit of economic integration obscures what is recognized, at least on paper, as a prominent goal of HOPE VI redevelopments under the FHA: Improving the lives of as many poor public housing residents as possible.<sup>194</sup> The benefit instead largely accrues to moderate-income residents and private developers,<sup>195</sup> while many of the poorest residents are dislocated and thus excluded altogether.<sup>196</sup> Catering to middle-class tastes and preferences

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<sup>191</sup> Alexander, *supra* note 11, at 155.

<sup>192</sup> See, e.g., Cornelia Grumman, *The Human Factor*, CHI. TRIB. (Mar. 30, 1996), [http://articles.chicagotribune.com/1996-03-30/news/9701150613\\_1\\_cabrini-role-models-mixed-income](http://articles.chicagotribune.com/1996-03-30/news/9701150613_1_cabrini-role-models-mixed-income) (interviewing CHA residents who clearly “doubted the effect that working-class ‘role models’ would have on the habits of some very poor residents in a mixed-income neighborhood”).

<sup>193</sup> See Ellickson, *supra* note 27, at 1012–16.

<sup>194</sup> See *supra* Part II.A; see also FINAL REPORT, *supra* note 48, at 2–6 (declaring that a “true and long-lasting solution” requires equal attention to not only geographic surroundings, but also social and economic conditions).

<sup>195</sup> Cf. Lawrence Vale, *Housing Chicago: Cabrini-Green to Parkside of Old Town*, DESIGN OBSERVER (Feb. 20, 2012), <http://places.designobserver.com/feature/housing-chicago-cabrini-green-to-parkside-of-old-town/32298/> (“Developers succeed in placing upscale new uses; a haunted housing authority succeeds in replacing deteriorated housing on a perpetually haunted site; and residents get displaced from their homes and communities.”). The “systematic dispersal” of public housing residents increases property values and creates the proper incentives for private developers and higher income movers to revitalize neighborhoods. See Matthew H. Greene, *The HOPE VI Paradox: Why Do HUD’s Most Successful Housing Developments Fail to Benefit the Poorest of the Poor?*, 17 J.L. & POL’Y 191, 195 (2008) (“This systematic dispersal leads to . . . a repopulation of the area by a mixture of market-rate renters along with a small percentage of the original subsidized tenants.”); *id.* at 204–15. Relying on a “demand-side approach” to public housing through mixed-finance provisions leaves low-income residents at the whim of private sector developers who will largely cater to upper-income residents driving the market. See Smith, *supra* note 52, at 36–37.

<sup>196</sup> See *Academic Perspectives on the Future of Public Housing: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 18 (2009) (prepared statement of Susan J. Popkin, Dir., Urban Inst.) (“[O]ur research shows that the program has not been a solution

means that public housing residents reap social benefits only to the extent that their interests converge with those of their wealthier neighbors. The more probable outcome, experience teaches, is continued segregation.

2. *Undermining Social Capital.*—HOPE VI developments also fail to cultivate sufficient social capital in the exclusive pursuit of economic diversity. The concept of social capital captures “the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals.”<sup>197</sup> Social capital should be of paramount concern to policymakers because it is the amalgamation of the intangible things that tie people together, a necessary and elusive ingredient in successful neighborhood-based redevelopment.<sup>198</sup> Yet the dual forces of economic integration and spatial deconcentration may do as much to undermine existing networks as they do to build new ones.<sup>199</sup>

One aspect of the problem is dislocation arising from the inability of HOPE VI redevelopments to accommodate most of the residents forced out of overflowing high-rises.<sup>200</sup> The constitutive elements of social capital—trust, shared norms, and social bonds—are particularly susceptible to physical and social upheaval in changing neighborhoods. Indeed, the “loss of extensive networks of family and friends may . . . increase[] social isolation if [residents’] new neighborhoods are hostile to them on account

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for those hard-to-house families who suffered the worst consequences of distressed public housing, . . . the most vulnerable, . . . [the] long-term public housing residents who are coping with multiple, complex problems . . . .”); *see also id.* at 119 app. (“In many cities, . . . the poorest and least desirable tenants [are] warehoused in the worst developments. As these developments have been demolished, housing authorities have often simply moved these vulnerable families from one distressed development to another . . . these replacement developments have the potential to become even worse environments than those from where these families started.”).

<sup>197</sup> Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006); *see generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (exploring the concept of social capital and its recent general decline in American society). *Bowling Alone* is widely regarded as providing a landmark analysis of the phenomenon of social capital. Commentators have thus referred to author Robert Putnam as “the most prominent analyst of social capital.” *See, e.g.*, Ellickson, *supra* note 27, at 1008, 1014.

<sup>198</sup> *See* PUTNAM, *supra* note 197, at 307–18.

<sup>199</sup> *See, e.g.*, Ellickson, *supra* note 27, at 1009–10 (“From what is now known, there are grounds for skepticism about the capacity of a mixed-income housing project to enhance the aggregate stock of social capital.”).

<sup>200</sup> For a complete discussion of the ways in which dislocation affects the foundational aspects of social capital, *see* Alexandra M. Curley, *Neighborhood Institutions, Facilities, and Public Space: A Missing Link for HOPE VI Residents’ Development of Social Capital?*, CITYSCAPE, 2010, at 33, 33–34 (reassessing HOPE VI communities “by examining some of the potential mechanisms for developing social capital in the neighborhood and by considering how relocation might shape residents’ access to social capital”).

of their class or race. . . . '[G]eographic proximity does not a neighbor make—at least not in the social sense.'"<sup>201</sup>

The loss of such networks to spatial dispersion of public housing residents especially affects black communities.<sup>202</sup> Most HOPE VI redevelopments experience dramatic swings in racial composition.<sup>203</sup> This process, usually part and parcel of neighborhood gentrification, undermines the kind of continuity that leads to meaningful production of social capital. Of course integration cannot be realized without some measure of upheaval; however, severe dislocation in many HOPE VI neighborhoods where thousands of public housing units were sacrificed and restrictive admissions policies fenced out would-be returnees—including friends and family—breaks too many important bonds. Without showing sensitivity to racial composition, it is difficult to maintain powerful social networks that nurture successful communities.

3. *Subordinating Income Mixing to Racial Integration.*—Even though specifically addressed to the problem of concentrated poverty, the underlying failure of HOPE VI to facilitate, or simply not impede, racial integration in neighborhoods like Cabrini-Green is the most significant shortcoming of income-mixing policies more generally. Because the conflict seems inevitable, the competing policies should be reconciled with a view toward the interests of the intended beneficiaries of national housing policy. As I have argued in this Part and will further demonstrate in the next, this group is better served by racially integrative policies.

One additional reason racially integrative policies like the FHA should trump income-mixing policies is that, to the extent there is overlap, the legacy of segregation has partially created and sustained the legacy of concentrated poverty in public housing, and not the other way around. On this point, sociologists Douglas Massey and Nancy Denton note that “segregation concentrates poverty to build a set of mutually reinforcing and self-feeding spirals of decline into black neighborhoods.”<sup>204</sup> Racially integrative policies are thus a superior option for addressing the root causes of decline in urban neighborhoods historically associated with public

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<sup>201</sup> Foster, *supra* note 197, at 565 (quoting Xavier de Souza Briggs, *Moving Up Versus Moving Out: Neighborhood Effects in Housing Mobility Programs*, 8 HOUSING POL'Y DEBATE 195, 197 (1997)).

<sup>202</sup> This is true because blacks generally constitute the largest share of the existing public housing population when redevelopment begins. *See, e.g.*, Wright et al., *supra* note 155, at 169. Relocation during and after the construction phase thus uproots a disproportionate number of black residents who were previously plugged into local networks. *See supra* notes 157–68 and accompanying text (developing this point more thoroughly).

<sup>203</sup> *See, e.g.*, Kelly, *supra* note 165.

<sup>204</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 2 (1993).

housing. HOPE VI, on the other hand, does not seem to offer the same promise:

While the program goals of income deconcentration and integration are prescribed in detail in the statute and regulations governing HOPE VI, goals of racial deconcentration and integration are amorphous and diffuse. This lack of specificity regarding racial desegregation reflects current judicial suspicion towards race-based remedies. The danger of this approach is that policies that do not engage the structures of community disadvantage in terms of race cannot dismantle those institutions and policies formed using race as an explicit criterion.<sup>205</sup>

The most prominent housing policies can and must, without resort to impermissible race-conscious remedies,<sup>206</sup> address urban problems—such as violence, unemployment, and an overwhelming sense of hopelessness—in large measure produced and sustained by racial segregation. Yet income-mixing policies rely instead on the wrongheaded assumption “that solving the issue of class makes a major difference on racial outcomes.”<sup>207</sup> This is akin to the familiar problem of treating the symptoms rather than the underlying disease. While income mixing may provide temporary relief as poor minority neighborhoods open up to middle-income white families, the constant pressure of gentrification has proved too much for sustainable integration—patterns of racial separation are reproduced, as are the associated harms.<sup>208</sup> Accordingly, income mixing ought to be subordinated to racial integration to reflect the proper direction of national housing policy into the future.

#### IV. REAFFIRMING RACIAL INTEGRATION AS A PARAMOUNT POLICY GOAL

The question of how to reformulate national housing policy is especially pressing as HOPE VI nears its end. In light of irreconcilable tensions between a predominantly mixed-income approach and robust levels of racial integration, I propose a new direction for housing policy based on reaffirming racial integration as a primary goal. One way to accomplish this is to subordinate income-mixing considerations to meaningful racial integration in neighborhoods whenever the two come into

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<sup>205</sup> Pindell, *supra* note 79, at 388 (emphasis omitted) (footnote omitted).

<sup>206</sup> Strict scrutiny is, of course, applied even to those policies that classify on the basis of race in order to advance the interests of minorities. The Supreme Court has thus struck down race-conscious remedies on a number of occasions. *See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (concerning a program that promoted minority business enterprises in awarding municipal contracts); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (considering an affirmative action program employing a quota system).

<sup>207</sup> Gary Orfield, *Suburban Exclusion and the Courts: Can a Class-Based Remedy Reduce Urban Segregation?*, in RACE, POVERTY, AND DOMESTIC POLICY, *supra* note 35, at 242, 258.

<sup>208</sup> *See, e.g.,* Greene, *supra* note 195, at 205–21; Vale & Graves, *supra* note 99, at 53–55.

conflict. Reemphasizing racial integration in the redevelopment of public housing would spur the production of social capital and other important benefits by remedying the related harms of racial isolation and displacement that have continued to mar HOPE VI projects. More importantly, adopting an integrative norm comports with both the express obligations and underlying spirit of the FHA. An expansive reading of the affirmatively further provision indeed demands such a norm.<sup>209</sup> This Part first articulates an ideal integrative vision for housing policy under the FHA and then offers three mechanisms that affirmatively implement this vision.

#### A. *An Integrative Norm*

The racial pendulum has swung too far from black to white in many HOPE VI developments.<sup>210</sup> While certain neighborhoods that once experienced complete residential segregation, like Cabrini-Green, are now integrated to some extent, the dramatic shift toward middle-class whites does not represent the most preferred outcome.<sup>211</sup> The ideal level of racial integration lies instead somewhere between these two extremes. While the most natural definition of a racially integrated neighborhood seems to be half black and half white,<sup>212</sup> it makes little practical sense to assign a definite value to an ideally integrated neighborhood other than to say that it should not deviate too far from the middle (allowing, of course, for the fact that fewer blacks live in America than whites).<sup>213</sup> This vision, at its core, relies instead on the notion that a racially integrated neighborhood is one where blacks and whites “shar[e] spaces on relatively equal grounds.”<sup>214</sup> Neighbors thus have ample opportunity to engage in “biracial interaction,”

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<sup>209</sup> See discussion *supra* Part III.A.1.

<sup>210</sup> See Kelly, *supra* note 165, at 9 (“The racial pendulum [in Cabrini-Green] has swung from black to white.”).

<sup>211</sup> This critique applies with special force in gentrifying neighborhoods, rather than neighborhoods that remained primarily black when middle-class movers came in, like Henry Horner Homes in Chicago. See Susan J. Popkin, *The HOPE VI Program: What Has Happened to the Residents?*, in *WHERE ARE POOR PEOPLE TO LIVE?*, *supra* note 52, at 68, 72; see also Ben Austen, *The Last Tower: The Decline and Fall of Public Housing*, *HARPER’S MAG.* (May 2012), <http://harpers.org/archive/2012/05/0083897> (noting that most original Cabrini-Green residents have been “uprooted and replanted in unfamiliar areas no less uniformly poor and black—though now they [have] had to manage without the support networks and extended family that had surrounded them in public housing”).

<sup>212</sup> For the sake of simplicity, this discussion abstracts away from the obviously multiethnic character of many public housing developments today.

<sup>213</sup> See generally INGRID GOULD ELLEN, *SHARING AMERICA’S NEIGHBORHOODS* 12–19 (2000) (discussing academic attempts to define the term “racial integration” within the context of stable neighborhoods).

<sup>214</sup> *Id.* at 16.

social contact that involves more than mere geographic mixing.<sup>215</sup> Housing policy should strive to foster such integrated conditions in managing new and existing communities, including mixed-income neighborhoods that presently limit minority presence through restrictive policy mechanisms. Cabrini-Green, for instance, should not be considered truly integrated until CHA policies cease to effectively cap the proportion of black residents at 30%.

Reemphasizing racial integration as a primary goal of public housing is rooted in a desirably broad reading of the FHA's affirmatively further mandate.<sup>216</sup> Indeed, it is the only way to actually promote an end to racial segregation and to "fulfill, as much as possible, the goal of open, integrated residential housing patterns."<sup>217</sup> PHAs grappling with deeply entrenched legacies of racial discrimination in public housing must honestly confront structural and institutional barriers to integration in order to achieve the substantive goals embodied in the FHA.<sup>218</sup> Doing so would simultaneously obviate most concerns about policies that may have a disparate impact on black public housing residents. Affirmatively pursuing truly integrated communities implies greater housing opportunities and less displacement for such residents. Discriminatory effects are thus less likely to fall disproportionately on black families.

Reemphasizing racial integration would also enable the production of important social benefits. HOPE VI's single-minded focus on income mixing undermined such benefits to the extent that residents were dislocated and neighborhoods resegregated.<sup>219</sup> Making efforts to achieve meaningful racial integration in public housing communities, on the other hand, avoids many problems of spatial dispersion. Original black residents of public housing would thus retain more of their critical social networks and could more easily build a positive sense of neighborhood identification as an equal presence, rather than beginning anew as an isolated minority group. Racial integration would further "provide opportunities for exposure and interaction between whites and minorities[] [that] appear[] to contribute

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<sup>215</sup> See *id.* at 16–17; HARVEY LUSKIN MOLOTCH, *MANAGED INTEGRATION* 202 (1972) (arguing that "[i]ntegration of a thoroughgoing type" requires not only geographic proximity but also "transracial solidarity").

<sup>216</sup> 42 U.S.C. § 3608(e)(5) (2006).

<sup>217</sup> *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

<sup>218</sup> Cf. Pindell, *supra* note 79, at 388 (noting that the failure of HOPE VI to account adequately for race as "a primary cause of current, pervasive residential economic and racial segregation" has undermined the program's success, and that problems created by intentional racial discrimination cannot be adequately undone using only race-blind remedies). Racial barriers have evolved over many years to escape detection as overt intentional discrimination; instead, they live on as subtle, nearly imperceptible technologies of segregation and subordination.

<sup>219</sup> For a complete discussion of this critical point, see *supra* Part III.B.

to greater tolerance, fair-mindedness, and openness to diverse networks and settings.”<sup>220</sup> In other words, residential integration is beneficial for members of all races.

### B. *Affirmative Mechanisms*

National housing policy should continue to encourage investment in physical development and rehabilitation projects. Unlike voucher programs that scatter residents among existing neighborhoods, adequately funded public housing communities create opportunities for PHAs to actively promote stable racial integration by exercising some control over demographic composition. Such communities also avoid simply displacing residential segregation and concentrated poverty to adjacent, similarly impoverished neighborhoods.<sup>221</sup> Moreover, a project-based approach offers the best prospects for affirmatively increasing housing opportunities for poor black residents in truly integrated and gentrifying neighborhoods that enjoy the social benefits and economic advantages traditionally accompanying additional affluence. This is, after all, what it means to affirmatively further fair housing. The three proposed mechanisms that follow concretely illustrate how housing authorities can move toward more racially integrated housing.

First, restrictive income mixing that derives in part from marketability concerns should be abandoned. This is especially true for neighborhoods where income caps directly impede progress toward racial integration, as in Cabrini-Green. Put another way, uncertainty regarding the upper limit on the public housing share must be resolved in favor of the poor (often black) residents who are the primary beneficiaries of the FHA’s substantive protections. Marketability cannot be allowed to deny benefits to the very group for whom redevelopment was undertaken.

This important notion is known broadly as vertical equity.<sup>222</sup> In practice, it entails a focus on building integrated neighborhoods that are composed of an ideal share of poor, black public housing residents, rather than catering to the often discriminatory preferences of incoming middle-

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<sup>220</sup> MARGERY AUSTIN TURNER & LYNETTE RAWLINGS, URBAN INST., PROMOTING NEIGHBORHOOD DIVERSITY 4 (2009), available at <http://www.urban.org/UploadedPDF/411955promotingneighborhooddiversity.pdf>.

<sup>221</sup> Cf. ANTHONY DOWNS, OPENING UP THE SUBURBS 26 (1973) (making this point). In too many cases, uprooted black residents simply ended up in hypersegregated neighborhoods elsewhere. See Popkin, *supra* note 211 (“In Chicago nearly all the original residents who moved with vouchers ended up in neighborhoods that were at least 90 percent African-American.”).

<sup>222</sup> Vertical equity as a norm “provides that the neediest should derive the greatest benefits” from redistributive social programs. Schill, *supra* note 12, at 539; see also Ellickson, *supra* note 27, at 1003–08 (distinguishing between “vertical equity”—aimed at distributing benefits primarily to the most impoverished—and “horizontal equity”—aimed at “treat[ing] like households alike”).

class households. Sociological research demonstrates that seeking to increase the number of black residents can be a viable strategy.<sup>223</sup> Abandoning strict income mixing would ultimately allow more black public housing residents to return to their original neighborhoods following redevelopment.<sup>224</sup> In Cabrini-Green, for example, every additional unit of public housing created by relaxing the 30% cap would likely result in one fewer black family displaced from their home.

Second, mixed communities should foster an inclusive neighborhood atmosphere and positive racial image. One way to implement this policy is to encourage black participation in neighborhood institutions, such as resident advisory boards. These institutions, both formal and informal, are an important site of biracial interaction.<sup>225</sup> Community projects undertaken by both races also counter the familiar feeling among blacks that they are “wholly unwelcome” in neighborhoods where their racial community is small and isolated.<sup>226</sup> Creating an inclusive atmosphere is particularly important given that “a sense of community, and positive neighborhood identification are the essential features of social organization in urban areas.”<sup>227</sup> The effect of these efforts would be to keep existing black communities within larger neighborhoods intact despite social and demographic pressure from gentrification. In Cabrini-Green, for example, encouraging black residents to meaningfully participate in decisions regarding important neighborhood issues and take the lead on community betterment projects would signal that they are an invested and enduring neighborhood presence.

Third, PHAs should engage in affirmative marketing campaigns that promote neighborhood amenities of special significance to black families with the means to occupy non-public housing units. To be successful, these campaigns must generate more demand among blacks than among whites.<sup>228</sup>

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<sup>223</sup> One recent study found “little evidence . . . that present racial composition influences neighborhood satisfaction” among white residents, though the perception of *continual* racial change may still have an effect. ELLEN, *supra* note 213, at 103. The author goes on to note that “households—both black and white—might be a good deal less concerned about their neighborhood’s racial mix than is commonly believed and than is indicated by the often-cited surveys of racial preferences.” *Id.* at 129. Potential movers with a preference for discrimination, on the other hand, can simply elect to avoid integrated neighborhoods.

<sup>224</sup> Existing social networks would thus endure, limiting the loss of social capital caused by the redevelopment process.

<sup>225</sup> See MOLOTCH, *supra* note 215, at 201 (“[E]xtensive integration (primarily by demographic indices) occurs in places like retail shops, church chapels, and formal organizations oriented toward the accomplishment of instrumental goals.”).

<sup>226</sup> Cf. ELLEN, *supra* note 213, at 58 (noting that blacks sometimes avoid moving into white neighborhoods to avoid hostility from the majority group).

<sup>227</sup> WILSON, *supra* note 67, at 143.

<sup>228</sup> See MOLOTCH, *supra* note 215, at 110.

Identifying neighborhood amenities that blacks find particularly appealing is therefore a critical task. PHAs could create community housing centers or collaborate with other organizations to reach out to potential movers (of all races) in hopes of attracting black families who might not otherwise consider the neighborhood.<sup>229</sup> An effective campaign would further racial integration by attracting black families who have sufficient incomes to inhabit affordable-housing or market-rate units generally occupied by higher income white families in gentrifying neighborhoods like Cabrini-Green, thus moving closer to the goal of achieving stable levels of integration. In the end, these three policy recommendations, considered as a whole, would further actual racial integration as required under the FHA's affirmative mandate.

#### CONCLUSION

While HOPE VI has improved a number of lives, there is no reason to grow complacent now. Too many neighborhoods with substantial public housing still bear the ugly marks of racial segregation and extreme poverty. At this pivotal moment in U.S. housing policy, we should chart a new course by reaffirming our paramount interest in racially integrative policies. This course entails abandoning the notion of marketability, creating more inclusive communities, and affirmatively marketing housing opportunities with the goal of reaching a critical mass of racially diverse residents wherever public housing is undergoing redevelopment. Taken together, the proposed policy mechanisms are true to the substantive call of the FHA to affirmatively further fair housing.

Only when housing authorities rediscover the racial integration norm will black public housing residents finally get what they are due. After fifty years of misguided policy and systemic failure, it is a long time coming.

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<sup>229</sup> One commentator describes this process as “benign steering.” ELLEN, *supra* note 213, at 167–68.